

Rent Regulation Prior to the Establishment of the Board

Laws and social customs have promoted and regulated economic activities since ancient times. Rent regulation is one policy among countless others impacting on the economy and property interests. Royal charters establishing private corporations created a vehicle for massive capital formation and set the stage for the modern day business enterprise. Old English common law rules and statutes established our concepts of real and personal property and channeled the ways in which property could be sold or transferred. By the end of the nineteenth century, bankruptcy and debtor/creditor laws controlled the creation and elimination of personal and business debt, antitrust measures reigned in anti-competitive practices, and health and building codes began eliminating dangerous conditions in urban areas. In the twentieth century, legislative reforms imposed health and safety protections in the workplace, land use restrictions, environmental protections, banking and securities regulations, and redefined the terms of private employment contracts.

Along with these legal developments, massive public investments in education, roads, transportation facilities, communication systems, and various types of public research and development, combined to create a physical and human infrastructure under which commerce and culture have generally flourished.

These varying public actions have had both positive and negative effects on the value of private property and the uses to which such property may be put. For example, a city's decision to place an airport in a particular location may double the profits of a neighboring motel, while slashing the value of homes adjacent to noisy runways. Likewise, the adoption of a zoning ordinance may be devastating to a developer who purchased a vacant lot in anticipation of putting up a (now prohibited) high rise building, while being highly beneficial to the owner of a neighboring brownstone threatened with congestion and obstruction of light from the new building.

In the City of New York, the supply of rental housing is drastically limited by a variety of public actions: zoning laws limit the size, use and location of residential housing; building codes restrict materials used in construction and design; historic preservation laws limit demolition or alteration of certain structures; wage and labor policies raise the expense of construction and maintenance; public ownership of parks, roads and other spaces limit the availability of building sites. These *public* actions - driven as they are by competing public values and concerns - indirectly raise the cost of new construction and site acquisition and thereby contribute to the housing shortage. While this is true in every city, in a highly congested area such as New York, the *costs and benefits* of public intervention are more pronounced. The enhanced value of residential buildings in New York is, thus, in large part, attributable to government

intervention. To give a stark (if somewhat fanciful) illustration, if the City sold Central Park to private developers the value of residential units bordering the park would plummet, housing would be more abundant, and Manhattan, in general, would be a more affordable but far less attractive place to live.

Beyond the obvious and massive effects of federal fiscal and monetary policy, almost every act of government impacts - in some fashion - on private property interests. And at some level, all economic activity is the product of some implicit or explicit public policy, whether that policy is one of open competition or involves some degree of interventionism. Hence, there is no neutral baseline or “natural” market from which to measure deviations from market based allocations of goods and services. Government – past and present – is inextricably intertwined with the marketplace.

Both private markets and interventionist policies reflect a rough, evolving democratic consensus on how economic affairs should be conducted. We generally concern ourselves with “what works best.” There are, however, constitutional limits, state laws, customs and traditions that restrict the degree to which government has been able or willing to interfere with markets and private property interests.¹⁴ Among the innumerable government actions that impact on private property interests, rent regulation seems to tread most conspicuously.

Most interventionist measures and public sector activities have received widespread acceptance as necessary and proper to contain potentially destabilizing elements within our economy, to “promote the general welfare” or to foster salutary competitive practices. Generally, they spark little controversy.

Rent regulation has been an exception. Rent regulation involves direct government control of a key term in all contracts: price. Other contemporary examples of such overt intervention include minimum wage laws, milk price supports and rate setting for utilities and transportation services (e.g. yellow cabs). Yet these policies generate only a fraction of the passion witnessed during New York’s periodic “rent wars.”

Rent and price regulations are not new. After the first modern university was founded in Bologna, Italy around the beginning of the last millennium students flocked to the area creating a housing shortage. “Bolognese landlords threatened to raise scholars’ rents” and “student protests led Emperor Frederick Barbarossa to award them protection from exploitation in 1158.”¹⁵ In England, medieval clerics developed the

¹⁴ The constitutionality of rent regulation is discussed in detail at pp. 46 through 55.

¹⁵ Quoting from The Life Millennium, A University Education, p. 89, Life Books 1998.

concept of a just price for the necessities of life and Parliament continued to pass laws regulating the price of various services and commodities long after the clergy ceased to exert a significant influence in the making of laws.¹⁶ In revolutionary era America the colonies (and later the states) regularly restricted prices on staples and limited the amount innkeepers could charge for food and lodging.¹⁷ Notably, Trinity Church, owner of the “first large rural Manhattan estate to be organized for a town rental market,” was subject to a ceiling on its annual income.¹⁸

Many ancient rules and customs operated not to shield consumers, tenants or laborers from market forces, but to protect vested interests such as landowners. A good example is New York’s feudal land laws. Until the 1840’s vast tracks of land populated by tenant farmers were controlled by a small number of large landlords. Feudal land tenures harnessed these farmers to leasehold estates, and prevented them from ever owning the land they worked. Violent uprisings erupted when the landlords attempted to enforce harsh lease conditions or sought evictions during periods of economic distress. These uprisings eventually led to state constitutional reforms in 1846, abolishing all feudal land tenures and promoting a conversion to freehold estates.

In some respects, these struggles revealed an endemic tension in landlord/tenant relations. As noted in the *1980 Report of the New York State Temporary Commission on Rental Housing*:

*Simply substitute the years 1919-20, 1941-42, 1950-51, 1961-62, 1968-69, 1970-71, 1974 and 1979, for 1845, apartment house owners for landowners, and apartment house tenants for tenant-farmers and the conditions and remedial legislation action of over a century ago present a most striking parallel to the conditions and enactments of the later periods.*¹⁹

Residential leaseholders would never experience the dramatic changes secured by these early tenant farmers.²⁰ But changes in legal protections afforded residential tenants have been significant. Over the past century, lease terms governing tenure, habitability, evictions and rent adjustments have largely been supplanted or transformed by legislation and court rulings. Even in the absence of rent regulations, the common law lease of a century ago no longer exists. Leases once created independent covenants for delivery of possession and payment of rent. Tenants were thus obligated to pay rent

¹⁶ William H. Dunbar, *State Regulation of Prices and Rates*, 9 Harv. Q.J. Econ. 1, 4 (1895).

¹⁷ See Ely, *The Guardian of Every other Right, A Constitutional History of Property Rights* at 19-20 (1992).

¹⁸ Quoting Blackmar, *Manhattan for Rent 1785-1850*, 30 (1989).

¹⁹ At p. 141-42.

²⁰ One might argue, however, that laws favoring conversion to co-operative and condominium ownership do, in fact, promote the gradual, albeit partial, elimination of traditional leasehold tenures in apartment buildings.

even when possession was not delivered or services were not maintained. Leases now involve “mutually dependent” contractual obligations. If possession or services are not provided, rent may be withheld or abated.

A host of other lease terms have been altered by statute and court rulings. Lease provisions allowing “self-help” evictions are unlawful. Lease provisions waiving a landlord’s obligation to maintain habitability are unlawful. Restrictions on roommates, subletting and pets are now governed by statute. Moreover, New York tenants now have affirmative rights to organize with other tenants, to receive protection against retaliatory evictions and to prevent landlords from engaging in various forms of discrimination (including discrimination on the basis of age, race, creed, color, national origin, sex, age, disability, familial status, marital status, the presence of children, sexual orientation, lawful occupation, alienage or citizenship status.)

In a sense, all leasehold interests in residential apartments in New York have evolved into a new type of tenure – clearly not the kind of freehold estate held by homeowners, but certainly not the common law leasehold of a century ago.

If the vestiges of feudalism spawned tenant-farmer uprisings of the 1840’s, the unregulated proliferation of substandard (but high rent) housing in New York City created an even greater source of public unrest in the mid-nineteenth century. Affordability issues began to appear as soon as New York became a major metropolis. Notably, as today, the affordability problem was largely the product of a dual economy. As Burrows and Wallace observed in *Gotham*:

The 1830's boom improved living conditions for many working people, notably the two-fifths of the City's artisans who worked in the building trades, erecting the thousand-plus structures going up each year... But the majority of the working class saw their living standards deteriorate, partly because of boom-fostered inflation -- especially the rapidly rising rents exacted by those the City Inspector (in 1835) called 'mercenary landlords' -- but primarily because constructing housing for poor people wasn't profitable.²¹

One response to the City's low-income housing needs was the construction of multi-family “tenements” - the first of which was erected in 1833. Unfortunately this

²¹ Burrows & Wallace, *Gotham: A History of New York City to 1898*, p. 587.

proved to be an imperfect solution. Overcrowded tenements soon became a breeding ground for a variety of health and social problems. A cholera epidemic in 1849 took approximately 5,000 lives.²² In 1854, a second cholera outbreak took 2,509 lives.²³ Unemployment afflicted about one in five tenement families.²⁴ Poverty was widespread and severe. According to one account:

*Conditions in the City were beginning to take their toll in terms of the general social order. Major riots in 1849 and 1857 pointed toward the increasing pathological state of the tenement population. The most traumatic civil disturbance, however, was the “draft riots” of 1863. On the surface they were a reaction to newly imposed involuntary conscription for military service in the Civil War. But the violence was also the product of the intolerable condition of the city’s poor. The wretched and diseased population of the tenements, especially of the Sixth Ward, poured into the city streets. They demonstrated beyond question the connection between the housing problem and the threat of civil disturbance.*²⁵

As Jacob Riis described in *How the Other Half Lives*:

*The tenement-house population had swelled to half a million souls by [1855], and on the East Side, in what is still the most populated district in all the world ... it was packed at a rate of 290,000 to the square mile ... The death of a child in a tenement was registered in the Bureau of Vital Statistics as ‘plainly due to suffocation of foul air of an unventilated apartment,’ and the Senators, who had come down from Albany to find out what was the matter with New York, reported that ‘there are annually cut off from the population by disease and death enough human beings to people a city, and enough human labor to sustain it.’ And yet experts had testified that, as compared with uptown, rents were from twenty-five to thirty percent higher in the worst slums of the lower wards...*²⁶

By 1865, nearly five in seven city residents (not including Brooklyn) lived in sub-standard tenement housing.²⁷ In 1867 the State adopted the nation’s first comprehensive law addressing health and safety issues in tenements. The Tenement House Act of 1867 mandated such things as fire escapes for non-fireproof buildings and at least one water closet for every twenty tenants. The law also forbade occupation of cellars.

As the turn of the century approached, hundreds of thousands of new immigrants filtered into an already overcrowded housing stock. In 1884, Felix Adler, leader of the

²² Plunz, Richard, *A History of Housing in New York City*, p. 21.

²³ Id.

²⁴ Id. In 1858 there were about 25,000 unemployed tenement dwellers with approximately 100,000 family members affected. Just over 480,000 people lived in tenement housing. Id at 22.

²⁵ Plunz, Richard, *A History of Housing In New York City* p. 21.

²⁶ Riis, *How the Other Half Lives*, chap. 1, at 4.

²⁷ Plunz, at 22.

New York Society for Ethical Culture, observed, “[t]he evils of the tenement house section of this city are due to the estates which neglect the comfort of their tenants, and to the landlords who demand exorbitant rents.”²⁸

Neither the Tenement House Act, the market, nor philanthropic organizations proved sufficient to the task of ensuring healthful, safe and affordable housing. In 1894 a State legislative committee reported that while New York City ranked sixth in the world in population, it ranked first in density – with the Lower East Side surpassing a section of Bombay which contained the world’s highest known population density.²⁹ Crowded, unsanitary housing again prompted legislative action. The Tenement House Act of 1901 mandated running water on each floor and a water closet in each apartment consisting of three rooms or more. Every room was required to have an exterior window and each apartment was required to have sufficient means of egress to limit the risk of death in a fire.³⁰

Affordability remained an intractable problem. Protests and rent strikes involving thousands of apartments erupted in 1904 and 1908.³¹ By the end of World War I conditions again worsened prompting widespread demands for greater protection.

²⁸ Id. at p. 39.

²⁹ Id. at 37.

³⁰ Id. at 47.

³¹ Lawson, *The Tenant Movement in New York City 1904-1984* p.39-50.

Post-World War I Controls

The Emergency Rent Laws of 1920 were adopted in the wake of dramatic increases in dispossession proceedings and a collapse in new construction caused by a diversion of resources to the war effort. In 1919, some 96,623 dispossession proceedings were docketed in municipal courts, with an increasing number being commenced in the Fall of that year.³² In the first eight months of 1920 another 87,442 such proceedings were commenced.³³ Construction levels were equally bleak. In 1915, 1,365 tenements went up containing 23,617 units, but by 1919 only 89 tenements were built, containing 1,481 apartments.³⁴ A highly organized and politicized tenant movement launched a series of protests and rent strikes, demanding relief from spiraling rents resulting from the shortage.³⁵

These events coincided with the period known as the “Red Scare.” Five Socialists had been elected to the State Assembly. A debate ensued as to whether the Socialists should be allowed to take their seats. In March of 1920, New York City’s Mayor John Hylan, traveled to Albany, urging adoption of a series of rent bills. There he told the legislators, “[y]ou gentlemen are trying to clear the Assembly of socialism. Let me tell you that you must first eradicate the causes of socialism, and one of the greatest of these is the speculating landlord.”³⁶ The Assembly expelled its Socialist members – the most ardent advocates of rent and eviction protections. A few hours later, absent votes from the Socialists, it adopted New York’s first rent control laws.³⁷

The “April rent laws” were extended and strengthened in September of 1920. Under these laws the courts of New York State were effectively charged with the administration of rents. When challenged by tenants, rent increases were reviewed according to a standard of “reasonableness”. Effectively, any increase over that of a prior year was presumed “unjust, unreasonable and oppressive” unless an owner could demonstrate otherwise. Landlords seeking to justify rent increases were generally required to submit a Bill of Particulars setting forth gross income and expense figures. As observed in the *1980 Report of the New York State Temporary Commission on Rental Housing*:

³² *1980 Report of the New York State Temporary Commission on Rental Housing*, I-42.

³³ *Id.*

³⁴ *Id.* at I-43.

³⁵ Lawson, pp. 51-93.

³⁶ Maeder, *Roofs, Revolt of the Tenants, March-April 1920*, NY Daily News 2/4/2000.

³⁷ Lawson, p. 72.

[The] definition of 'reasonableness' was subject to judicial interpretation. Conflicting opinions and an absence of uniform interpretation and ruling cannot be considered surprising in light of the fact that there were no statutory guidelines and the courts had to determine in the first instance such questions as: what was properly includable in income and operating expenses; or, the consideration to be given to extraordinary repairs, contemplated future repairs, vacancies, bad debts, depreciation, and interest on mortgages. Perhaps, most important, the courts were required to determine what constituted a proper or fair rate of return to the landlord, and became thereby the 'administrative agency' administering the rent laws of 1920.³⁸

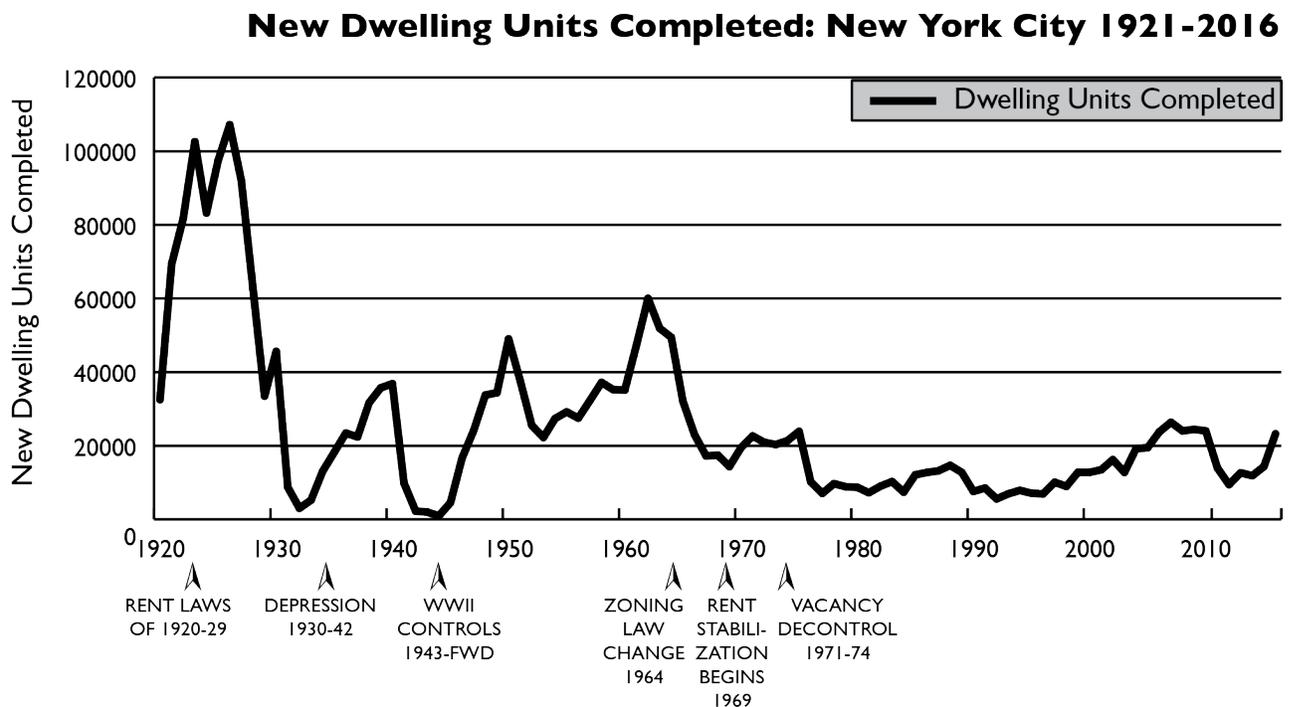
The housing shortage of the early 1920's was severe. Vacancy rates fell below 1% from 1920 through 1924. To induce new construction, the City exempted all properties built between 1920 to 1926 from property taxation until 1932. In addition, all units constructed after September 27, 1920 were exempt from the rent laws. Notwithstanding the presence of relatively strict rent protections for existing units, new construction proceeded at a record pace, with hundreds of thousands of new apartments being added to the stock before the decade ended. By 1928 the City's vacancy rate was approaching 8% and rent regulations were no longer needed. A phase out began in 1926 in the form of luxury decontrol – exempting units renting for more than \$20 per room per month. After 1928 apartments renting for \$10 or more, per room, per month were excluded. The Rent Laws of 1920 expired completely in June 1929, although limited protections against unjust evictions were continued.

³⁸ At p.1-45.

Chart I.

Rent Regulation and Construction of New Housing

What is notable about the experience of the 1920's is that a combination of property tax incentives, economic prosperity and the exemption of new construction from rent regulations all produced housing abundance. A second housing boom occurred in the two decades following World War II. Remarkably, as the graph below illustrates, New York's two great housing booms in the twentieth century occurred during periods when strict rent controls were imposed on existing units.



Despite the presence of similar policies and circumstances to those of the 1920's over the past four decades (i.e. tax abatements and exemptions from rent regulation for new construction and extended periods of economic growth), the City has been unable to achieve a normal vacancy rate (5%+). Among the many factors which might explain the difference between the experience of the 1920's and the present are the loss of relatively inexpensive building sites, the enactment of more restrictive zoning and building laws, and the gradual increase in the relative cost of housing in the suburban belt surrounding the City.

The Great Depression

The absence of rent controls during the Great Depression is instructive in one critical respect. Despite tragic levels of unemployment, widespread tenant unrest³⁹ and severe affordability problems, rent controls offered little as a policy option because rents were already depressed and vacancies remained high. As summarized by one housing historian:

*In the early 1930s, a massive loss of income by all city residents threw housing markets into disarray; tenants could not pay their rents, landlords could not meet their mortgages, and courts received a flood of eviction and foreclosure cases they lacked the capacity to process or enforce.*⁴⁰

With affordability problems on the rise, tenant households began doubling up. According to a 1946 Report of the Joint Legislative Committee to Recodify the Multiple Dwelling Law, the housing shortage began to re-appear as early as 1936 but the shortage was largely concealed because economic conditions had forced many families to double-up.

³⁹ See Lawson, pp. 95 - 127, (Chap. 3, From Eviction Resistance to Rent Control, Naison) analyzing the eruption of rent strikes and tenant activism in Harlem, the Bronx, Brooklyn and the Lower East Side in the 1930s.

⁴⁰ Id. at 96.

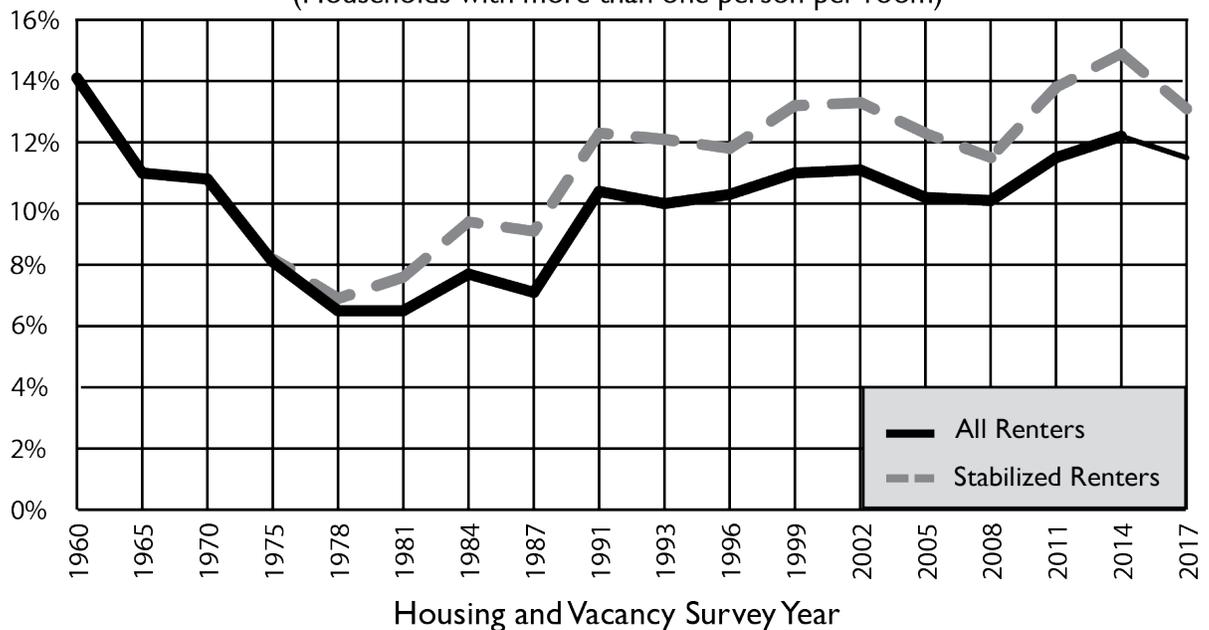
Chart II.

The Overcrowding Problem Today

In recent decades the triennial Housing and Vacancy Survey (HVS) has tracked the level of overcrowding in rental housing (a measure of “doubling up”). Along with vacancy rates, the level of overcrowding is a key indicator of the severity of the housing shortage and concomitant affordability problems.

Percent of Overcrowded Rental & Stabilized Households in New York City

(Households with more than one person per room)



The chart above shows overcrowding (defined as more than one person per room) rates found in each HVS since 1960. Rent stabilized households show more severe overcrowding levels than in all renter households, except in 1975. Overcrowding in both stabilized and all renter households has also shown a general trend of increase since the late 1970s.

World War II Era Controls

In 1942, under the Emergency Price Control Act, the federal government established a price regulation system nationwide in response to the prospect of wartime shortages and inflation. The setting of rents under this system was left to the discretion of the Administrator of the Office of Price Administration (“OPA”), subject to review by a special court known as the Emergency Court of Appeals. Under the new system, the

implementation of rent control in New York did not begin until 1943. According to one account:

With the advent of World War II and the imposition of federal rent control in selected defense areas elsewhere in the United States, the city's left and liberal housing groups lobbied Mayor Fiorella LaGuardia and President Roosevelt's [OPA] to freeze rents. Initially, OPA refused, claiming that the city's rental vacancy rate was too high to justify rent control. In the wake of an August 1943 Harlem riot and threatened rent strikes if landlords did not exercise voluntary restraints, however, OPA changed its mind and imposed a wartime rent freeze...⁴¹

On November 1, 1943 rents were frozen for all rental units in New York City at rent levels that had existed on March 1, 1943. These rents were subsequently adjusted by the Administrator as conditions warranted and in accordance with federal legislative intent.

Following last minute extensions of the law in 1944 and 1945, and a belated extension in 1946 (described below), the Emergency Price Control Act expired in 1947. Prior to its expiration Congress adopted the Housing and Rent Act of 1947 which preserved rent controls into 1948. This Law did not regulate units which were certified for occupancy after February 1, 1947.⁴² Subsequent acts further extended these controls until the federal government's involvement with rent regulation in any city was fully terminated in 1953.

In 1946 the State of New York enacted "stand by" legislation to preserve rent controls in the event that federal controls expired. In 1950 this legislation was activated with a rent freeze and the establishment of a commission to review rent regulation. In 1951, in anticipation of the withdrawal of federal controls, the State adopted a system of rent regulation similar to the federal system, and the administration of rents for 2.1 million apartments was transferred to the State from the federal government.

⁴¹ Keating, Teitz & Skaburskis, *Rent Control - Regulation and The Rental Housing Market* 1998, p. 154.

⁴² February 1, 1947 is a critical date. Until 1969 all housing built after this date was exempt from any kind of rent regulation. Generally, references to "post-war" housing are references to buildings with certificates of occupancy issued after this date. Conversely, references to "pre-war" housing are to buildings built before this date. Virtually no housing was constructed between 1942 and 1947, so references to "pre" war housing are not entirely inaccurate.

Establishing a pattern that would continue for fifty years, the 1940's witnessed a series of "hair's breadth escapes for controls."⁴³ The first Extension Act [of federal controls] was approved on June 30, 1944, the very day initial controls were to have expired. The second Extension Act was adopted on June 30, 1945 - also the last day to act - extending controls to June 30, 1946. According to one account, "to pass this extension in time Congress went to considerable lengths. On June 30th the House of Representatives met at 10:00 A.M. (the Senate had already passed the extension), and at 1:25 P.M. the resolution was approved by the House, rushed to a waiting airplane and flown to Kansas City for President Truman's signature." One year later, on June 29th, 1946 Congress failed to override President Truman's veto of the 1946 Extension Act. By midnight on June 30th 1946 the nation would be "without price or rent controls - except in New York State... On the afternoon of Sunday, June 30, 1946, Joseph D. McGoldrick, former New York City Comptroller, was attending the christening of his third daughter. He was rushed to a waiting State Commerce Department airplane, which flew him to Albany. When he arrived at 9:00 P.M., he was taken immediately to Governor Dewey's office, where he was sworn in as temporary State Housing Rent Commissioner. Just exactly two hours and thirty-seven minutes before the expiration of controls, he issued 'State Housing Regulation Number 1' which acted to continue federal controls wherever they had existed in New York under federal law." One month later, responding to President Truman's objections to the 1946 extension bill (objections largely concerning agricultural commodities), Congress adopted a revised bill that the President signed on July 25, 1946, thus re-establishing federal controls.

Under the State system made operational in 1951, owners who claimed hardship in meeting building expenses were permitted to apply for rent increases in addition to those directly authorized by statute. A minimum fair net annual return of 4% on equalized assessed value was allowed.⁴⁴

In 1953 an across the board rent adjustment of 15% over the rent levels which existed on March 1, 1943 was adopted. This applied to all rents that had not yet been increased by at least this much since 1943. In addition, the minimum fair net annual return was increased from 4% to 6%. The equalization rates of 1954 became the base rates for use in computing equalized assessed value in fair net annual return proceedings.

⁴³ This series of events was described by Frederic Berman, former housing commissioner in the Lindsey administration, in a special 1968 report entitled A History of Rent Control in New York City. The quotes are taken from that report.

⁴⁴ Equalization of property taxes involves the adjustment of real property assessments (valuations) within a taxing district in order to achieve a uniform proportion between assessed values and actual cash values of real estate so that all property tax owners are taxed at an equal rate. See Wurtzebach and Miles, Modern Real Estate, glossary p.742.

In 1958 some 600 units in NYC with rents exceeding \$416.66 per month (\$500 per month if furnished) and which met certain other criteria, were decontrolled as luxury units.

In 1961 the fair net annual return provisions were refined to prevent certain abuses. In addition, the use of 1954 equalization rates on assessed value as a base for reviewing fair net annual return applications was eliminated in favor of using current equalization rates. Since recognition of newer assessments and equalization rates, in effect, raised the recognized values of these properties, many owners now qualified for rent increases. Consequently, “hardship” applications were filed in record numbers.

According to the State Commission's 1980 report, the rent increases resulting from the recognition of new assessment and equalization rates were criticized by tenants as unfair, and this “issue soon spilled over into and became the principal issue in that year’s mayoralty campaign”. In order to prevent the State from engineering future rent increases of this sort, “the candidates of both parties pledged to demand self-determination and local administration of rent control within the City of New York”.⁴⁵ Consequently, in 1962 the duty of administering rent control along with the power to enact local controls was transferred to the City. Post-1946 buildings, which had been exempted under federal and state controls, remained so under City controls.

Also, as noted in the Commission’s report, “the maximum rents as they existed under state law, which, in effect, were the 1943 freeze date rents adjusted pursuant to intervening statutes, became the maximum rents under the City Act.”⁴⁶

Under City controls “[t]he fair net annual return (hardship) provision required the use of ‘current assessed’ instead of ‘current equalized assessed’ value as the valuation base for computing an owner’s entitlement to a rent adjustment. Also, rent increases pursuant to the fair net annual return provision were limited to a maximum of 15 percent biennially. Local Law 30 of 1970 (which established the MBR [Maximum Base Rent] program) re-instituted the use of current equalized value in the fair net annual return provision.”⁴⁷ The MBR system later linked the removal of certain housing code violations to eligibility for rent increases, a requirement that still applies for buildings with rent controlled units.

⁴⁵ Quoting the Commission's Report at 1-62.

⁴⁶ Quoting the Commission's Report at 1-64.

⁴⁷ Id. at 1-64.

In 1971 the State adopted several new laws limiting the continuance of rent control. One of these provided for the decontrol of rental units vacated after June 30, 1971. This “vacancy decontrol” law remains in effect, although most decontrolled units now fall under rent stabilization. Another 1971 law, popularly known as the “Urstadt” law, prohibited the City from adopting new rent regulations more stringent than those already in existence. This law also remains in effect.

It should be added that the City adopted various forms of luxury decontrol for certain high rent units in both 1964 and 1968. It should also be noted that there was a brief return to federal rent regulation under the Nixon administration’s wage and price program with a 90 day freeze in late 1971.

Rent Control Today

There remain less than 22,000 rent controlled units in the City. The remaining units are generally occupied by persons who have possessed their apartments since June 30, 1971, or by their surviving spouse, adult lifetime partner or other family member. The median age of rent controlled tenants, as of 2014, was 72, up from a median of 70 in 2011 (2017 data is not yet available). The median annual income for rent controlled households in 2013 was \$29,745 (in 2016 dollars) and was \$28,260 in 2016 (a 5.0% inflation-adjusted drop). In general, this is a dwindling stock occupied by an elderly, low-income population.

The “maximum base rent” or “MBR” for each rent controlled unit is adjusted biennially according a general adjustment factor established by the State’s Division of Housing and Community Renewal. These units are also subject to a 7.5% cap on annual rent increases. This cap produces what is known as the “maximum collectible rent” or the “MCR.” The MCR - the amount a tenant actually pays for a given apartment - often reaches the MBR. When this occurs, adjustments in the maximum collectible rent cannot exceed the maximum base rent. For example, if the maximum collectible rent is \$500, a 7.5% increase would bring the rent to \$537.50. But, if the maximum base rent is \$510 the collectible rent cannot exceed this base. In this situation both the MCR and the MBR are now \$510. If the biennial MBR is then increased by 5%, both the MCR and the MBR will increase by 5% resulting in a rent paid of \$535.50. In 2010 the biennial MBR approved increase was 12.9%

It is important to note that the Rent Guidelines Board has no role in the adjustment of rent controlled rents. Most rent controlled units will fall under rent stabilization upon vacancy, however, and the Board does have a special role in helping to establish initial rents for these decontrolled units. This process is described at pages 84 through 86 under the discussion of Fair Market Rent Appeals and at pages 92 through 94 under the heading Special Guidelines for Decontrolled units.

Rent Stabilization

In 1969 rapidly falling vacancy rates and an increase in complaints of rising rents in non-controlled units led Mayor Lindsay to call upon a group representing the owners of unregulated apartments to propose a self-regulation program. At the same time the Mayor appointed the first Rent Guidelines Board “to make an independent evaluation of the plan for self-regulation” to be submitted by the owner’s group.

Following the owner’s report and review by the Rent Guidelines Board, the City enacted the Rent Stabilization Law of 1969 (“RSL”). This law applied to some 325,000 apartments that had been completed after February 1, 1947. It also applied to some 75,000 formerly controlled apartments that had been decontrolled through subdivision, conversion or luxury decontrol laws. Unlike rent control, which applied to buildings with 3 or more units (and one or two unit buildings if continuously occupied since April 1, 1953), rent stabilization applied to buildings with 6 or more units. Consequently, decontrolled units in buildings with 3, 4 or 5 units remained decontrolled. Also, the law did not apply to new buildings that received a certificate of occupancy after March 10, 1969.⁴⁸

Under the 1969 law, the Rent Guidelines Board continued in operation and was charged with the establishment of guidelines for rent increases within certain prescribed limitations. Any lease or rental agreement adopted after May 31, 1968 would be subject to the first guideline, which governed lease renewals and new leases occurring between June 1, 1968 and June 30, 1970.

For leases coming due under the first guideline the law prescribed no more than a 10% increase for 2-year leases, and a 15% increase for 3-year leases. Also, an additional 5% vacancy allowance was granted for two-year leases, and a 10% allowance was given for 3-year leases. The Board was thereafter charged with establishing annual guidelines following a review of (1) the economic condition of the residential real estate industry in New York City including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees [added in 1983], cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, and (3) such other data as may be made available to it.

⁴⁸ Later, this date would be changed to January 1, 1974, and newly constructed buildings may have become subject to rent stabilization if the owner/developer took part in the City’s J-51, 421a or similar tax abatement programs. These programs are discussed at page 94.

At the time no special Board positions for tenant or owner representation were designated. The designation of two owner and two tenant representatives was added in 1974.

The new law also placed the development of a code to regulate owner/tenant relations (with regard to appropriate supplemental charges, lease renewals, evictions etc.) in the hands of the Rent Stabilization Association (“RSA”)—a private industry group—subject to approval by the City’s housing agency. Also established was a “Conciliation and Appeals Board” consisting initially of owner and public members to review rent code violations. Tenant representation was added to this board in 1974. Under the Omnibus Housing Act of 1983, the Conciliation and Appeals Board was abolished. Two years later the State legislature also removed the RSA from its role in developing the rent code, along with its counterpart in the hotel sector—the Metropolitan Hotel Industry Stabilization Association. The powers of these bodies, along with the City’s administration of rent regulation were transferred to the State Division of Housing and Community Renewal (“DHCR”) where they remain today.⁴⁹

In the mid-1980's this agency came under increasing attack from many sectors prompting a State legislative investigation of the agency’s performance. The 1987 report following this review was entitled “Bleak House” and was highly critical of DHCR. It is worth noting that owner groups, while critical of DHCR, have often asserted that rent regulation in New York City is bureaucratically unmanageable. Tenant groups, on the other hand, have charged that a lack of government commitment to the proper functioning of the system is to blame for its failures. In more recent years the DHCR has implemented a number of administrative improvements addressing many of its earlier difficulties.

In 1971, under pressure from owners, the State legislature adopted vacancy decontrol (as previously mentioned) and vacancy destabilization. This allowed owners to set market rents upon vacancy and would have led to the phasing out of both rent control and rent stabilization had the measure remained in force. However, rapidly rising rents during the 1971-74 period led to the passage of the Emergency Tenant Protection Act (ETPA) of 1974. Together with the RSL and the Local Emergency Rent Control Act of 1962, this is the fundamental law now governing the rent stabilization system. A detailed review of the ETPA, excerpted from the 1980 report, is provided below.

⁴⁹ For an overview of the administrative history of rent regulation and a critique of the system as a failed attempt at owner self regulation, see Keating, *Landlord Self-Regulation: New York City's Rent Stabilization System 1969 - 1985*, 31 J. of Urb. & Contemp. L. 77 (1987).

[Note: Certain summarized sections of the ETPA contained in the 1980 report have been edited out of this excerpt.]

Vacancy decontrol and destabilization soon became a political issue in much the same manner as the change by the State in the Fair Net Annual Return provision had been ten years earlier. The City of New York brought a court action to postpone the operation of the law but its application was denied. In 1973 Mayor-elect Beame charged that as a result of the State's mandated vacancy decontrol law many of the City's poor, moderate and middle income families had been placed in an intolerable position by not only being forced to pay exorbitant rents but in also losing the assurance they previously had against the possibility of unconscionable future rent increases, and he further asserted that many City residents were being driven out of the City as a result of vacancy decontrol. Governor Rockefeller appointed a Committee under the Chairmanship of Assemblyman Andrew Stein to conduct hearings and make recommendations on the subject. The "Stein Committee" recommended abrogation of vacancy decontrol.

In 1974 the Legislature enacted the Emergency Tenant Protection Act of 1974 (ETPA) (Chapter 576, Laws of 1974) the objective of which was to prevent excessive rent increases in the decontrolled sector of the rental housing market due to low vacancy rates, the inadequate supply of standard rental housing and the increase in new household formations in New York City and the surrounding suburban counties of Nassau, Rockland and Westchester. Chapter 576 in substance provided for a State stabilization program (ETPA) and also amended the New York City Rent Stabilization law. The provisions of ETPA are declared by the statute to be applicable only to New York City, and any City Town or Village (at their respective option) in Nassau, Rockland and Westchester counties.

Chapter 576 is a complex statute. It substantially affected the State rent control program outside New York City, and all New York City rent control and rent stabilization regulation. However, it did not affect State and City pre-1947 rent controlled housing (which in New York City and the three counties remained controlled by the State and City rent control agencies) which remained under existing law and regulation so long as the same tenant in occupancy on June 30, 1971 remained in possession. Essentially ETPA amended the vacancy decontrol provision of Chapter 371 as applicable to the areas indicated above. Section 4 of Chapter 571 is the Emergency Tenant Protection Act of 1974 and significant provisions thereof are summarized by section.

Section 3(a) provides for the local determination of an emergency for all or any class or classes of housing where the vacancy rate is 5% or less (except State or City rent controlled housing accommodations) and describes the local determination of emergency as extending to housing accommodations:

- previously decontrolled
- decontrolled in the future
- previously destabilized
- presently exempt from State rent control
- presently exempt from City rent control
- presently exempt from the New York City rent stabilization law

Section 3(b) and (c) requires a declaration that the emergency is at an end when the vacancy rate exceeds 5%, and permits an earlier termination in whole or in part where the local governing body finds the emergency to be wholly or partially abated. Any existence or termination of an emergency must be preceded by a public hearing.

Section 4(c) provides that in New York City the Rent Guidelines Board shall be the Board established by the New York City rent stabilization law as amended.

Section 5 provides that a local emergency may be declared for all or any class of housing except:

- (a) New York State or City rent controlled accommodations
- (b) government-owned accommodations
- (c) accommodations whose rents are fixed or subject to the supervision of the State Division of Housing and Community Renewal, the New York City Housing and Development Administration, or the New York State Urban Development Corporation or, to the extent regulation under ETPA is inconsistent therewith accommodations aided by insurance under any provision of the National Housing Act;
- (d) accommodations in buildings containing less than six dwelling units unless part of a garden type maisonette dwelling complex containing six or more dwelling units notwithstanding the existence of “one or two family certificates of occupancy” for portions thereof;

- (e) buildings completed or rehabilitated after January 1, 1974;
- (f) accommodations owned by an eleemosynary institution and operated on a non-profit basis;
- (g) hotel accommodations outside New York City;
- (h) motor homes, trailer homes and tourist courts;
- (i) non-housekeeping furnished accommodations where there are two or less boarders and the remaining portion of the housing accommodation is occupied by the owner or his immediate family;
- (j) accommodations in buildings operated exclusively for charitable purposes on a non-profit basis;
- (k) accommodations which are not occupied by the tenant in possession as his primary residence.

Section 11 declares void as contrary to public policy any lease provision or rental agreement which purports to waive a tenant's rights under ETPA.

Section 13 directs all state and local government agencies to cooperate with the State Division of Housing and Community Renewal, and any rent guidelines board in effectuating the purposes of ETPA. [emphasis added]

Chapter 576

The following sections of Chapter 576 also enacted significant changes as to the State's rent control and New York City's rent control and rent stabilization programs.

Section 2 amends Chapter 371 Laws of 1971 by repealing vacancy decontrol for New York City rent stabilized accommodations and by providing that all previously destabilized apartments and all decontrolled apartments - past and future - are to be subject to ETPA.

A provision which denied decontrol of rent controlled accommodations where a finding by the City Rent Agency that the vacature of the accommodation had been achieved via tenant harassment was retained.

Section 7 amends section YY51-3.0 [now §26-504] of the Administrative Code of the City of New York by adding housing accommodations made subject to the provisions of the Rent Stabilization Law by ETPA. These are:

- (a) Vacancy decontrolled accommodations (in buildings containing six or more accommodations) which were formerly subject to rent control;
- (b) accommodations formerly subject to New York City rent stabilization which had been vacancy destabilized;
- (c) accommodations in New York City created between 1969 and 1974 and had been exempt from both rent control and rent stabilization.

Section 9 amends section YY51-5.0 [now §26-510] with respect to the New York City Rent Guidelines Board by staggering the terms of the members, and prescribing criteria for guidelines orders.

Section 12(b) (1) repeats the language of section 9(b) of ETPA except that in addition to designating the Conciliation and Appeals Board as the agency for determining fair market rent applications,⁵⁰ it also requires that decisions by the Conciliation and Appeals Board on such applications consider, in addition to the special guidelines to be established by the City's Rent Guidelines Board, the "...rents generally prevailing in the same area for substantially similar housing accommodations." [Fair Market Rent Appeals are discussed at 76-78 and 84-86, *infra*.]

Section 15 provides that all rights, remedies and obligations created pursuant to the New York City Rent Stabilization Law, the Rent Stabilization Code, and the orders of the Conciliation and Appeals Board inure to the benefit of all owners and tenants made subject to the rent stabilization law by ETPA. It also declares that nothing in Chapter 576 is intended to diminish the powers of the Conciliation and Appeals Board, or the New York City Rent Guidelines Board to make, amend, or modify rules, regulations, or guidelines.

Section 17 declares the provisions of ETPA to be effective immediately subject to a declaration of a public emergency by the local legislative body. ***
end of edited excerpt from the 1980 report ***⁵¹

⁵⁰ Now a DHCR function.

⁵¹ This edited excerpt was taken from pp. 1-84 through 1-94 of the 1980 report.

The Omnibus Housing Act of 1983

The next major revision of the rent regulation laws occurred in 1983 with the passage of the Omnibus Housing Act. This Act had only a limited impact on the operations of the Rent Guidelines Board, however, and its main features, including the transfer of administration of rent regulations from the City to the State and the abolition of the Conciliation and Appeals Board, have previously been mentioned. Three changes imposed by the new law did affect the Board's operations. Prior to this act the Board routinely adopted special rent adjustments or surcharges at different times within a single guideline period. The new law ended this practice by limiting the Board to one guideline package per year. In addition, the law eliminated the availability of three-year leases as an option for tenants faced with lease renewals. Finally, the law added "governmental fees" to the list of cost considerations that the Board is required to review.

Also worth note is the fact that the 1983 law significantly overhauled certain enforcement provisions of the rent stabilization laws. Treble damages were imposed for willful rent overcharges [limited to two years / straight damages for overcharges up to four years]. A four-year limitation period was established for filing overcharge claims.⁵² In addition, for the first time owners of rent stabilized apartments were required to register rents on an annual basis.

As mentioned earlier, subsequent legislation in 1985 ended the official involvement of the Rent Stabilization Association and the Metropolitan Hotel Industry Stabilization Association in the stabilization system.

The Rent Regulation Reform Act of 1993

Another major change in the rent regulation system came with the adoption of the Rent Regulation Reform Act of 1993. Following a pattern set decades earlier, there were four last minute extensions of the rent laws, including one in which Governor Cuomo entered the Senate chamber at 11:57 PM to sign a three day extension before

⁵² Under this rule an overcharge was viewed as a continuing infraction. Thus, a tenant was allowed to challenge the last four years of any overcharge even if the unlawful increase began prior to the four-year period. Subsequent changes in 1993 and 1997 made the limitations period absolute. Thus, unlawful increases in rent that are more than four years old are now completely immunized from challenge.

the midnight deadline. In the final bill State legislative leaders agreed to the first decontrol initiative in over twenty years. The key provisions of the 1993 law are briefly as follows:

- Apartments renting for \$2,000 or more between July 7, 1993 and October 1, 1993, which were vacant on July 7, 1993 or thereafter, were exempted from rent regulation.⁵³
- Apartments which 1) are occupied by persons who have a total annual income in excess of \$250,000 per year for two succeeding years, and 2) that have legal rents in excess of \$2,000 per month as of October 1, 1993, were exempted from rent regulation. The \$250,000 threshold would be modified four years later with the adoption of the Rent Regulation Reform Act of 1997.
- The law established a system of income certification to be administered through the Division of Housing and Community Renewal with the cooperation of the Department of Taxation and Finance.
- The law established one-fortieth the cost of individual apartment improvements as the allowable monthly rent increase when such improvements are made. The DHCR had considered implementing a longer “amortization” period via administrative regulations. The establishment of one-fortieth as the appropriate amount by statute eliminated the possibility of such an administrative change.⁵⁴
- The law limited the availability of damages in cases where stabilized tenants claim a rent overcharge because the owner failed to register the apartment with the Division of Housing and Community Renewal.⁵⁵
- The law provided that the chairperson of the Senate Committee on Housing and Community Development, jointly with the chairperson of the Assembly Housing Committee would establish a study group on rental housing which would produce a report for the Governor, the President Pro Tem of the Senate, and the Speaker of the Assembly no later than June 30, 1995. The study was to examine a number of issues relating to the impact and effectiveness of rent regulations and was to include, among other things, “recommendations regarding: (1) the methodology and criteria employed by rent guidelines boards in establishing guidelines for rent

⁵³ The July 7, 1993—October 1, 1993 time period was later extended by Act of the New York City Council so that an apartment reaching the \$2,000 threshold AFTER October 1, 1993 was subject to vacancy decontrol.

⁵⁴ See pages 80-82 for a discussion of individual apartment improvements.

⁵⁵ See page 88 for a discussion of the consequences of a failure to register.

adjustments.” This study and accompanying recommendations were apparently never completed.

- The law extended the ETPA until the fifteenth day of June 1997.

The Rent Regulation Reform Act of 1997

The Rent Regulation Reform Act of 1997 followed one of the most bitter state legislative battles of the 20th century. Following a failed effort to work out a compromise between the Republican led Senate and the Democratic led Assembly, existing rent laws expired at midnight on June 15, 1997 – the first time in over fifty years that the state was without some kind of rent regulations. After four days of intense negotiations, the laws were renewed for six more years, with some major changes.

- The law imposed a complex statutory vacancy allowance which provides as follows:
 - If the incoming tenant selects a two-year lease, the increase shall be 20% over the prior legal regulated rent.
 - If the new tenant selects a one-year lease, the increase shall be 20% over the legal regulated rent, less the difference between (a) the RGB two-year renewal lease guideline applied to the prior legal regulated rent, and (b) the RGB one-year renewal lease guideline applied to the prior legal regulated rent. For example, if the one-year guideline is 4% and the two-year guideline is 7%, the vacancy allowance is 17% (i.e. $20 - (7 - 4) = 17$).
 - In addition to the above, if an owner has not collected a vacancy allowance for the vacant apartment for at least 8 years, the owner is entitled to an additional six-tenths of one percent (.6%) for each year since the last vacancy allowance for the apartment was taken (or since the apartment fell under rent stabilization). For example, if the prior tenant was in occupancy for eleven years, and the new tenant takes a two-year lease, the vacancy allowance is 20% plus $(.6\% \times 11)$ or a total of 26.6%.
 - If the prior legal rent was less than \$300, an additional \$100 increase may be added. If the prior rent was above \$300 but below \$500, the owner is entitled to all increases allowed by law or a minimum increase of \$100. These vacancy allowances are in lieu of RGB one or two-year renewal increases, but in addition to other increases authorized by statute, such as

major capital improvement increases, individual apartment increases, and any additional vacancy increase adopted by the RGB.

- The RRRA of '97 also modified succession rights. It eliminated nieces, nephews, aunts and uncles from its definition of family members eligible to succeed departing tenants of record. These individuals still might qualify for succession rights if they can prove “emotional and financial commitment, and interdependence between [themselves] and the tenant.” The new law also imposed a vacancy allowance on the second succeeding family member. Thus, if a parent passed away leaving an apartment to a son, the son would not have to pay a vacancy allowance. If, however, the son were to depart, leaving the apartment to a brother (a brother who meets the requisite two year co-occupancy requirement) the brother would have to pay all vacancy allowances in effect.
- The RRRA of '97 further modified the luxury decontrol provisions first adopted in 1993. Tenants residing in apartments renting for more than \$2,000 per month earning more than \$175,000 per year for two consecutive years (down from \$250,000) are now subject to high income decontrol.
- An amendment to the Rent Stabilization Law adopted by the New York City Council in 1997 provided that the high rent vacancy decontrol adopted in 1993 only applied to apartments renting for \$2,000 or more at the time they are vacated. The DHCR had taken a different view, and concluded that if the rent lawfully reached \$2,000 (through the vacancy allowance, improvement allowances etc.) after the prior tenant vacated, it could be deregulated. The State adopted the DHCR's view and codified it in the RRRA of '97. Subsequently, the City Council adopted a local law requiring owners to disclose prior rent histories to new occupants of deregulated apartments.
- The RRRA of '97 restricted consideration of evidence to establish rent overcharge claims to events occurring within four years of the claim. Thus, if a tenant does not file an overcharge claim within four years of the rent registration filed with the DHCR claimed to include the excessive amount, the rent is final and the complaint will not be considered.
- To eliminate any fear developers may have of subsequent rent regulations, the RRRA of '97 allows the Commissioner of DHCR to enter into contracts with developers to exempt new construction from any form of rent regulation for a period of fifty years.

- The RRRA of '97 also provides a mechanism to remove “hold-out” rent controlled tenants from buildings where the owner seeks to demolish and construct new units. If such tenants occupy less than ten percent of the units in a building (or one apartment in a building with 10 or fewer units), the owner may remove such tenants, but must provide relocation benefits established by the DHCR.
- The RRRA of '97 imposes strict requirements that tenants engaged in Housing Court proceedings deposit rents into court on a second adjournment or if more than 30 days have passed following the party’s first appearance (unless the owner has requested the adjournments.)
- The RRRA of '97 also stiffens criminal penalties for physical harm to tenants caused by landlords engaged in harassment, making such acts a Class E felony. The Legislature’s requirement of physical injury makes this particular enactment rather illusory. Under most circumstances, it is already a felony to deliberately injure someone.

The Rent Law of 2003

The Rent Law of 2003 (Chapter 82 of the Laws of 2003), in effect until June 15, 2011, was enacted in June of 2003 and amended the 1997 rent laws in three major ways:

- Limits the ability of NYC to pass laws concerning rent regulation issues controlled by the State;
- Allows for the deregulation of an apartment upon vacancy if the legal regulated rent may be raised above \$2000, even if the new tenant is not actually charged an amount above \$2000;
- And permits an owner, upon renewal, to increase a rent stabilized tenant's rent to the maximum legal regulated rent, regardless of whether a tenant has been paying a preferential rent (but does not prohibit contractual agreements between owners and tenants to maintain the preferential rent after renewal).

The Rent Act of 2011

The following is a summary of the major changes to various rent laws, passed by the NYS Legislature and signed by the Governor on June 24, 2011. It will remain in effect until June 15, 2015. These major changes were put into effect with passage of this bill:

- **Frequency of vacancy increases:** Effective June 24, 2011, rent increases legally permitted upon vacancy may not be taken more than once in any calendar year (January 1 - December 31).
- **Individual Apartment Improvements:** Effective Sept. 24, 2011, individual apartment improvements completed in buildings with more than 35 apartments allow the landlord to permanently increase the legal regulated rent by 1/60th of the cost of the improvements (was 1/40th under the prior Rent Law). For improvements done in apartments located in buildings containing 35 or fewer units, passing along 1/40th of the cost of improvements remains unchanged.
- **High-Rent/Vacancy Deregulation:** Effective June 24, 2011, this provision allows for the deregulation of an apartment upon vacancy if the legal regulated rent reaches \$2,500 (up from \$2,000 under the prior Rent Law);
- **High-Rent/High-Income Deregulation:** Effective July 1, 2011, this provision permits, by order of DHCR, upon application by the building owner, the deregulation of an apartment with a monthly legal regulated rent of \$2,500 or more (up from \$2,000 under the prior Rent Law) if household income is in excess of \$200,000 in each of the two preceding calendar years (up from \$175,000 under the prior Rent Law). These new thresholds apply to proceedings commenced in the 2012 cycle, not to proceedings filed prior to July 1, 2011.

The Rent Act of 2015

The following is a summary of the major changes to various rent laws, passed by the NYS Legislature and signed by the Governor on June 26, 2015. It will remain in effect until June 15, 2019. These major changes were put into effect with passage of this bill:

- **Vacancy Deregulation:** This provision allows for the deregulation of an apartment upon vacancy if the legal regulated rent reaches \$2,700 (up from \$2,500 under the prior Rent Law). It also provides that this deregulation threshold will increase each January by the amount that the Rent Guidelines Board has authorized for one-year renewal leases in the current guideline year.
- **Major Capital Improvement Increases:** Previously, increases permitted for Major Capital Improvements (MCIs) were amortized over a seven-year period. Per the Rent Act of 2015, the amortization period increases to eight years for buildings with 35 or fewer units, and nine years for buildings with more than 35 units.
- **Vacancy Increases:** For apartments where the vacating tenant was paying a preferential rent, the statutory vacancy increase of the apartment cannot exceed five percent of the previous legal regulated rent if the last vacancy lease commenced less than two years ago; ten percent of the previous legal regulated

rent if the last vacancy lease commenced less than three years ago; or fifteen percent of the previous legal regulated rent if the last vacancy lease commenced less than four years ago.

Noteworthy Aspects of Selected Court Cases

Along with the development of the state and local laws discussed in the preceding section, frequent litigation over the past 40 years has done much to shape the operation of the Rent Guidelines Board and the rent stabilization system. What follows is a list of court decisions and some notes on how these decisions may have reinforced or changed the system and the Board's role in it. Some of the cases involve Rent Guidelines Boards that operate outside of the City under a mandate similar to that of the N.Y.C. Rent Guidelines Board. The cases themselves should be directly consulted for further information on the facts and issues involved in each.

1. 8200 Realty Corporation v. Lindsay
27 N.Y.2d 124, 313 N.Y.S.2d 733 (1970)
 - The New York Court of Appeals upheld the constitutionality of the real estate industry self-regulation system. Although noteworthy from a historical perspective, this case is no longer directly relevant to rent stabilization since the Rent Stabilization Association is no longer statutorily involved in administration of the rent regulations.

2. Associated Builders/CHIP v. N.Y.C. Rent Guidelines Board
Supreme Court N.Y. Co., Special Term Part I (1974) Index No. 11928/74
 - The court rejected RGB guidelines on the grounds that they were not accompanied by a detailed explanatory statement.

3. Strausman v. Herman
52 A.D. 2d 882, 383 N.Y.S.2d 59 (2d Dept.1976), aff'd 42 N.Y.2d 1053 (1977)
 - The Appellate Division found that an affidavit by the Chairman of the Nassau County RGB stating that a DHCR ruling was consistent with the intent of the rent guideline it was interpreting was sufficient to support the validity of the ruling. Thus, the annulment of that ruling by a lower court was reversed. Therefore the courts will give the Board's interpretation of its own orders great weight.

4. Allyn Realty Corp. v. Herman
56 A.D.2d 626, 391 N.Y.S.2d 685 (2d. Dept. 1977) [Involves Nassau County RGB]
 - The court ruled that the literal meaning of Board orders should be adhered to unless the literal interpretation of such meaning would lead to an absurd result.
5. Incorporated Village of Great Neck Plaza v. Nassau Co. Rent Guidelines Board
60 A.D. 2d 593, 400 N.Y.S.2d 120 (2d Dept. 1977)
 - The Appellate Division ruled that the Nassau County RGB's failure to consider financing costs, vacancy rates and data reasonably available with respect to owners' net incomes, as required by 4(b) of the Emergency Tenant Protection Act of 1974 (a provision corresponding to 26-510(c)) resulted in the invalidation of its guidelines.
6. Rent Stabilization Association v. N.Y.C. RGB
98 Misc 2d 312, 413 N.Y.S.950 (1978)
 - The Supreme Court, New York County, ruled that the Open Meetings Law applies to RGB Meetings. Because of violations of this law, the court ordered that the RGB hold further meetings to promulgate new guidelines but refrained from establishing court ordered guidelines in the interim period.
7. Coalition Against Rent Increase Passalongs v. Rent Guidelines Board of N.Y.C.
104 Misc 2d 101, 427 N.Y.S.2d 660 (Sup. Ct. N.Y. Cty. 1979) aff'd 176 A.D.2d 343 (1980)
 - The Supreme Court, New York County, ruled that reopening of RGB guidelines for adjustments after the July 1, annual adjustment was permitted. This, however, is no longer permissible under the Omnibus Housing Act of 1983.
 - Also, the court noted, "...all rent controls in the City of New York [citations omitted] have a twofold purpose: to limit profiteering in a market marked by housing shortage and to conserve and improve the housing stock of the City of New York."
8. Incorporated Village of Great Neck Plaza v. Nassau County RGB
69 A.D. 2d. 528, 418 N.Y.S.2d 796 (1979)\ul style="list-style-type: none;">- The court ruled that Nassau County RGB is not a state agency and therefore is not subject to the State Administrative Procedure Act (SAPA).

Following the same rationale, the New York City RGB is also not subject to SAPA.

9. Liotta et. al. v. RGB

547 F. Supp. 800 (S.D.N.Y. 1982)

- Property owners argued in federal court that a loud and boisterous atmosphere at an RGB meeting precluded fair and rational deliberations and resulted low rent increases which constituted a denial of due process to the owners. The United States District Court for the Southern District found that in instances where state law provides an adequate remedy to initially seek redress of alleged due process violations, a plaintiff must seek state court review of the issue before it seeks review in federal court.

10. Matter of Muriel Towers Co.

117 Misc. 2d 837 (Sup. Ct. N.Y. Co. 1983)

- The Supreme Court, New York County, found that the “circus atmosphere” (created by the exercise of constitutional rights by a “vocal citizenry”) at an RGB meeting did not prevent rational deliberations by the Board. The Court also found that the Board’s consideration of tenants’ ability to pay in setting guidelines is proper.

11. METHISA v. RGB

Supreme Court N.Y. Co. Index No. 21444/84(1984)

- A 0% adjustment guideline for hotel rents following hearings in which evidence of extensive neglect and deprivation of services in these buildings was presented was upheld. According to the court, the RGB is permitted to consider the nature of the services provided as part of its examination of expenditures. Such consideration is not penal nor quasi-judicial in nature and thus does not exceed the RGB’s jurisdiction.

12. Stein v. RGB

127 A.D. 2d 189, 514 N.Y.S.2d 222 (1st Dept. 1987)

- The Appellate Division, First Department ruled that supplementary Board orders or re-openers are permissible to protect the public from the impact of changed economic conditions in the housing market. [Reopening the guidelines in the same guideline period is no longer permissible since the passage of the Omnibus Housing Act of 1983. See #7]

13. RSA v. Dinkins, RGB / Gesmer

Sup. Ct., N.Y. Co., Index No. 11506/90; 167 A.D.2d. 179, 562 N.Y.S. 2d 411 (1st Dept. 1990), app. den. 77 N.Y.2d. affd. 809 (1990)

- The Supreme Court, New York County, ruled that absolute impartiality in landlord-tenant matters is not a prerequisite to appointment as a public member of the RGB. In addition, the court held that the qualifications of Ellen Gesmer, which included 11 years experience as an attorney handling housing related matters, met the statutory requirement of “at least five years experience in either finance, economics or housing.” (See note in next case)

14. RSA v. Dinkins, RGB / Friedheim

Sup. Ct., N.Y. Co. - N.Y.L.J. 4/3/91 p.22, col. 1

- The Rent Stabilization Association (RSA) sought to have Oda Friedheim, a tenant member of the RGB removed, alleging that she was an officer in a tenant organization in violation of the Rent Stabilization Law. The court ruled that a *Quo Warranto* action brought by the Attorney General was the exclusive means for contesting title to a public office in New York State. [Note: The exclusive right of the Attorney General to contest title to office was raised on appeal in the Gesmer case as well. The Appellate Division chose to follow the lower court's ruling on the merits - and never addressed this standing issue.]

15. 23 Realty Associates v. Tiegman et al.

Sup. Ct., Co. of N.Y. Index No. 12465/91 App. Withd. 176 A.D.2d. 1251 (1st Dept. 1991)

- A rent stabilized hotel owner claimed that hotel guidelines from 1984 through 1990 were adopted without any lawfully required investigation, or proper consideration of all guideline components and criteria. The court ruled that the City had “marshaled considerable data to show that RGB enacted its guidelines after giving due consideration to the [required] criteria.”
- The Court also ruled that all challenges except the challenge to the most recent guideline were time barred by a four month statute of limitations.

16. RSA v. Dinkins / RGB

U.S. District Court, S.D.N.Y. (J. Stanton) 805 F.Supp. 159 (S.D.N.Y 1992), affd. 5 F.3d 591 (2d. Cir. 1993)

Note: Since this case directly concerns the RGB's methodology, a summary of the District Court's opinion is provided. This summary is for informational purposes only. The plaintiff dropped the challenge against the RGB methodology on appeal, and the Second Circuit Court of Appeals reviewed the

case *de novo*. Therefore, the decision of the District Court is not binding precedent.

The District Court Opinion

- The RSA initiated a challenge in federal court alleging *inter alia* that the guidelines over several years failed to account for the effects of inflation on owners net operating income. They argued that this failure, along with an inadequate hardship mechanism, resulted in an unconstitutional taking of property because such adjustments were essential to maintaining a “reasonable return on the property as an investment.” The court stated that “a 'reasonable return' is not protected by law in this circuit” (p.163). Instead, the court made clear that the relevant test at issue is whether or not economic viability is impaired. Citing a prior case the court noted, “the crucial inquiry...is not whether the regulation permits plaintiffs to use the property in a 'profitable' manner, but whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone else for that use.” *Id.* The court did not conclude that the RGB failed to provide owners with a reasonable return, but found that even if the RSA's allegations to that effect were true, an unconstitutional taking would not necessarily have occurred. The court also emphasized the difficulty of mounting a facial challenge to rent regulations, noting that unlike an “as applied” challenge where a concrete injury to an individual plaintiff is demonstrated, in facial challenges plaintiffs must “establish that no set of circumstances exists under which the act would be valid.”

The Opinion of the Second Circuit Court of Appeals, 5F 3d 591(2d. Cir. 1993)

- On appeal to the Second Circuit, the plaintiff dropped the challenge against the RGB's methodology but pressed the claim that DHCR's hardship rent increase procedures (explained in detail at 74 to 76) were facially unconstitutional because such procedures did not guarantee an adequate return. The appeals court concluded that such claims could only be framed in an “as applied” challenge, and that “the proper recourse is for the aggrieved individuals themselves to bring suit” (p. 595). The court noted that although such an approach to a suit “may appear inefficient and burdensome, it is the only way to present a federal court with the type of live 'case or controversy' demanded by the Constitution. Moreover, it is the only realistic way to be able to resolve it fully and fairly.” Finding that the RSA lacked proper standing to bring an as applied challenge, the Second Circuit unanimous affirmed the District Court’s decision.

17. The Greystone Hotel v. City of New York, the Rent Guidelines Board et al.
98-9116 (2d. Cir 1999) (unpub. op.) affg. 13 F. Supp. 2d. 524 (S.D.N.Y. '98)
- The owner of a “Class B” hotel argued that the RGB violated its rights to due process and equal protection by granting lower rent increases than those given for apartments. The owner also argued that the rent stabilization law and code effected a physical and regulatory taking of its property. Because the property retained some economic value no regulatory taking was found. Because the owner initially chose to use the hotel as a rental property, no physical taking was found. With respect to the relatively lower rent adjustments given to hotel owners the owner claimed that it was being forced to address the affordability problems of lower income tenants. The court found that the “RGB considered tenant hardship in accordance with a statutory scheme that mandated this consideration in conjunction with a host of other factors that explicitly weigh landlord costs” (p.3). Because the RGB made “a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment” no due process or equal protection violation was found, citing Pennell v. City of San Jose, 485 U.S. 1, 13 (1988). Notably, the Court declined to permit this decision to be used as a precedent in subsequent proceedings. Thus, while it resolved the dispute between the parties, it may not be cited as precedential authority in future legal proceedings.
18. Benroal Realty LP v. Nassau County Rent Guidelines Board
Supreme Court, Nassau County, N.Y.L.J. 2/14/01 p.31, col. 6
- The Nassau County Rent Guidelines Board linked its rent adjustments to whether or not each affected community under its jurisdiction offered a Senior Citizen Rent Increase Exemption (SCRIE). Tenants in communities without a SCRIE program received higher rent increases than tenants in communities with a SCRIE program. The Supreme Court, Nassau County, ruled that the Nassau County RGB had “no statutory or inherent authority to extend the state statutory benefits of SCRIE for eligible seniors to non-eligible tenants generally.”
19. New York State Tenants & Neighbors Coalition, Inc. v New York State Division of Housing & Community Renewal
18 A.D.3d 875, 796 N.Y.S.2d 371 (2d Dep’t 2005)
- The New York State Tenants & Neighbors Coalition sued the New York State Division of Housing, attempting to invalidate the rent guidelines set in Nassau County for the guideline year 2003-2004. The Emergency

Tenant Protection Act requires the RGB to submit, on or before July 1st of each year, with the DHCR its “findings for the preceding calendar year” and to “accompany such findings with a statement of the maximum rate or rates of rent adjustment authorized for leases or other rental agreements commencing during the next succeeding twelve months.” Tenants & Neighbors argued that the Board failed to include, as part of the Guideline certified on September 25, 2003, any specific findings “for the preceding [i.e., 2002] calendar year” and contended that the failure to include such findings invalidates the Guideline. The RGB and DHCR argued that Part II of the Guideline contained “findings” sufficient to meet the requirements of ETPA, including a generic list of the types of data, materials, and other information reviewed and relied upon each year by the Board in determining whether a rent adjustment is warranted. The appellate court found that the Board's interpretation of the words “findings for the preceding calendar year” was neither rational nor reasonable, and criticized the Board’s use of a “generic list of items so broad as to remain virtually unchanged over a period of several years.” Although the court agreed with Tenants & Neighbors that the Board had not made required “findings,” it would not overturn the Guideline because of the omission, and ordered the Nassau County RGB only to adopt findings in compliance with the ETPA.

20. Mercedes Casado, et al., v. Marvin Markus, et al.,
898 N.Y.S.2d 780 (Sup. Ct. 2010)

- This case was filed by Mercedes Casado, et al., against RGB Chair Marvin Markus, challenging the validity of the fixed dollar provision of Apartment Order #40. This Order provided a 4.5% increase for one-year lease renewal and 8.5% increase for two-year lease renewal or *a fixed dollar amount of \$45 for a one-year lease renewal or \$85 for a two-year lease renewal for tenants in place for 6 years or more, whichever was greater*. The Supreme Court held in favor of the plaintiffs and found that the RGB did not have the authority to create separate classes of housing accommodations under the Rent Stabilization Law. The Court reasoned that only the City Council had that authority. Therefore the Court voided the fixed dollar provisions of Order #40 and left the percentages as valid. On appeal by the RGB, the Appellate Division, First Department, affirmed the Supreme Court’s decision. On appeal to the NYS Court of Appeals, the Court reversed and dismissed the petition challenging the minimum dollar increases. The Court held that the RGB does have the power to make distinctions between low-rent apartments in which there has been no recent vacancy and other apartments. It rejected petitioners'

argument that the RGB may not permit any increases that are larger, in percentage terms, for some apartments than for others. Therefore, the originally passed guidelines were ruled valid and legal.

The Constitutionality of Rent Regulation

The constitutionality of rent regulation is an issue commonly raised in discussions about the RGB's orders. Because it is rarely analyzed, an extensive treatment of the issue is provided below.

The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. The Takings Clause has been a source of great dispute and scholarly debate for over a century.

Generally speaking, constitutional scholars have all but given up arguing that rent regulations inevitably result in an unconstitutional taking of private property.⁵⁶ The few scholars who persist in such attacks often founder on definitional grounds. If even the smallest degree of price or rent regulation results in an unconstitutional taking because the “natural” order of the market is altered in a way which favors one party over another, every act of government which economically disadvantages someone to the benefit of another becomes suspect. Virtually every law has some burden shifting economic impact. Economic interests, as measured in pure market terms, are constantly being diminished or enhanced by governmental action. Only property rights, a limited subset of such interests, receive constitutional protection. As Harvard law professor Frank Michelman has explained, if every existing “legally sanctioned advantage is property” we are gradually “forced to recognize in every act of government a redefinition and adjustment of a property boundary [for which compensation must be paid]. The war between popular self government and strongly constitutionalized property now comes to seem not containable but total.”⁵⁷

Constitutional norms shaped by settled precedent and adjusted by evolving practical concerns are precisely what prevent this “war” from spreading. Within our democratic system, property (and the power that attaches to it) is thus treated as a legal norm - informed but not controlled by economic analysis.⁵⁸ The reasonable

⁵⁶ But see Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741 (1989) and Responses by various authors in 54 BROOKLYN L. REV. 1215 (1989).

⁵⁷ Quoting Michelman, *Takings*, 1987, 88 COLUMBIA LAW REVIEW 1600, 1627-28 (1988).

⁵⁸ As Justice Holmes put it in his famous *Lochner* dissent, “... a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of

expectations of property owners are supported by legal protections that operate outside of any abstract or purely economic definition of property. But expectations alone do not define property rights. As constitutional scholar Laurence Tribe has observed:

Grounded in custom or necessity, these expectations achieve protected status not because the state is deigned to accord them protection, but because constitutional norms entitle them to protection. These norms, however, cannot be expressed entirely within the language of expectations; that path is a circular one inasmuch as expectations are themselves subject to governmental manipulation. Instead, the norms must reflect a mix of several concerns -- including regularity... autonomy ...and equality. Without appeal to such concerns we are defenseless against the alluring but fatal argument that, since it is government that gives, government is free to take as well.⁵⁹

Some scholars have suggested that we should look back to the original intention of the Framers to determine what was meant by the term property at the time the Bill of Rights was adopted. Even if the Fifth Amendment's prohibition against taking property terminated the conceptual development of what is meant by "property", thereby freezing what was included in the term in 1791, locked in with it would be the operative meaning property received under the common law - a meaning which, as previously discussed,⁶⁰ failed to immunize against price and rent regulations.

As with all language, what is meant by a legal term or phrase is inseparable from the experience of its users. A legal term which remains in use for centuries is subtly remolded by the evolving culture, manipulated by pressing interests, nuanced by changing contexts and animated by the unique frame of reference brought to bear by each new interpreter. No special exception exists for the term property. Thus, "property" may one day incorporate within its meaning an inviolable right to demand any price that a market might allow; or it may include fewer rights than are presently secured. In any reasonable construction of the term property and the rights it implies, the correct constitutional balance will hang somewhere between established understandings and emerging practical concerns. As Professor Michelman puts it, "balancing - or, better, the judicial practice of situated judgment or practical reason - is not the law's antithesis but a part of law's essence."⁶¹

laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. 45, 75 (1905).

⁵⁹ Tribe, *American Constitutional Law*, pp. 608-609.

⁶⁰ See text at page 17.

⁶¹ *Supra*, note 57 at 1629.

Scholarly disputes about the nature of property and the extent of constitutional protections are likely to continue as long as scholars, property and the Constitution are around. There is, however, a rather large body of authoritative court decisions that deal with the “takings” issue, along with a number of other constitutional concerns raised by the regulation of rents.

While “takings” claims have presented the most notable challenge, rent regulations have also been attacked as violative of substantive and procedural due process, equal protection, the Contracts Clause, as exceeding Congressional war powers, violating the doctrine of separation of powers, imposing involuntary servitude, and as an unconstitutional quartering of troops.⁶² Few such challenges have been successful.

In 2008 owners of a four-story residential building, James and Jeanne Harmon, commenced an action in federal court against the Chair of the Rent Guidelines Board (RGB) and the NYS Division of Housing and Community Renewal (DHCR) seeking a declaratory judgment and permanent injunction declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs and plaintiffs’ property and declaring certain apartment leases null and void. In *Harmon v. Kimmel* (originally referred to as *Harmon v. Markus*), plaintiffs raised a myriad of constitutional challenges, including a takings claim and claims that the law violates plaintiffs’ due process rights, the contract clause, thirteenth amendment protection from involuntary servitude, and the equal protection clause. In March of 2010, the United States District Court, Southern District of New York, granted the RGB’s motion to dismiss as well as that of the state defendants.

The Harmons then appealed to the United States Court of Appeals for the Second Circuit, in New York. In March of 2011, The US Court of Appeals denied this appeal. A three-judge panel of the appeals court said the couple was aware of the law when they acquired the building. The panel added that the couple retained important rights under the regulations: they could, in some circumstances, reclaim the apartments for their own use; they could demolish the building so long as they did not replace it with housing; and they could “evict an unsatisfactory tenant.” All of that meant, the panel said, that the city’s regulations did not amount to “permanent physical occupation of the Harmons’ property.”

Finally, the Harmons attempted a final appeal by petitioning the U.S. Supreme Court to consider their claim that the NYS rent stabilization law was unconstitutional. In March of 2012, the U.S. Supreme Court refused the Harmons’ petition.

⁶² See Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SOUTHWESTERN UNIVERSITY LAW REVIEW 1019 (1992) (internal citations omitted).

The U.S. Supreme Court's Treatment of Rent Control Laws

The first significant constitutional challenge to rent controls followed the adoption of post World War I controls in Washington D.C. and New York City. These “due process” challenges were rejected in an opinion written by Justice Oliver Wendall Holmes in 1921.⁶³ Notably, Justice Holmes' recognition of the concept of what is now referred to as a “regulatory taking,” postdated these decisions by one year.⁶⁴ The only instance where the United States Supreme Court has stricken a rent control statute came in 1924 when Justice Holmes found that the wartime justification of the rent controls had come to an end.⁶⁵ On two occasions World War II era rent controls were unsuccessfully challenged before the U. S. Supreme Court.⁶⁶

In 1992 the U.S. Supreme Court addressed a physical takings claim in a rent control ordinance involving mobile home lots. In *Yee v. City of Escondido*,⁶⁷ the Court held that where owners of rent regulated mobile home lots or “pads” had opened their property to occupation by others (the initial pad renters), they could not “assert a per se right to compensation based on their inability to exclude particular individuals”, including those who purchased mobile home units from prior tenants, and thus succeeded them in their right to a rent controlled pad. The court explicitly decided not to review a regulatory takings claim which had not been raised at trial.

In *Pennell v. San Jose*,⁶⁸ the court found no constitutional infirmity in a rent control ordinance which permitted the consideration of tenant hardship in a mechanism for special rent adjustments. Applying a rational basis standard of review, among other things, the court held that the hardship provision neither rendered the ordinance facially invalid under the Due Process clause, nor violated the Equal Protection Clause. The court recognized that “a legitimate and rational goal of price or rate regulation is the protection of consumer welfare.”⁶⁹ Most notably, the Court declined to consider the appellant's claim that the hardship provision resulted in a regulatory taking. Finding that there was “no evidence that the 'tenant hardship clause' [had] in fact ever been relied upon by a hearing officer to reduce the rent below the figure it would have been set at

⁶³ *Block v. Hirsh*, 256 U.S. 135 (1921) (dealing with Washington, D.C.'s rent control laws); See, also, *Marcus Brown Holding Co. v. Feldman* 256 U.S. 170 (1921) dealing with New York City's rent control laws.

⁶⁴ In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), (Justice Holmes recognized that if a regulation goes “too far” it will be recognized as a taking).

⁶⁵ *Chaselton Corp. v. Sinclair* 264 U.S. 543 (1924).

⁶⁶ *Bowles v. Willingham*, 321 U.S. 503 (1944) and *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

⁶⁷ 503 U. S. 519, (1992)

⁶⁸ 485 U.S. 1 (1987)

⁶⁹ *Id.* at 13.

on the basis of other factors set forth in the Ordinance”⁷⁰ the majority declared the regulatory taking claim premature. In a notable dissent, Justice Scalia, joined by Justice O'Connor reached the regulatory takings issue and concluded that, because the hardship provision forced some individuals (landlords) to bear a public burden alone (i.e. support low-income tenants), the hardship provision resulted in a regulatory taking.

The dissent in *Pennell* suggests that policy makers should be wary about the constitutionality of any measure that imposes a discrete regulatory burden on owners due to the fact that they may have low income or hardship tenants in their building. It implies that the elimination of abnormal rents through rent controls is clearly constitutional. However, imposing a public welfare burden on individual owners may not be.⁷¹

In *Greene v. Mirabel*⁷² the court dismissed for want of a substantial federal question a takings claim challenging the 7 1/2% statutory limit on annual rent increases under New York's rent control law. While the statute in question permitted a higher increase if landlord's could prove that the return on their investment was less than 8 1/2%, the landlords asserted that they were denied “hardship” adjustments before the Division of Housing and Community Renewal and in state courts.

⁷⁰ Id. at 11.

⁷¹ Compare *Parrino v. Lindsay*, 29 N. Y. 2d 30 (1971). In *Parrino* the New York State Court of Appeals had occasion to consider whether a temporary local law, which generally froze rents for elderly persons with household incomes of less than \$4,500, was unconstitutional. In citing the temporary nature of the measure and the fact that the rent levels paid had already been upheld as constitutionally valid, the Court of Appeals refused to find a denial of equal protection. The court also found that a regulatory taking had not occurred. This portion of the decision was criticized in a case that went before the Supreme Court of New Jersey a few years later. In *Property Owners Association of North Bergen v. North Bergen*, 378 A.2d 25 (1977) a North Bergen ordinance which provided that elderly tenants earning less than \$5,000 annually would be immune from rent increases was found to result in an unconstitutional taking. There the Court held,

“A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem.” 378 A.2d at 31.

Justice Scalia quoted this passage approvingly in his dissent in *Pennell* noting that the Supreme Court of New Jersey was dealing with “the same vice I find dispositive here” 485 U.S. at 23. Perhaps the *Parrino* case can be distinguished on the grounds that it dealt with a temporary measure and that the rent levels had already been found constitutional. The New Jersey Supreme Court was clear in its disagreement with *Parrino*, however, and passed over the opportunity to distinguish it from the North Bergen case. After noting that *Parrino's* “factual circumstances are not present here” the Court added, “and we do not find *Parrino* persuasive.” 378 A.2d at 31

⁷² 485 U.S. 983 (1988).

After avoiding a direct “regulatory takings” challenge to rent control for over sixty years, in *Lingle v. Chevron*⁷³ the U.S. Supreme Court finally addressed such a claim in 2005. *Lingle* involved the regulation of rents for commercial gas stations in the state of Hawaii.

Beginning in 1980 a growing body of case law suggested that the courts could declare laws regulating property unconstitutional if such laws failed to “substantially advance legitimate state interests” - leaving it to the courts to decide just what such “legitimate state interests” are. Legal advocates for property owners were hopeful that a determination of whether rent regulation laws served “legitimate state interests” could be removed from the legislative process and left to the judiciary. With this they foresaw the gradual restriction and possible demise of all rent regulations. Indeed, the New York Court of Appeals affirmed this perception when it exercised discretion under the “legitimate state interests” standard to strike down a law protecting the employees of not-for-profit hospitals who sublet rent stabilized apartments rented by such hospitals. In *Manochejian v. Lenox Hill Hospital*, the New York Court of Appeals held that protecting a non-occupying institutional consumer was not a “legitimate state interest” given the stated general goals of New York’s rent laws. This case is discussed below at page 56.

In *Lingle v. Chevron*, involving a restriction imposed by the Hawaii Legislature upon rent charged by oil companies to dealers leasing service stations, Justice O’Connor held that the “legitimate state interests” test had absolutely no validity in the context of regulatory takings jurisprudence. In a clear and categorical decision without dissent, Justice O’Connor eliminated a quarter of a century of confusion surrounding regulatory takings. Noting that the “legitimate state interests” test was inappropriately borrowed from certain due process cases, Justice O’Connor declared that the finding of a regulatory taking rested upon other tests which are closer to a classic ouster of an owner from property - such as when a permanent physical invasion occurs, or an owner suffers the destruction of all economically beneficial uses, or a property is so heavily burdened that the regulation amounts to a taking.⁷⁴ None of these latter standards pose significant threats to rent regulations of the type currently in effect in New York and most other jurisdictions that have such protections.

⁷³ *Lingle v. Chevron USA*, 125 S.Ct. 2074 (2005)

⁷⁴ Although Justice O’Connor acknowledged that a regulation may run afoul of the Due Process Clause if it is arbitrary or irrational, and Justice Kennedy took note of this possibility in a concurrence, it is unlikely, in light of *Pennell*, that a typical rent regulation requirement would be invalidated under such a deferential analysis.

In light of the Court's unanimous decision in *Lingle*, it is difficult to imagine how a constitutional claim to a conventional rent regulation statute could succeed at this time. *Yee* established that such laws do not constitute a physical taking. *Pennell* established that such laws do not violate due process or equal protection of the law. *Lingle* established that rent regulations cannot be scrutinized for their underlying public policy justifications in the context of constitutional takings analysis.

Challenges to Rent Regulation laws before the New York Court of Appeals

The New York Court of Appeals struck down two measures aimed at protecting rents or tenancies between 1989 and 1995, and upheld two others.

In *Federal Home Loan Mortgage Corporation v. New York State Division of Housing and Community Renewal*,⁷⁵ the New York Court of Appeals held that units in a formerly rent stabilized building which underwent cooperative conversion regain the protection of rent stabilization if the building loses its cooperative status upon foreclosure of an underlying mortgage. This result was particularly unwelcome in the banking community. The market value of properties foreclosed upon could be expected to vary significantly depending on whether the property experienced free market rents or regulated rents following foreclosure. Hence the Court's decision to recognize a reversion to rent regulated status effectively raised the incentive on the part of financial institutions to arrange for workouts - as an alternative to foreclosure in financially troubled cooperatives.

Although the court in *Federal Home Loan Mortgage Corp.* appeared to have responsibility for addressing the narrow question of whether the building reverted to rent stabilized status,⁷⁶ it also considered constitutional objections to the law which permitted this reversion.⁷⁷ First, it addressed the plaintiff's claim that the law effected a physical taking. Recognizing that "the essence of plaintiff's dispute is not that it is being forced to use the property in a new or undesirable manner, but that the rent it charges in terms of the rental leases should be market based and not subject to regulation under the [Rent Stabilization Law]" the court found that "no new use of the property had been forced upon plaintiff, and no unconstitutional physical taking has been effectuated."⁷⁸

⁷⁵ 87 N.Y. 2d 325 (1995).

⁷⁶ This question had been certified from the United States Court of Appeals for the Second Circuit where the case had been under consideration. *Id.*

⁷⁷ Rent Stabilization Law, NYC Admin. Code Section 26-504.

⁷⁸ 87 N.Y.2d at 335.

The court also rejected a regulatory takings claim. Notably, in addressing the regulatory takings claim the court reiterated its recognition of the legal framework for finding a regulatory taking used in *Manocherian v. Lenox Hill Hospital*,⁷⁹ and earlier in *Seawall Assocs. v. City of New York*⁸⁰, (a framework which, as discussed below, has now been brought into question by *Lingle*). Unlike the *Manocherian* case, however, [discussed below] the *Federal Home Loan Mortgage Corp.* decision found that extending the protection of the Rent Stabilization Law to the former cooperative shareholders would “serve the same legitimate State interest served by application of the RSL in a housing shortage - 'preventing eviction and resulting vulnerability to homelessness of the identified beneficiaries’”. Having found the proper nexus, the court rejected the plaintiff's regulatory taking claim.

Manocherian v. Lenox Hill Hospital,⁸¹ is a rather complex case which held that the extension of rent stabilization protections to leases held by not-for-profit hospitals for ultimate use by hospital employees (as subtenants) resulted in a regulatory taking.

With the adoption of the Omnibus Housing Act of 1983 the New York State Legislature tightened rules with regard to sublets by, among other things, limiting the right to sublet to tenants who intended to return and occupy their units at the termination of the subtenancy. Since not-for-profit hospitals could not be prime/occupying tenants, the effect of this law was to terminate the rent stabilized status of leases held by such entities. As a result, a number of hospital employee/subtenants faced eviction. To remedy this unintended consequence the New York State Legislature adopted Chapter 940 of the laws of 1984, which restored rent stabilized status to these leases.

This re-establishment of rent protection for a non-occupying corporate entity was challenged by the plaintiff as a regulatory taking. Relying upon the takings standard articulated in *Seawall* (discussed below), and finding that Chapter 940 did “not protect and benefit specific occupant subtenants, but rather erect[ed] a subsidized housing regime for Lenox Hill Hospital's preferential allotment” the New York Court of Appeals held that Chapter 940 “suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest.”⁸² The court thus drew a distinction between a non-occupant corporate entity and housing consumers who intended to occupy their apartments. The court appeared to be influenced to some degree by the perpetual status of the hospital as a corporate tenant and by the fact that the hospital employees could

⁷⁹ 84 N.Y.2d. 385 (1994).

⁸⁰ 74 N.Y. 2d 92 (1989). See also *Lucas v. So. Carolina Coastal Council* 505 U.S. 1003 (1992).

⁸¹ 84 N.Y.2d 385 (1994), cert den., 514 U.S. 1109 (1995).

⁸² 84 N.Y.2d 385, 386 (1994).

be evicted upon discharge from their employment. These facts, the court ruled, contravened two key goals of rent protection “occupant protection and eventual market redemption.”⁸³

Notwithstanding the various considerations which appeared to weigh in the court's finding, this was the first time that the New York Court of Appeals ruled that a rent law produced unconstitutional subsidies. The ruling appears to suggest that any legislative attempt to protect non-occupying consumers (e.g. business and not-for-profit entities) in a market where rents are effected by a legislatively recognized housing shortage, may be closely scrutinized by state courts. Nonetheless, is difficult to see how the ruling in *Manocherian* can survive the U.S. Supreme Court’s decision in *Lingle*. The analytical framework utilized in *Manocherian* included the “legitimate state interest” test which was explicitly and unanimously rejected by the U.S. Supreme Court in *Lingle*.

In *Rent Stabilization Assn. v. Higgins*,⁸⁴ the New York Court of Appeals upheld an administrative regulation promulgated by the New York State Division of Housing and Community Renewal which granted unmarried partners of a permanent character succession rights of the same type enjoyed by surviving spouses. Among other claims raised by the appellants, the regulation was challenged as permitting a forced physical occupation of the property resulting in a *per se* taking. Relying upon *Yee*, the court concluded that “[b]ecause the challenged regulations may require the owner-lessor to accept a new occupant but not a new use of its rent-regulated property, we conclude that appellants have failed to establish their claim that, facially, a permanent physical occupation of appellant's property has been effected.” The appellants also raised a regulatory taking claim. Dismissing the claim, the court found no deprivation of an economically viable use of the property and no failure to advance the legitimate state interest of protecting persons against the possible loss of their homes.

Decisions like *Higgins*, *Manocherian* and the *Federal Home Loan Mortgage* have been influenced to some degree by *Seawall Associates v. City of New York*, although the latter decision did not directly address a traditional rent regulation law in the same sense.⁸⁵ *Seawall* involved an attempt to prevent the further decline and loss of single room occupancy housing by imposing a moratorium on the alteration, conversion or demolition of such housing. The law allowed an exemption for those who were willing to pay \$45,000 dollars per unit into a low-income housing fund. In addition, the

⁸³ 84 N.Y. 2d at 394.

⁸⁴ 83 N.Y.2d 156(1994).

⁸⁵ 74 N.Y.2d 92 cert den. 493 U.S. 976 (1989).

law mandated that unused units be repaired and rented out. Finding that the buy- out provision amounted to a form of “ransom” and that the rent up provision resulted in a forced physical occupation of the property, the New York Court of Appeals ruled that the law resulted in an unconstitutional physical and regulatory taking.

As indicated above, *Lingle* sets forth a clear standard for analyzing regulatory takings claims, and provides that an inquiry into whether a regulation “substantially advances legitimate state interests” is not a proper component of the regulatory takings analysis. Accordingly, *Lingle* calls into question the reliance of *Seawall* and other cases on such an analysis in deciding whether a measure amounts to a regulatory taking. However, *Lingle* does not directly address whether the physical taking component of *Seawall* was properly decided.

The foregoing developments suggest that long established, traditional rent control measures appear likely to survive judicial scrutiny against takings claims. On the other hand, new and novel extensions of such protections, particularly those may be found to constitute a physical occupation, could meet with mixed success.