

LET THEM RENT CAKE: GEORGE PATAKI, MARKET IDEOLOGY, AND THE ATTEMPT TO DISMANTLE RENT REGULATION IN NEW YORK

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INTRODUCTION

There are not many issues upon which the editorial boards of all the daily newspapers in New York City agree. Yet in the spring of 1997, *The New York Times*, the *Daily News*, the *New York Post*, and *Newsday* were unanimous in respect to one thing: rent regulation had to go. The editorialists (joined, less surprisingly, by their colleagues at the *Wall Street Journal* and *Crain's New York Business*) were hardly reflecting popular sentiment. A poll of New York City residents in June 1997 found that “[a]t least 70 percent of [New Yorkers]—including homeowners and tenants—said rent regulations were necessary to provide affordable housing and to prevent rents from soaring.”¹

What the editorialists were reflecting was the pervasiveness of the idea of the “free market” as natural and beneficial, and of the corollary notion that restrictions on that free market are unnatural, unjust, and counterproductive.² This theology provided the basic assumption that underlay and constricted much of the policy debate over whether to extend, modify, or eliminate the rent regulation system, a system which was due for its periodic renewal on June 15, 1997.³

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1. See David Firestone, *The Rent Battle: The Reaction; Rent Regulations Firmly Supported in New York City*, N.Y. TIMES, June 11, 1997, at A1.

2. See, e.g., Editorial, *Reform Rent Laws; Don't Rush a Deal*, CRAIN'S N.Y. BUS., Apr. 14, 1997, at 8 [hereinafter Editorial, *Reform Rent Laws*].

3. From the outset, rent regulation had been framed as a “temporary” system, designed only to continue so long as a housing emergency existed in New York. See, e.g., Local Emergency Housing Rent Control Act of 1962, 1962 N.Y. LAWS ch. 21 (requiring periodic examination for presence emergency conditions after April 1, 1967). As such, the law contained a sunset provision, and an affirmative act of the State Legislature was required to re-authorize the system. See *id.*

Opponents of rent regulation, of course, had a serious problem with which to deal. Rent regulation protected about 2.5 million people in New York City.⁴ It was thus crucial for adherents of market theology to don the garb of market populists, and they did so with a vengeance. Fundamental questions of greed and power were turned on their head. Forget that the principal motive for building owners and their allies might indeed be the maximization of profit. Forget that the security of tenure that tenants enjoyed under rent regulation (i.e., the right to lease renewals) would evaporate if rent regulation were to end and that, thereafter, tenants could remain in their homes only so long as the arrangement suited the landlord.⁵ Focus instead on a very different picture painted by opponents of rent regulation: the quintessential landlord was the struggling owner of a small building being deprived of the ability to earn a livelihood.⁶ The quintessential tenant was the wealthy family shamefully exploiting the system at the expense of their poorer brethren.⁷ If only regulation were ended, rents might actually go down, and a new era of apartment construction would begin.

At the center of the controversy was New York's governor, George Pataki, a man firmly committed to market theology, and a man whose reelection campaign was only a year away. The Governor, the unquestioned leader of his party,⁸ had an ambitious agenda: set rent regulation on the road to its demise while presenting himself as a friend of tenants.⁹ Through a strategy of concealment, soft-pedaling, and implicit coordination with like-minded, pro-landlord forces, he came close to staging a spectacular short-term victory. Instead, he ultimately had to settle for making what was still real and substantial progress¹⁰ toward a day when no apartments would be regulated, and market values would trump all other values.

Indeed, the June 2003 reprise of the rent regulation debate can only be understood in light of the outcome in 1997. In 2003, anti-regulation forces were happy to consolidate their gains by letting

4. See N.Y. CITY RENT GUIDELINES BD., 1996 NEW YORK CITY HOUSING AND VACANCY SURVEY [hereinafter HOUSING AND VACANCY], available at <http://www.housingnyc.com/research/hvs96/96findings.html> (last visited Nov. 8, 2003).

5. See *id.*

6. See discussion *infra* Part I.E accompanying notes 102-141.

7. See discussion *infra* Part I.D accompanying notes 93-101.

8. See James Dao, *Pataki Courts Democrats for Bond Act*, N.Y. TIMES, Sept. 9, 1996, at B1.

9. See discussion *infra* Part I.H.2 accompanying notes 171-189.

10. See discussion *infra* Part II.A accompanying notes 321-360.

the 1997 system continue for as long as possible; pro-regulation advocates were desperate to recapture lost ground by trying to repeal the core of the 1997 amendments.¹¹ Though not well understood by the public or press at the time, 1997 had been a watershed moment.

This essay examines the ideological and political struggle over rent regulation that was waged by rent regulation opponents in the Spring of 1997. Part I traces the debate as it unfolded in 1997, including the role of legislative leaders, the governor, the press, and anti-regulation advocates. It focuses on the assumptions about the market shared by the various anti-regulation protagonists, and on the factors starkly omitted from their analyses. Part II sets forth the results of the debate, examining the provisions and consequences of the “Rent Regulation Reform Act of 1997,” including the legislation passed in 2003 to extend rent regulation another eight years. Finally, Part III offers conclusions about the role of market theology, the nature and motivation of anti-regulation arguments, the strategies of the governor, and the future of rent regulation.

It is important that the 1997 battle over rent regulation be understood as part of a struggle that had been going on for more than fifty years (see the Appendix for a chronology of New York City’s rent regulation systems). On the eve of the 1997 debate, there was a residual system of strict rent regulation called “rent control” that was still in place for approximately 70,000 apartments in New York City.¹² When such apartments were vacated, and if the building had six or more units, they joined the much larger stock of “rent stabilized” apartments, units that were governed by a looser system of regulation. The stock of rent-regulated apartments, which totaled more than 1,000,000 units,¹³ was the focus of the debate, and is the focus of this paper.

The principal features of rent stabilization as it existed at the beginning of 1997 can be summarized as follows: 1) so long as a tenant paid the rent and did not engage in conduct violative of his lease, that tenant was entitled at lease expiration to a written one- or two-year renewal lease;¹⁴ 2) once an initial legal rent had been

11. See discussion *infra* Part II.C accompanying notes 375-396.

12. See Clifford Levy, *The Rent Battle: The Tenants; City Hall Workers Flooded With Phone Calls*, N.Y. TIMES, June 15, 1997, § 1, at 29.

13. See Richard Pérez-Peña, *New Era for Rents*, N.Y. TIMES, Dec. 7, 1996, § 1, at 270.

14. See SEPTEMBER JARRETT & MICHAEL MCKEE, RENT REGULATION IN NEW YORK CITY: A BRIEFING BOOK 48 (1993).

set (when the apartment was first registered as being rent stabilized), further rent increases (for a one-year renewal, a two-year renewal, and, generally, a “bonus increase” after an apartment had been vacated) were set each year by a public body, the Rent Guidelines Board;¹⁵ 3) these increases were supposed to track the increase in costs borne by landlords in running their buildings,¹⁶ although whether the Guidelines Board was being too generous or too stingy was a constant source of debate between tenants and landlords; 4) a new tenant stepped into the rent-stabilized shoes of his predecessor;¹⁷ 5) landlords were not permitted to reduce services (and were subject to reductions in collectible rent if they did);¹⁸ 6) a family member of a tenant who had been living with that tenant was entitled to a lease in her own name were the named tenant to die (“tenant succession”);¹⁹ 7) landlords were entitled to rent increases both for building-wide capital improvements they made, and for improvements they made to individual apartments (in practice, generally apartments that had been vacated);²⁰ 8) apartments could be deregulated either if they were renting for \$2,000 or more and were then vacated, or if they were renting for \$2,000 or more and the tenants in occupancy had income in each of two successive years of at least \$250,000;²¹ and 9) apartments in buildings with fewer than six units were not covered at all.²²

According to the 1996 New York City Housing and Vacancy Survey, approximately 68 percent of rent stabilized apartments were occupied by households with total 1995 household income under \$40,000;²³ 91.5 percent of rent stabilized apartments were occupied by households with total 1995 household income under \$80,000.²⁴

15. *See id.*

16. *See* Rent Stabilization Law (“RSL”), N.Y. CITY ADMIN. CODE § 26-510(b) (1969) (listing projected real estate taxes and maintenance costs as factors for the Rent Guidelines Board to consider when setting rent increases).

17. The new tenant signs a so-called “vacancy lease.” *See* RSL § 26-511.

18. *See id.* § 26-514.

19. *See* Rent Stabilization Code, N.Y. COMP. CODES R. & REGS. tit. 9, § 2523.5(b) (1997).

20. *See id.* § 2522.4.

21. *See* Rent Regulation Reform Act of 1993, 1993 N.Y. LAWS, ch. 253.

22. *See* RSL § 26-504(a).

23. *See* N.Y. CITY RENT GUIDELINES BD., HOUSING NYC: RENTS, MARKETS & TRENDS ‘97 app. D.2 at 102 (1997), available at http://www.housingnyc.com/research/pdf_reports/97book.pdf (last visited Oct. 21, 2003) [hereinafter MARKETS & TRENDS].

24. *See id.*

I. THE 1997 DEBATE

A. A Campaign of Disinformation

The rent regulation battle began in earnest when Joseph Bruno, the Majority Leader of the New York State Senate, announced in December, 1996 that he was going to “end rent control as we know it.”²⁵ Bruno, asserting that rent regulation had done “as much damage to the city’s housing market as an ‘atomic bomb’ would,” said he would simply let regulations expire on June 15, 1997 if the system were not dramatically overhauled to deregulate all apartments except those occupied by people with disabilities, senior citizens, and people with the “lowest income,” a category the Senator did not define further.²⁶

On one level, Senator Bruno’s position did not appear to be idle boasting. Both houses of New York’s legislature operated largely by one-person rule: the Democratic-majority Assembly by its Speaker, Sheldon Silver; the Republican-majority Senate by its Majority Leader, Mr. Bruno.²⁷ The Republicans in the State Senate held a five-vote majority in that chamber,²⁸ and it was true that legislative inaction would effectively kill rent regulation.²⁹ On another level, however, politicians and the press understood that rent regulation continued to have widespread support, and that Senator Bruno’s statement represented merely an opening gambit in what would be a difficult negotiation.³⁰

The Governor’s strategy was to maintain a low profile, allowing Senator Bruno to take political flack for urging the end of rent regulation, and then belatedly come forward with a plan to end rent regulation more gradually. The Governor would then characterize himself as having offered a “compromise” that protected te-

25. See Editorial, *Rent Control and Reason*, TIMES UNION (Albany), Jan. 6, 1997, at A6.

26. See Joel Stashenko, *Bruno Softens Stance on Rent*, TIMES UNION (Albany), Dec. 31, 1996, at B2; see also Pataki *Urges Gradual End of Rent Laws*, N.Y. TIMES, Dec. 12, 1996, at B1.

27. See, e.g., James C. McKinley Jr., *Before Bills Move in Albany, 3 Leaders Cut Deals in*, N.Y. TIMES, Oct. 21, 2002, at A1 (“New York’s is a government where . . . the power of the Assembly speaker and the Senate majority leader over legislation is almost absolute.”).

28. See Raymond Hernandez, *The Rent Debate: The Battleground; In Battle Over Rent Law, Focus is on a Pivotal Republican Legislator*, N.Y. TIMES, Apr. 7, 1997, at B1.

29. See James Dao, *The Rent Debate: Battle; War of Nerves in Albany*, N.Y. TIMES, Apr. 6, 1997, § 1, at 1.

30. See Editorial, *A Way to Compromise on Rents*, N.Y. TIMES, May 13, 1997, at A20 [hereinafter Editorial, *A Way to Compromise on Rents*].

nants. Actually, Governor Pataki's position in relation to rent regulation was clear enough to anyone who had been paying attention. Even though the Governor refused to set forth a specific proposal on rent regulation for months after Senator Bruno's announcement, he acknowledged in the immediate aftermath of that announcement that he "supported Bruno's ultimate goal of eliminating most rent regulations."³¹ His record as a legislator was clearly anti-regulation. He voted against rent regulation extension as an Assemblyman in 1989 and 1991; in 1993, as a State Senator, "he voted to extend the laws, but largely because they added luxury decontrol."³² In 1995, he stated his support for vacancy decontrol, a system by which rent regulation is ended over time by eliminating apartment from controls as soon as the incumbent tenant leaves.³³ If the press seemed, for the most part, not to know where the Governor stood, rent regulation opponents were better informed. Peter D. Salins of the conservative, anti-regulation Manhattan Institute, for example, writing in January 1997, was prepared to say unequivocally that Governor Pataki was "on the record as opposed to rent control."³⁴

There was early and continuing speculation that Senator Bruno and Governor Pataki were working in tandem, with Bruno taking the "radical" position to permit Pataki to posture himself as a "moderate." For example, even in the face of Senator Bruno's first call for deregulation, the Director of the Real Estate Institute at New York University asserted that he was "sure that's what will be true. . . . Even if it isn't orchestrated in advance, politically, it's inevitable that there will be a compromise, and then Pataki gets to look like the savior."³⁵ Despite repeated denials during the course of the debate, it is clear from comments made by Senator Bruno after that debate had concluded in June, 1997 that the speculation was entirely correct: "I established a position which I knew was to the far right," said Senator Bruno. "I knew where I would end up, and where I wanted to end up was somewhere along the lines

31. See *Pataki Urges Gradual End of Rent Laws*, *supra* note 26, at B1.

32. See James Dao, *Aides Say Pataki Favors Easing Some Limits on Rents*, N.Y. TIMES, Mar. 27, 1997, at B6.

33. See *id.*

34. See Peter D. Salins, *Rent Control's Last Gasp*, CITY J., Winter 1997, at 59. The Manhattan Institute publishes *City Journal*. See *About the Manhattan Institute*, at http://www.manhattan-institute.org/html/about_mi.htm (last visited Sept. 29, 2003).

35. See Pérez-Peña, *supra* note 13.

where the governor was.”³⁶ His only complaint was that the Governor was forced to present his “compromise” position too soon.³⁷ Senator Bruno acknowledged that the real goal of anti-regulation forces was the adoption of vacancy decontrol,³⁸ the tactic previously endorsed by Governor Pataki in 1995.³⁹ Indeed, vacancy decontrol was at the top of the list of “first steps” towards full decontrol that *The New York Times*, a leading voice of rent deregulation, urged in December 1996 in the first of several anti-regulation editorials.⁴⁰

No one expected an early resolution to the battle over rent deregulation. Albany had a well-deserved reputation for legislative brinkmanship, with little of importance ever resolved before the last possible moment.⁴¹ Thus the first six months of 1997 would see the arguments over rent regulations enacted and reenacted. For opponents of rent regulation, success hinged on two sales pitches. The first was an effort, as Peter Salins put it, to “convince the state’s opinion elite and the public at large that controls really are harmful.”⁴² The second was an effort to shift the question from one of whether controls should be lifted to one of when controls should be lifted; that is, to create the impression that elimination of regulation was and should be inevitable, so that the only issue was how to achieve that goal.⁴³ On both counts, market theology in general and market populism in particular were absolutely crucial.

Opposition to rent regulation was hardly a new phenomenon amongst devotees of the market. In fact, rent regulation has long been roundly condemned by almost all economists.⁴⁴ “More than 93 percent of the members of the American Economics Association surveyed by Alston, Kearl, and Vaughan (1992) agreed with

36. See Sarah Metzgar, *Bruno Admits Regret Over Rent-Control Deal*, *TIMES UNION* (Albany), June 21, 1997, at A1.

37. See *id.*

38. See James Dao & Richard Pérez-Peña, *Rent War Redux: As Dust Settles, A Tortuous Inside Story Emerges*, *N.Y. TIMES*, June 29, 1997, § 1, at 1.

39. See Dao, *supra* note 32.

40. See Editorial, *A Sensible Plan for Rent Decontrol*, *N.Y. TIMES*, Dec. 8, 1996, § 4, at 14.

41. See James Dao, *Inside Albany: A Guide to Power Centers*, *N.Y. TIMES*, Jan. 23, 1994, § 13WC (Westchester Weekly), at 1 (“Most legislatures leave their toughest battles until the last possible moment, but in Albany brinkmanship has been taken to new heights.”).

42. See Salins, *supra* note 34, at 65.

43. See *id.*

44. See Andrejis Skaburskis & Michael B. Teitz, *The Economics of Rent Regulation*, in *RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET*, 41, 41 (W. Dennis Keating et al. eds., 1998).

the statement: ‘A ceiling on rent reduces the quantity and quality of housing available.’”⁴⁵ Yet scholarly and other opponents of rent regulation—even those prepared to describe the system as a “moral outrage”⁴⁶—had to build their argument in the face of the fact that controls constrain landlords from raising rents to as high a level as they desire to charge. As the authors of “Rent Control: An Economic Abomination” acknowledged: the “short run” rent-lowering impact of regulation “cannot be denied.”⁴⁷

B. Key Market Populist Arguments

On a popular level, the most frequent argument against rent regulation was not an argument at all, but a paean to the magical properties of the marketplace. Somehow, the song went, things would just be better when unnatural constraints on the operation of the market were lifted. Oftentimes, the bow to the market was conjoined with specific arguments against regulation, but the depth of the assumption of the virtue of the marketplace was best reflected in editorials like that of the *Daily News*, which opined, without stating any justification, “A free housing market would only benefit the city.”⁴⁸ *Newsday’s* anti-regulation editorial page was informed by the feeling that, “If there has been one key lesson of the ‘90s it is this: Governments impede free markets at their own peril.”⁴⁹

If there were one argument that rent regulation opponents were agreed upon, it was that regulation had hindered new construction, and that the removal of regulation would free the market to create enough housing to undo New York City’s perennial housing shortage. The benefits would not just be more and better housing, but lower prices in a deregulated environment that caused there to be greater supply in relation to demand. There were many variations on this theme, and all are instructive. Editorialists like those in *The New York Times* and *Wall Street Journal* were among those repeatedly charging that rent regulation discouraged construction

45. *See id.*

46. *See* Walter Block et al., *Rent Control: An Economic Abomination*, 11 INT’L J. OF VALUE-BASED MGMT. 253, 253 (1998).

47. *Id.* at 254.

48. *See* Editorial, *Spell School Safety: C-O-P-S/Something to Build On*, N.Y. DAILY NEWS, Jan. 22, 1997, at 30.

49. *See* Editorial, *This is Your City . . . This is Your City on Rent Control*, NEWS-DAY, Apr. 13, 1997, at G1 [hereinafter Editorial, *This is Your City*].

of new buildings.⁵⁰ The *New York Post* wrote that rent regulation had “all but wrecked what should be a thriving rental market by effectively removing private-sector incentives to build new housing.”⁵¹ Legislators, debating as though the fact were self-evident, said that, “Rent control, as we know, inhibits new construction of apartments.”⁵² Senator Bruno claimed that if rent regulation were eliminated, the city would see an apartment-building boom.⁵³

Because of the extent of New York’s housing shortage, this argument was quite potent, and, as it was repeated so frequently, may well have been influential in shaping opinion. After all, even regulation advocates would have to weigh the supposed benefits of regulation against the clear harm of the loss of new housing. The problem with the proposition that rent regulation reduced new construction was that it ignored the state of the law: the fact was that all new construction had for years been exempt from any type of rent regulation.⁵⁴ Any developer was permitted to construct a new residential building, and charge whatever that developer wanted to charge.⁵⁵ The only exception to this rule was the circumstance in which a developer was not prepared to build in the “free market,” but rather depend on governmentally-provided tax subsidies.⁵⁶ In that circumstance alone (New York’s “421-a” program), rent stabilization applied to a new building for a period of from ten to twenty years.⁵⁷ From 1981-1996, there were approximately 65,000 residential units, many of them rental units, that received initial benefits under this program.⁵⁸

Regulation opponents had a second argument which attempted to link regulation with reduced construction, but this argument, while repeated in anti-regulation circles, was not the focus of the public campaign. According to this line of argument, landlords were not actually inhibited by the fact that their new buildings

50. See *A Sensible Plan for Rent Decontrol*, *supra* note 40; Roger Starr, Editorial, *Rent Control Loses Its New York Lease*, WALL ST. J., May 1, 1997, at A18.

51. See Editorial, *Time to End the Rent Laws*, N.Y. POST, Dec. 9, 1996, at 24.

52. See NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 66 (Mar. 17, 1997) (statement of Mr. Balboni). All Assembly debate statements cited in this article were made during the March 17, 1997 Assembly debate. See *id.*

53. See Joel Stashenko, *Horseplay Aside, Bruno Vows Rent Control Change*, TIMES UNION (Albany), Jan. 12, 1997, at D5.

54. Emergency Tenant Protection Act (“EPTA”) of 1974, 1974 N.Y. LAWS ch. 576.

55. See *id.*

56. See N.Y. REAL PROP. TAX LAW § 421-a (2003).

57. See *id.* § 421-a(f); N.Y. CITY RENT GUIDELINES BD., 421A AND J-51 TAX FAQ, at <http://www.housingnyc.com/resources/faq/421a-J51.html> (last visited Nov. 9, 2003).

58. See *Markets & Trends*, *supra* note 23, at app. G.6, at 124.

would be subject to rent regulation (because they were not), but they were still inhibited from building because of the fear that at some time in the future controls might be re-imposed. Writing for the Cato Institute, a conservative think tank, William Tucker argued that builders have learned that “any new housing in New York risks being ‘recaptured’. . . . Consequently, little new rental housing is ever built.”⁵⁹ The evidence cited by Tucker was the fact that, in 1969, then New York City Mayor John Lindsay had said that housing built after 1969 would not be rent regulated, but that regulation was imposed on housing built between 1969 and 1974 by the State Legislature pursuant to the Emergency Tenant Protection Act of 1974 (the “ETPA”).⁶⁰ Indeed, the ETPA did place recent new construction under regulation, although only in the face of the State’s brief experiment with vacancy decontrol, an experiment that resulted in massive rent increases as well as multiple reports of landlord harassment designed to cause tenants to vacate their apartments.⁶¹ While in the succeeding twenty-three years, all unsubsidized new construction remained unregulated, regulation opponents such as Assemblyman Faso insisted that, “There simply is no confidence that the free market will continue to exist” once buildings have been erected.⁶²

Anthony Downs, another rent regulation opponent, also described New York as having adopted a “double-cross strategy” (i.e., placing new units that were supposed to be exempt from regulation under control) that inhibits new construction.⁶³ Downs’s, *A Reevaluation of Residential Rent Control*, actually claimed to have empirical data to support the argument that the fear of follow-on regulation caused a reduction in new construction.⁶⁴ He contrasted the average annual new housing construction of 32,000 in the 1950s and 37,000 in the 1960s, with averages of 17,000 in the 1970s and

59. WILLIAM TUCKER, THE CATO INSTITUTE, HOW RENT CONTROL DRIVES OUT AFFORDABLE HOUSING, CATO POLICY ANALYSIS 13 (1997), available at <http://www.cato.org/pubs/pas/pa-274.html> (last visited Oct. 24, 2003).

60. See *id.*

61. See TEMPORARY STATE COMMISSION ON LIVING COSTS AND THE ECONOMY OF THE STATE OF NEW YORK, REPORT ON HOUSING AND RENTS OF THE TEMPORARY STATE COMMISSION ON LIVING COSTS AND THE ECONOMY OF THE STATE OF NEW YORK TO THE GOVERNOR AND THE LEGISLATURE 7 (1974).

62. See NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 121 (Mar. 17, 1997) (statement of Mr. Faso).

63. See ANTHONY DOWNS, A REEVALUATION OF RESIDENTIAL RENT CONTROLS 48 (1996).

64. See *id.* at 125.

10,400 in the 1980s.⁶⁵ Describing the first two decades as the period prior to stringent regulation, and the last two as during the period of stringent regulation, he concludes that the decline occurred because of regulation.⁶⁶ The only qualification made in respect to the data is that they included both owner-occupied and rental units.⁶⁷

The analysis by Downs is very much characteristic of scholarly opposition to regulation. Believing that “[r]ent control is basically immoral and unjustified,”⁶⁸ Downs sought to justify his view by presenting seemingly scientific data (or theoretical models), but failed to address fundamental questions in his analysis. Here, Downs needed to determine whether the reduction in construction was entirely caused by rent regulation, whether the reduction merely coincided with stringent rent regulation, or whether the reduction was partially caused by rent regulation (and, if so, to what extent). Among the questions that might have been asked about the reduction in construction was the role of the federal government in subsidizing suburban expansion while disinvesting in cities, the role of massive out-migration of whites from New York (a net of four million in the forty year period examined by Downs) and the impact of neighborhood change, the role of New York City’s fiscal crisis in the mid-1970s, and the rise in construction costs. Downs looked at none of these questions.

The other crucial factor not considered (or, at least, not acknowledged) by those citing the fear of after-construction controls as a reason builders did not build is simply the extent to which a builder would actually be hurt by regulation even if such regulation were imposed. If a developer were actually making a “free market” decision about construction, that developer would have concluded that the development would be profitable, and would set initial rents at whatever the market would bear. Until such time as the developer’s fear of control came to be realized, the developer would continue to receive market rents. Even if controls were ultimately imposed, there has never been a case in New York where existing rents were forced to be reduced. Thus, the only question in terms of economic return would be the extent to which controls would cut into profitability over time. And, as a 1997 study

65. *See id.* at 51.

66. *See id.*

67. *See id.*

68. *See* John Tierney, *The Rentocracy: At the Intersection of Supply and Demand*, N.Y. TIMES, May 4, 1997, § 6 (Magazine), at 39 (quoting Downs).

demonstrated, the cumulative increases granted by the Rent Guidelines Board have historically exceeded the increases in the costs borne by owners.⁶⁹

The final argument linking regulation to the inhibition of new construction was the one least frequently expressed, but perhaps most revealing of the pro-market mindset. This argument did not claim that new construction was regulated, or even that it would be regulated in the future. The problem was the impact that existing regulation had on prospective consumers of unregulated housing. Because of regulation, *Newsday* complained, even developers of luxury buildings have to “do business in a market rife with artificially cheap apartments.”⁷⁰ The consequence, wrote Peter Salins, is that regulation “discourages affluent tenants with rent discounts from shopping around for the new apartments that developers would build.”⁷¹ In other words, given the fact that developers were unable or unwilling to construct housing that would compete with regulated rents,⁷² what the developers needed was an environment in which all had no choice but to compete for apartments that were no longer “artificially cheap,” but rather, apparently, “naturally” more expensive.

The arguments about inhibition of new construction were “market populist” only insofar as they promised more housing for everyone, and studiously avoided any mention that deregulation equaled greater profit for landlords. What was needed were more directly populist appeals with greater potential emotional and pocketbook appeal, both to stoke resentment of regulation and to ease fears about what the consequences of deregulation would be. These arguments—notably that regulation was unfair *to tenants* because some tenants were rent-regulated and others were not, because it was unfair for wealthy tenants to enjoy the benefits of regulation, and that deregulation would cause either relatively lim-

69. See OFF. OF N.Y. CITY PUB. ADVOCATE MARK GREEN, RENT DESTABILIZATION STUDY II: AN ANALYSIS OF THE FAIRNESS TO LANDLORDS OF RENT INCREASES GRANTED BY THE RENT GUIDELINES BOARD FOR STABILIZED APARTMENTS 4 (1997), available at http://www.housingnyc.com/research/pdf_reports/greenrent-study.pdf (last visited Oct. 21, 2003). This study examined the period from 1976 through 1997. See *id.* at 10 tbl.1. The study’s examination of the arguments about overall landlord profitability is discussed *infra*, at text accompanying notes 125-127.

70. Editorial, *This is Your City*, *supra* note 49.

71. Salins, *supra* note 34, at 62.

72. This fact is essential to a consideration of the argument of regulation opponents that an unregulated market would result in lowered rents *throughout* the socioeconomic range of New York City tenants, a proposition discussed *infra*, at text accompanying notes 218-230.

ited rent rises (or even rent decreases)—were featured prominently in the spring of 1997.⁷³ Before turning to them, however, it is important to examine an aspect of a debate that played out on the floor of the New York State Assembly in March 1997.

C. The Debate in the Assembly

It has been said that “virtually no society treats the market as the only criterion of social functioning.”⁷⁴ The Assembly debate provided a tantalizing hint that the thinking of rent regulation opponents may well form an exception to that rule. Assemblyman Vito Lopez, Chair of the Assembly’s Housing Committee, had introduced a bill that would have reauthorized rent regulation substantially as it had existed.⁷⁵ The bill was not thought to have any chance to be passed into law, but was instead seen as “an opening bid by the Assembly leadership in negotiations that all sides expect to be highly contentious and to drag on through the legislative session.”⁷⁶ The debate on the bill, though, provided a window into the contrasting views of members of the Assembly, and the language of housing as home and community was starkly juxtaposed to the language of housing as market.

Defenders of rent regulation argued that rent regulation contributed to neighborhood stability and economic integration, and that, fundamentally, an apartment was a “home” to a renter in just the same way as a standalone private dwelling is a “home” to its owner.⁷⁷ Assemblyman Richard Gottfried, for example, pointed out that “in New York City, rental housing is the way most people live as their home.”⁷⁸ In the course of the debate, Assemblyman Scott Stringer claimed that the attack on rent regulation:

[I]s really an attack on communities. . . . My community, 20, 25 years ago, was a community you would be afraid to walk in. It was a community that literally you could get killed going to the drug store. There were drugs, there was danger, the schools were falling apart. And a bunch of pioneers, people who are

73. See discussion *infra* text accompanying notes 93-101.

74. Michael B. Teitz, *A Social Perspective on Rent Control*, in *RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET* 82 (W. Dennis Keating et al. eds., 1998).

75. A. 2-A, 220th Leg., Reg. Sess. (N.Y. 1997).

76. See Raymond Hernandez, *Bill Would Bolster Rent Control Laws*, N.Y. TIMES, Feb. 20, 1997, at B2.

77. See NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 170 (Mar. 17, 1997) (statement of Mr. Gottfried).

78. *Id.*

senior citizens today, arrived on the west side and in other parts of the City and they set up their roots. They entered rent-regulated apartments and they started to build those communities. They build the school and the day-care centers. They created the flavor and the life of these neighborhoods.⁷⁹

Assemblyman Stringer described what those renter “pioneers” had done was to have invested in their homes and neighborhoods.⁸⁰

Similarly, Assemblyman Edward Sullivan said, “Within one or two blocks, you can walk from apartments where people are rather well off, to places where people are not so well off, and that is what gives New York City its flavor, its character, its understanding of one another, that’s what creates a neighborhood in New York.”⁸¹ Finally, Assemblywoman Deborah Glick insisted that New Yorkers enjoyed a social network, just like neighborhoods in other places: “We just don’t have it stretching down the block that curves around a tree-lined street. We have that in our buildings that rise up many, many stories.”⁸²

Recitations like those from the four Democratic members of the Assembly cited above would normally be hardly remarkable. Declarations praising the values of home and neighborhood have long been the bread-and-butter of legislators. It is certainly true that a variety of developments in the last thirty years have contributed to “the destruction of a sense of place and to the transformation of America into a country of exiles.”⁸³ Nevertheless, there was and remains a “living sense of a boundaried place,” a sense that “always has a provincial character” and which “takes shape first as connections to families and friends, then to neighborhoods, towns, and regions, and finally, to the nation and the world.”⁸⁴

What is remarkable is that one of the principal concerns expressed by rent regulation opponents was that rent regulation makes people less mobile than city dwellers should be. As Assemblyman Balboni complained, “People stay in their neighborhoods

79. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 73-74 (Mar. 17, 1997) (statement of Mr. Stringer).

80. *See id.* at 78.

81. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 162-63 (Mar. 17, 1997) (statement of Mr. Sullivan).

82. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 141 (Mar. 17, 1997) (statement of Ms. Glick).

83. WILLIAM LEACH, COUNTRY OF EXILES: THE DESTRUCTION OF PLACE IN AMERICAN LIFE 181 (1999).

84. *Id.* at 180.

forever.”⁸⁵ Even though people “are supposed to move,” he continued, “New York City is practically five times as bad” in terms of mobility as other cities. “In other words, for every one year that somebody stays in an apartment in Houston, New Yorkers stay there five years.” The problem with rent regulation, Balboni concluded, is that the system “give[s] the people something they want to hold on to forever.”⁸⁶

Had Assemblyman Balboni been able to imagine that a renter’s apartment was his home, he would surely have been less troubled that some renters would want to hold on to their homes for a long time. This, after all, is precisely what homeowners in New York City do. Based on an analysis of information contained in the Census Bureau’s 1996 Housing Vacancy Survey (the year closest to the debate), it turns out that fully 43.3 percent of owners were living in their homes for sixteen years or more, compared to only 26.1 percent of non-rent stabilized renters and only 21.6 percent of rent stabilized renters.⁸⁷ At the other end of the longevity-of-occupancy spectrum, only 31.5 percent of owners were living in their homes for five years or less, whereas 53.6 percent of non-rent stabilized renters and 58.3 percent of rent stabilized renters were in their homes for that period of time.⁸⁸ In short, renters were more mobile than owners, but still not mobile enough for rent regulation opponents.

For Assemblyman Balboni, as with other opponents of rent regulation, an apartment was not so much a home for its user, but an asset to be deployed by its landlord owner. The Assemblyman

85. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 67 (Mar. 17, 1997) (statement of Mr. Balboni).

86. *Id.* at 68.

87. Data from the Census Bureau’s 1996 Housing and Vacancy Survey was included in *Housing NYC: Rents, Markets & Trends '97*. See *MARKETS & TRENDS*, *supra* note 23, app. D1 at 94-95, app. D.3 at 104-07. Integrating that information, one can derive the following:

Year Moved in	Owner-Occupied	% of total	Non-stabilized rentals	% of total	Stabilized rentals	% of total
	834,183		931,414		1,014,751	
93-96	166,949	20.01	345,560	37.10	402,889	39.70
90-92	95,929	11.50	153,516	16.48	188,202	18.55
87-89	92,499	11.09	79,748	8.56	78,891	7.77
84-86	67,989	8.15	62,172	6.68	62,921	6.20
81-83	49,823	5.97	48,427	5.20	62,092	6.12
71-80	167,575	20.09	124,613	13.38	159,916	15.76
prior to 71	193,420	23.19	118,376	12.71	58,841	5.80

88. See *MARKETS & TRENDS*, *supra* note 23, at 104.

seemed genuinely shocked when his colleague, Scott Stringer, had described the way that rent-regulated tenants had invested in neighborhoods as follows:

[Y]ou have said on two different occasions during your discussion the word ‘investment.’ What do you mean by ‘investment’? Now, because have we changed the debate suddenly? Because these are people who are not . . . invested in a housing [*sic*], right, they don’t own the housing, they are renting, right? Correct? Is that correct?⁸⁹

The concept that investment could take the form not only of financial equity but “sweat equity” as well was entirely foreign to Mr. Balboni. Another rent regulation opponent, Assemblyman Faso, in an example of the red-baiting that surfaced periodically in the Spring of 1997, pled for deregulation in these terms: “[M]y goodness, they have abolished rent control in Ho Chi Minh City, but somehow we can’t seem to whip up the strength to realize the laws of supply and demand in New York City.”⁹⁰

When the Democratic-controlled Assembly passed the Lopez reauthorization bill on March 17th, there was still approximately three months to go before what was seen as the June 15th deadline for resolution, and Governor Pataki was still playing his cards close to the vest. A week later, the Governor even proclaimed that “he had no plans to offer his own proposal for changing the state’s rent regulations, arguing that the most productive role for him would be to stay above the fray to broker a compromise between Democrats who want to maintain the current system and Republicans who want to abolish many protections for tenants.”⁹¹ In the meantime, opponents of regulation went about the business of trying to demonstrate that it was they who were supportive of the average New Yorker.⁹²

D. Wealthy Tenants?

A central market populist argument was that rent stabilization really only benefited a wealthy few. “What is perhaps most galling about rent regulation in New York City,” wrote Peter Salins, “is

89. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 77 (Mar. 17, 1997) (statement of Mr. Balboni).

90. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 114 (Mar. 17, 1997) (statement of Mr. Faso).

91. See *Pataki Offers to Mediate in Rent-Control Debate*, N.Y. TIMES, Mar. 26, 1997, at B4.

92. See discussion *infra* Parts I.D-E.

that the housing scarcity it generates affects the entire city while its benefits fall to a select few. Cocktail-party talk about movie stars who pay a song for luxury apartments isn't so far off the mark."⁹³ This assertion was repeatedly driven home by anti-regulation advocates. In perhaps the most widely circulated story—the cover story in the Sunday magazine of *The New York Times*—John Tierney emphasized that, “Most of the good deals go to people with above-average incomes in Manhattan’s best neighborhoods.”⁹⁴ The editorial page of *The Times* argued that the system “creates an absurdly inequitable system protecting some well-to-do tenants at the expense of others.”⁹⁵ The editorial in *Crain’s New York Business* was almost identical: “[M]ost of the benefits [of rent regulation] go to well-off New Yorkers in the trendiest neighborhoods.”⁹⁶ Joseph Strasburg, the head of the Rent Stabilization Association, the major landlord trade group in New York, also focused on Manhattan tenants: many of them “don’t need protection because they are people of means, many of them who own second homes. Who are we protecting here?”⁹⁷

The broad goal of these arguments was to paint rent regulation as inequitable. The more targeted goal was to lower the tenant income level at which at occupied apartments that rented for \$2,000 a month or more would be deregulated. The existing level was annual income of \$250,000, but proposals surfaced in the course of the debate to cut that level to as low as \$125,000.⁹⁸ Three simple tests demonstrate that the professed concern about unfairly protecting the wealthy was no more than market populist rhetoric. First, even though “the debate has centered on those seen as abusing the system by receiving subsidies they do not need,” *The Times* reported, Census Bureau statistics showed that “only 5 percent of those families in rent-regulated apartments report yearly incomes of more than \$100,000.”⁹⁹ An even smaller percentage of families—“0.35 percent of the 1.1 million regulated tenants”—had in-

93. Salins, *supra* note 34, at 62.

94. See Tierney, *supra* note 68.

95. See Editorial, *A Leader Needed on Rent Control*, N.Y. TIMES, Apr. 8, 1997, at A14.

96. See Editorial, *Reform Rent Laws*, *supra* note 2, at 8.

97. See Katti Gray, *Rent Law Test Set in Albany*, NEWSDAY, Apr. 5, 1997, at A16.

98. Michael Slackman & Ellen Yan, *Swing Vote in Rent Wars*, NEWSDAY, June 5, 1997, at A36.

99. See Adam Nagourney, *Ads Seek to Push Pataki and D’Amato Into Debate on Rent*, N.Y. TIMES, Apr. 28, 1997, at B1.

come over \$250,000.¹⁰⁰ Thus, the overwhelming benefits of regulation were not in fact going to the wealthy.

Second, the means sought to be used to correct the supposed abuse—luxury decontrol—was not actually targeted at the problem that had been identified. If the concern had actually been to prevent wealthy tenants from securing a windfall via regulation, then one solution might have been to impose a surcharge on the rents of such tenants, a surcharge payable into a fund for the development of affordable housing. Then, when the wealthy tenant moved out, the next tenant could be of moderate means, because the apartment itself would still be regulated. But the actual goal of regulation opponents, naturally enough, is deregulating units. Thus, in the guise of fighting a relatively unpopular beneficiary of regulation, the means selected effectively remove the apartment from ever being affordable to anyone but a wealthy tenant. It is a measure of the success of market populist rhetoric that the mismatch between means and ends was never commented upon throughout the debate.

Third, the supporters of “luxury decontrol” had to ignore their usual arguments about the importance of maintaining a tax base in New York City in order to put forward their market populism. This fact went almost entirely unremarked upon throughout the course of the debate. It was, however, clearly summarized by Assemblyman Richard Gottfried:

I was thinking if someone were to propose that taxes that the [wealthy] couple pay be increased by \$100 a year, maybe, or \$1,000 a year, oh my God, you would think someone was proposing the French Revolution. We would hear about how if you raise the taxes on that . . . couple, my God, they would flee New York. They would take their productivity with them . . . But if the rent laws are not preserved . . . we'd be authorizing their landlord [to raise their rent upwards of thousands of dollars per month]. Now, am I missing something? If we raise their taxes ever so slightly, that would be a disaster for the City's economy, for the State's economy. But if we take thousands of dollars, tens of thousands of dollars from them to put in their landlord's pocket, somehow that's okay.¹⁰¹

100. See Deborah Sontag, *Up With Their Rents! Albany Aims at the Rich*, N.Y. TIMES, May 2, 1997, at A1.

101. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 174-75 (Mar. 17, 1997) (statement of Mr. Gottfried).

E. Impoverished Landlords?

If the technique of market populism demanded that tenants be wealthy, it likewise demanded that landlords be small-scale and struggling. Describing a *Crain's New York Business* breakfast forum with Senator Bruno, anti-regulation advocate Alair Townsend's rhetorical device was to feign having "assumed the worst" when she saw "a group of men in short-sleeved cotton shirts, no ties or jackets, clustered at a rear table" (i.e., she assumed that pro-tenant advocates had infiltrated the forum).¹⁰² But in fact, Townsend said, delivering her moral with a flourish, "They turned out to be owners of small residential buildings. So much for the stereotype of the rich, sharp-suited landlords against middle-class tenants struggling to stay in the city."¹⁰³ In the Assembly debate, Assemblyman Winner rose to make "a plea on behalf of some of those small landlords, small property owners that made major investments of whatever their life saving might have been with regard to these small pieces of real property in the City of New York to find their inability to get any kind of a modicum rate of return on their investment."¹⁰⁴ *The Times* editorialized that it was particularly important to pay attention "to the problems of small landlords."¹⁰⁵

As was the case with the tactic treating wealthy tenants as representative of the beneficiaries of rent regulation, the picture of the small landlord being representative of landlords in general was quite misleading. In fact, buildings with fewer than six apartments are exempt from rent regulation.¹⁰⁶ According to a study by the New York City Rent Guidelines Board, using data derived from the Census Bureau's 1996 Housing and Vacancy Survey, 44.7 percent of rent stabilized apartments are in buildings with 50 units or more, and 77.2 percent are in buildings with 20 units or more.¹⁰⁷ Statistics on concentration of ownership are more difficult to come by, but a 1985 report for the Rent Stabilization Association showed that "71 percent of New York City's rental apartments were owned

102. Alair Townsend, *Rent Regs Send Most Pols for Cover, So Hooray for Stand-Up Guy Bruno*, *CRAIN'S N.Y. BUS.*, Mar. 10, 1997, at 9.

103. *Id.*

104. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 215 (Mar. 17, 1997) (statement of Mr. Winner).

105. Editorial, *End the Stalemate on Rent Laws*, *N.Y. TIMES*, June 11, 1997, at A24 [hereinafter Editorial, *End the Stalemate on Rent Laws*].

106. See Rent Stabilization Code, *N.Y. COMP. CODES R. & REGS.* tit. 9, § 2520.11(d) (2003).

107. See HOUSING AND VACANCY, *supra* note 4.

by only 12 percent of landlords.”¹⁰⁸ A 1987 report found that 56 percent of rent stabilized units were owned by 5 percent of the members of the Rent Stabilization Association.¹⁰⁹

The financial clout wielded by anti-regulation forces was not of a scope that can be generated by mom-and-pop landlords. “In the five years leading up to the [spring 1997] battle over rent controls, New York City landlords and developers mounted a quiet concerted effort to build their influence in state government through a large increase in campaign contributions, with one of the stated aims being to do away with the rent laws.”¹¹⁰ For example, the political action committee of the Rent Stabilization Association had not contributed to state campaigns until 1992.¹¹¹ In the five years running up to the 1997 debate over deregulation, however, it “gave almost \$750,000 . . . making it one of the biggest players in state politics.”¹¹² In addition, a tight group of big real estate interests in New York City directly gave “more than \$1.1 million to state campaigns and party committees since the start of 1993, overwhelmingly to Republicans.”¹¹³ As the Rent Stabilization Association’s leader described his group’s long-term effort: “If elected officials know you’re going to be there for them, there’s more comfort there for them to do the right thing.”¹¹⁴

As another weapon in their market populist arsenal, anti-regulation advocates asserted that regulation hurt tenants by causing buildings to be abandoned. Republicans repeatedly claimed that “the rent laws force landlords to abandon up to 19,000 housing units annually because they cannot get a reasonable return on their investment.”¹¹⁵ Regulation was also regularly blamed for what *Newsday* characterized as “scandalously bad maintenance in many buildings.”¹¹⁶ The theme of rent regulation causing deterioration of housing stock was also a mainstay of both popular and scholarly opposition to rent regulation. Peter Salins wrote that the cost of

108. See JARRETT & MCKEE, *supra* note 14, at 10.

109. See Michael B. Teitz, *The Politics of Rent Control*, in RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET, 61, 71 (W. Dennis Keating et al. eds., 1998).

110. See Richard Pérez-Peña, *Landlords Quietly Increased Donations to Fight Rent Law*, N.Y. TIMES, May 5, 1997, at A1.

111. See *id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See John Caher, *Thousands Rally at State Capitol for Rent Control*, TIMES UNION (Albany), May 21, 1997, at A1.

116. See Editorial, *This is Your City*, *supra* note 49.

rent regulation was “decades of deferred maintenance and substandard services.”¹¹⁷ The authors of *The Maze of Urban Housing Markets* used an econometric analysis to try to demonstrate that, “regardless of the exact nature of the upsurge in housing demand presumed to stimulate the policy response of rent control, owners of existing rental dwellings will be encouraged to downgrade them so as to improve their rate of return.”¹¹⁸ In almost identical language, Charles de Seve, in a report for the Rent Stabilization Association, wrote that regulation “forces owners to erode their own investments by making capital maintenance unaffordable.”¹¹⁹

The arguments about both abandonment and inadequate maintenance are largely, though not entirely, dependent on the proposition that owning a rent-regulated building in New York City is an unprofitable enterprise, and that mechanisms are not available either to compensate landlords for needed improvements to their buildings or for hardship that individual landlords might experience. In fact, landlords have been entitled to get rent increases whenever they make capital improvements.¹²⁰ Notably, the costs of building-wide capital improvements were not only recoverable over the course of seven years; the rent increases that were permitted to compensate the landlord for such improvements become permanent increases that give the landlord a continuing return even after the cost of the improvements has been fully paid for by the tenants.¹²¹ In the case of individual apartment improvements, these costs could be recovered on a more rapid 40-month schedule.¹²² Here, too, a landlord could continue to collect the rent increase even after the tenant had fully paid for the improvement.¹²³

The question of profitability is one that cannot be answered with precision because landlords have consistently rejected any effort to

117. Salins, *supra* note 34, at 63.

118. JEROME ROTHENBERG ET AL., *THE MAZE OF URBAN HOUSING MARKETS: THEORY, EVIDENCE AND POLICY* 337 (1991).

119. CHARLES W. DE SEVE, *RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE EFFECT OF DEREGULATION ON RENTS & ECONOMIC ACTIVITY IN NEW YORK CITY 2* (1997).

120. *See* RSL § 26-511(c)(6) (1969).

121. *See* RSL § 26-511(c)(6)(b).

122. For the mechanisms to determine both building-wide and individual apartment improvements, see the Rent Stabilization Code, N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4 (2003).

123. *See id.* § 2522.4(1). Note, however, that in the case of individual apartment improvements, it is only when the apartment was vacant that the landlord was able to make the unilateral decision to effect improvements. *See id.* In the case of occupied apartments, the tenant generally had to consent to improvements. *See id.*

have them open their books.¹²⁴ The available indicators, however, show clearly that the arguments about rent-regulated housing being unprofitable were based more rhetoric and ideology than on empirical data. The analysis by New York City's Office of Public Advocate compared the rent increases granted by the City's Rent Guidelines Board from the period 1976 through 1997 with the rent increase that would have been necessary to maintain landlords' net operating income ("NOI").¹²⁵ Based on a series of one-year leases, with increases compounded from year-to-year, the total increases granted were 210 percent, compared to the 143 percent that would have been necessary to maintain NOI.¹²⁶ Based on a series of two year leases, the same comparison showed a difference no less than 127 percent granted, versus 99.8 percent needed to maintain NOI. The study, looking at a period from 1989 to 1995, also found that even using an inflation-adjusted measure by the Rent Guidelines Board—one that unrealistically inflates the cost of landlords' debt service—landlord income had "kept pace with inflation."¹²⁷ The Rent Guidelines Board, in a report published in October 1997 (i.e., after the conclusion of the debate) found, according to the sample of buildings it surveyed that "[r]ents and revenues rose faster than operating costs in the City's [rent] stabilized stock for the third year in a row, causing Net Operating Income . . . to increase by an average of 8%."¹²⁸

Obviously, not all rental properties operate in the black. The same Rent Guidelines Board report referred to above found that approximately nine percent of the buildings sampled "faced costs that exceeded revenues."¹²⁹ It is nevertheless the case that any landlord was permitted under the existing rules of rent stabilization to apply for rent increases based on financial hardship,¹³⁰ so that claims of hardship would appear to be highly exaggerated. Certainly, there has been no documentation of any pattern whereby

124. See Bob Liff, *Rent Control on Hot Seat*, NEWSDAY, May 11, 1992, at 19 (citing New York City Council member Tom Duane calling on "landlords to open up their records.").

125. See OFF. OF N.Y. CITY PUB. ADVOCATE MARK GREEN, *supra* note 69, at 4-5.

126. See *id.*

127. See *id.* at 8.

128. MARKETS & TRENDS, *supra* note 23, at app. D.2. at 38.

129. *Id.* at 48.

130. See Rent Stabilization Code N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(b); RSL § 26-511(c)(6).

landlords in financial hardship have been refused requested rent increases.¹³¹

Arguments about maintenance and profitability may be most interesting for what they reveal about the presumed nature of the market and the appropriate responses to the operation of that market. One does not have to look to pro-regulation advocates for arguments that the only concern of landlords is how they can maximize their returns. *The Maze of Urban Housing Markets* describes, as a scientific certainty that can be graphed,¹³² the response of landlords to controls on the rents they can charge: “the owner will attempt to downgrade the dwelling to [a lower-quality submarket] in order to maximize returns.”¹³³ The anti-regulation advocate Peter Salins described this phenomenon in blunt terms: “As a class, landlords are neither altruistic nor dumb, so they pass along the cost of rent regulation as best they can.”¹³⁴ Arthur Zabarkes, who has both managed buildings and been the director of the Real Estate Institute at New York University,¹³⁵ was likewise direct about his practices:

At unregulated apartments we'd do most things that the tenants requested. But on the rent-regulated units, we did absolutely only what the law required. It was sad. There were people with 15-amp fuses from 1947 that couldn't handle an air conditioner, but we weren't legally required to replace them, so we didn't. We had a perverse incentive to make those tenants unhappy. *With regulated apartments, the ultimate objective is to get people out of the building.*¹³⁶

The assumption that the drive to maximize profits is the normal state of affairs first of all sheds light on the actual concerns of those who, like *The Times*, complained that rent regulation “deprived

131. See Bob Liff, *Rent Control on Hot Seat*, *NEWSDAY*, May 11, 1992, at 19 (citing New York City Council member Tom Duane calling on “landlords to open up their records”). The State Division of Housing and Community Renewal refused this author's request, pursuant to the New York Freedom of Information Law, *PUB. OFF. LAW* §§ 84-90 (2001), for data on the number of hardship applications made by landlords of New York City rent-regulated buildings for the period from 1997-2002, and the number of such applications approved and rejected. See letter from N.Y. State Div. of Hous. and Cmty. Renewal to Craig Gurian (July 10, 2002) (on file with author). In rejecting the request, the agency wrote that it “does not maintain a list of said information in the form stated in your request.” See *id.* On July 23, 2002, the author appealed, in writing, this rejection; the author has received no response.

132. See ROTHENBERG ET AL., *supra* note 118, at 336 for the graph.

133. *Id.* at 337.

134. See Salins, *supra* note 34, at 63.

135. See Tierney, *supra* note 68.

136. See *id.* (emphasis added).

landlords of a fair return on their apartment buildings.”¹³⁷ If one posits that these anti-regulation forces have conflated the idea of “fair return” with the idea of “maximum return,” their position is entirely understandable: rent regulation does indeed limit one’s ability to maximize one’s return. It also suggests how the idea of the market as a natural and unalterable force is so important to the shape of policy responses. To the extent that the market is seen almost as a force of nature, the most plausible response is to adapt to its demands, not quixotically to try to alter the market to correspond with other values. The only way the authors of *The Maze of Urban Housing Markets* were able to perform their econometrics was to assume, “as is typical, that there are no proscriptions against downgrading the dwelling.”¹³⁸ Having such proscriptions in place, however, is certainly not impossible to imagine: even adequate light, air, and space in apartments were not the result of late nineteenth and early twentieth century landlord volunteerism but of the imposition of housing codes.¹³⁹ The standards in those codes, as has been done before, could be raised,¹⁴⁰ and enforcement enhanced.¹⁴¹ But, at least as rent regulation opponents read the political landscape, market ideology was so much in the ascendancy that, with the exception of denunciations of government regulation in general, they never even felt the need to address the possibility that better maintenance could be achieved by having the market adapt to more effective regulation. Their unquestioned assumption was that adaptation to the market was always the best solution.

137. Editorial, *A Way to Compromise on Rents*, *supra* note 30.

138. ROTHENBERG ET AL., *supra* note 118, at 336.

139. The Tenement House Law of 1867, for example, required any multiple dwelling to have a fire ladder, a privy for every twenty tenants, and connections between inside rooms and those receiving outside air directly. See Joel Schwartz, *Housing*, in THE ENCYCLOPEDIA OF NEW YORK 565, 566 (Kenneth T. Jackson ed., 1995).

140. After landlords, “seeking to maximize their rental space” tried to satisfy the room-connection requirement of the The Tenement House Law of 1867 by building shafts and transoms, authorities passed the Tenement House Law of 1879, which required air and light directly for interior rooms. See *id.* The Tenement House Law of 1901, in turn, prohibited inside rooms without windows and additionally required fire escapes and separate privies for each family in a multiple dwelling. See *id.* at 567.

141. The 1901 Act, for example, also created the Tenement House Department, which “pressured the landlords of old law buildings to comply with the new code.” See *id.* It may well be true, as the authors of *The Maze of Urban Housing Markets* candidly acknowledged in a footnote, that, to the extent that proscriptions do currently exist, “there is no effective administrative machinery to monitor and punish or roll back such downgrading.” See ROTHENBERG ET AL., *supra* note 118, at 355 n.2. A lack of enforcement, however, is not a necessary state of affairs.

F. The Debate Intensifies

The unanimity of newspaper editorials to the contrary, the fight over rent regulation was not at all one-sided. As spring approached, tenants and their allies became more and more active. In late February, for example, more than 3,000 people demonstrated at City Hall Park in favor of continuing rent regulations.¹⁴² In mid-March, the New York State Tenants and Neighbors Coalition began a drive to persuade three Republican State Senators from Nassau County (which had 17,000 rent regulated apartments) to abandon State Senate Majority Leader Bruno and vote to extend the then-existing regulations.¹⁴³ By the end of March, the battle had intensified: tenants in particular were continuing to target “Senate Republicans whose city and suburban districts include thousands of rent-regulated apartments.”¹⁴⁴

The initial showdown in the Senate came on April 7th. The Senate, like the Assembly, operated largely by one-person rule.¹⁴⁵ Without Senator Bruno’s support, a proposal to extend rent regulations would normally be doomed to languish in Committee. Democrats in the Senate pushed for a test vote by making a motion to discharge the pro-regulation bill from Committee. The bid failed by a vote of 33 to 27, with only two Republicans—Goodman of Manhattan and Padavan of Queens—voting with the Democrats.¹⁴⁶ There were, however, two additional Republicans who voted against the motion: Vellella of the Bronx and Spano of Westchester, who said “they supported extending the rent laws, but did not want to vote against their majority leader” on a procedural vote challenging his authority.¹⁴⁷ Thus, despite the fact that anti-regulation legislators prevailed, it was clear that Senator Bruno’s margin for an ultimate showdown on regulation was perilously narrow.

At the same time, a landlord-sponsored study, which had been completed in March, began to circulate widely. The study, prepared for the Rent Stabilization Association by economist Charles

142. See Merle English, *Tenant Groups Rally Over Rent Control*, *NEWSDAY*, Feb. 27, 1997, at A29.

143. See Jessica Kowal, *Nassau is Focus in State Battle on Rent Ceilings*, *NEWSDAY*, Mar. 13, 1997, at A8.

144. See Michael Finnegan, *Rent Regs War Heating Up: Tenants and Landlords In Battle Royal*, *N.Y. DAILY NEWS*, Mar. 31, 1997, at 8.

145. See McKinley, *supra* note 27.

146. See *First Volley Fired in Rent War/Democrats Sought Vote to Extend System*, *NEWSDAY*, Apr. 8, 1997, at A6.

147. See James Dao, *G.O.P. Wins First Test in Albany in an Effort to End Rent Controls*, *N.Y. TIMES*, Apr. 8, 1997, at A1.

de Seve, created a sensation. The purpose of the study was to focus on the benefits of deregulation, and to assure the public that “[f]ear of large rent increases is ill-founded.”¹⁴⁸ Mr. de Seve wrote that the projected average post-deregulation citywide rent increase, excluding Manhattan, would be “only 8.32%.”¹⁴⁹ But his study also predicted post-deregulation increases in Manhattan of more than 50 percent for regulated units on the Upper West Side, and increases of almost 30 percent in Greenwich Village and on the Upper East Side. Increases in Queens were estimated to average between 13.7 percent and 19.4 percent.¹⁵⁰

Charles de Seve and his sponsors may have underestimated the level of concern that could be raised by their numbers for at least two reasons. First, the numbers fit neatly into the market populist argument that the greatest benefits from regulation flowed to a geographically-limited elite. Thus, there appeared to be an opportunity to drive a wedge between different groups of tenants and, hopefully, to make it politically easier for outer borough politicians to oppose rent regulation. The second was that it apparently did not occur to de Seve that the massive increases in some neighborhoods could be “bad” in terms of loss of economic integration or in any other respect. Noting the greater predicted increases in some Manhattan neighborhoods, he wrote: “[T]hat is as is should be as the market takes account of the differential value of land throughout the City.”¹⁵¹ Indeed, the de Seve study was unselfconscious in its pro-market boosterism. If there were a range of views within market theology, de Seve’s version was fundamentalist.

G. The Beauty of the Market

In de Seve’s view, there really was an “invisible hand” at work. It is not as though landlords determine rents; instead, “[t]he market imposes its own limits in response to the interaction of supply and demand.”¹⁵² However much landlords might wish to charge more, they “cannot overcome the power of the free market.”¹⁵³ Landlords would take the opportunity to make improvements, and then tenants would be able to choose from among “apartment selections throughout New York City having a wide variation in

148. DE SEVE, *supra* note 119, at 1.

149. *See id.* at 7.

150. *See id.* at 8.

151. *See id.* at 5.

152. *See id.* at 3.

153. *See id.*

price, quality and location.”¹⁵⁴ For de Seve, part of tenant choice might include making some adjustments. The solution for some tenants “who want a higher quality or better located apartment than might be affordable” might be to “pool their resources.”¹⁵⁵ In order to pay for improvements, tenants who did not choose to relocate “will forego some other expenditures to pay higher rents.”¹⁵⁶ The expenditures that tenants might choose not to make were not specified. Mr. de Seve did not use the term “filtering” (let alone “trickle down”), but his view was consonant with what many economists believed would occur if apartments were deregulated. When rent regulation is removed, the operation of the market (i.e., higher prices) “prompts tenants to move from apartments too large for their needs, that induces landlords to upgrade existing buildings and developers to construct new ones.”¹⁵⁷ Over time, these economists thought, “affordable housing will filter down to all segments of the population.”¹⁵⁸

The widespread belief in the goodness of the market is based on the idea that its operation works to the benefit of all participants. In theory, tenants would be satisfied with the quality and features of their apartments, and, at the same time, builders would be satisfied by the mix of apartments they would be able to put on the market. Housing markets are, of course, dynamic, so it is not as though the theoretical point of perfect equilibrium is always achieved. On the contrary, the equilibrium of the market is constantly subject to disturbances. When this happens, equilibrium is supposedly restored by “supply transformation responses.” On the landlord side, these responses include new construction and the conversion of units from one sub-market to another. On the consumer side, the responses might include downsizing or changing neighborhood. The authors of *The Maze of Urban Housing Markets* made the consumer side of the process seem simple and painless: consumers are able to participate in restoring equilibrium simply by “chang[ing] their desired housing configurations.”¹⁵⁹ And, the consumers are not hurt in the process: “mutually advanta-

154. *See id.* at 2.

155. *See id.* at 3.

156. *See id.* at 6.

157. Dennis Hevesi, *Deregulation: A Seismic Shift, Intensity Unknown*, N.Y. TIMES, Jan. 19, 1997, § 9, at 5.

158. *See id.*

159. ROTHENBERG ET AL., *supra* note 118, at 183.

geous shifting [is] guaranteed so long as there is taste heterogeneity among households.”¹⁶⁰

The market knows, and the market speaks. It gives its signals by changes in rents caused by supply-and-demand imbalances, changes that tell developers, investors, and owners what to do. As Anthony Downs explains this analysis, in the circumstance of inadequate supply it is essential that rents go up: this is the only effective signal that additional units should be built.¹⁶¹ A key to this view of a smoothly and appropriately functioning market, explicitly acknowledged by Downs, is the assumption that holds “that strong competition exists among owners of existing rental units, among potential developers of additional units, and among tenants.”¹⁶² When combined with the ability of developers to enter the rental market freely and build as they so choose, “movements of rents effectively signal—and call forth—changes in resource allocation that are both socially desirable and efficient.”¹⁶³

The assumption that rental housing markets in New York City could be truly competitive without regulation, and therefore that housing consumers would be able to “choose,” is the same way that housing producers can choose, was crucial to both the program and the political well-being of regulation opponents. If the assumption were to go unquestioned, Governor Pataki’s desire (as his aides allowed he wanted) for “an orderly transition to a market system” would be seen as a desire for housing market results that were “socially desirable and efficient” for all.¹⁶⁴ If the competitiveness assumption came to be debated, let alone came to seem implausible in the New York City rental housing context, the Governor’s desire might be seen very differently, either as a reflection of his simply wanting to enhance the profits of landlords, or at least as a reflection that imposing market values was more important to him than any social impact on tenants. While it is not possible to know for sure whether deregulation advocates in general, or Governor Pataki in particular, actually believed that rental housing markets in New York City could be competitive, it is certainly the case that they acted as though they did. The merit to the assumption of competitiveness will be examined later in this study.¹⁶⁵

160. *See id.*

161. *See* DOWNS, *supra* note 63, at 23.

162. *See id.* at 24.

163. *See id.*

164. *See* Dao, *supra* note 32.

165. *See infra* Part I.L. accompanying notes 271-296.

H. Vacancy Decontrol Takes Center Stage

1. *Pressure on the Governor*

Regardless of what assumptions were in his head and in his heart, the Governor, as April wore on, had to be feeling more and more pressure to come out into the open and declare what he wanted to be done. The *Times*, his editorial ally on rent regulation, urged him to put forward his own plan, saying that, “The current situation demands a Governor who is willing and able to lead.”¹⁶⁶ By the end of April, state Democratic officials said that they “would start an advertising campaign urging voters to hold Gov. George E. Pataki and [United States] Senator Alphonse M. D’Amato personally responsible if the State Legislature allows rent control laws to expire.”¹⁶⁷ The reporting on the advertising campaign pointed out what was described as the central fact in the rent regulation dispute: that “Mr. Pataki and Mr. D’Amato are the most powerful Republicans in the state and have the clout and the motivation to heavily influence the outcome of the dispute.”¹⁶⁸ A few days later, *Newsday*, another Pataki ally in the fight against rent regulation, weighed in with its call for the Governor to put forth a plan.¹⁶⁹ *Newsday* editorialized that “It’s time for D’Amato and Pataki to earn their keep.”¹⁷⁰

2. *Vacancy Decontrol, But Don’t Worry*

At the end of April, the Governor was still trying to acclimate New Yorkers to the idea that there was no option but that rent regulation had to change. His “main focus during an afternoon press conference was on what he depicted as the inevitable end of the city’s current rent-control system.”¹⁷¹ By mid-May, just five weeks before the scheduled expiration of rent regulations, Governor Pataki could hold out no more. He began to lay out what he sought to describe as a pro-tenant compromise. “Repeatedly using the words ‘fair’ and ‘balanced’ to describe his plan, Mr. Pataki proudly suggested . . . that he had found a way to split the differ-

166. *A Leader Needed on Rent Control*, *supra* note 95.

167. *See* Nagourney, *supra* note 99.

168. *See id.*

169. *See* Editorial, *Out of Control/Pataki or D’Amato Must Broker a Reasonable Compromise on New York Rent Laws*, *NEWSDAY*, May 2, 1997, at A38.

170. *Id.*

171. *See* Frederic U. Dicker, *Pataki: Kiss Our Current Rent Laws Goodbye*, *N.Y. POST*, Apr. 30, 1997, at 7.

ence between Republicans and Democrats.”¹⁷² His spin was picked up by the headline of the first *Times* article on the story: “Entering Debate, Governor Offers Rent Compromise.”¹⁷³ The Associated Press, as carried by the *Albany Times Union*, was even more faithful to the Governor’s script: “Pataki’s Rent Control Plan Seeks Middle Ground,” read one headline;¹⁷⁴ “Pataki Asks Greater Rent Protection,” read a second.¹⁷⁵ *Newsday’s* article characterized his plan as a “middle-ground proposal.”¹⁷⁶ Only one initial story got to the heart of the proposal. The lead in the *Daily News* read, “Gov. Pataki yesterday proposed wiping out rent protections when tenants vacate their apartments.”¹⁷⁷ In contrast, the *Post’s* headline read “Pataki’s Plan Seeks Perpetual Protection.”¹⁷⁸ The lead in the *Post* the next day said that the Governor’s proposal would spell “a slow but certain death for the city’s rent-regulation system.”¹⁷⁹

Vacancy decontrol was indeed at the heart of the Governor’s proposal, but he spent significant energy trying to disguise both the existence of that proposal and its consequences. One stratagem was to release other parts of his proposal first, so that they would be the center of public attention. On May 11th, he proposed an expansion of luxury decontrol, seeking to reduce the income ceiling at which high-rent decontrol would kick in from \$250,000 to \$175,000, and get rid of the requirement that the apartment be renting for \$2,000 per month or more for decontrol to apply.¹⁸⁰ Only on the next day, May 12th, did he release the rest of his plan, which included vacancy decontrol. In doing so, he literally refused

172. James Dao, *Pataki Urges End of Rent Cap When Apartment Is Vacated*, N.Y. TIMES, May 13, 1997, at A1.

173. Raymond Hernandez, *Entering Debate, Governor Offers Rent Compromise*, N.Y. TIMES, May 12, 1997, at A1.

174. *Pataki’s Rent Control Plan Seeks Middle Ground*, TIMES UNION (Albany), May 13, 1997, at A4.

175. Joel Stashenko, *Pataki Asks Greater Rent Protection*, TIMES UNION (Albany), May 12, 1997, at B2.

176. Ellen Yan, *Rent Remedy? Pataki Seeks Phaseout of Rules for Most; Plan Draws Fire on All Sides*, NEWSDAY, May 13, 1997, at A3.

177. Jon R. Sorensen & Michael Finnegan, *Pataki’s Idea of Control Gov Says Let Moving, Death End Hike Limits*, N.Y. DAILY NEWS, May 13, 1997, at 5.

178. Gregg Birnbaum & Frederic U. Dicker, *New Lease on Life for Rent Laws: Pataki’s Plan Seeks Perpetual Protection*, N.Y. POST, May 12, 1997, at 6.

179. Gregg Birnbaum & Tom Topousis, *Pataki Bids for Slow Decontrol: His Apt.-Vacancy Plan Would End Rules Over Time*, N.Y. POST, May 13, 1997, at 2. The *Post’s* editorial writers must not have read the article, for they wrote on the same day that the Pataki position “stakes out a middle ground.” See Editorial, *The Pataki Rent Plan*, N.Y. POST, May 13, 1997, at 24.

180. See Hernandez, *supra* note 173.

to utter the phrase “vacancy decontrol” even once.¹⁸¹ This refusal, which continued through the balance of the rent regulation debate,¹⁸² was part of a second strategy: to substitute for “vacancy decontrol,” a phrase well understood (both by supporters and opponents) to mean a removal of protections from tenants,¹⁸³ a very different description of the Governor’s desire for tenant protection. “My plan to save rent control,” said Governor Pataki, “will ensure that every middle-class tenant has the right to remain in their apartment for the rest of their lives if they choose, protecting rent laws for about 99 percent of New York tenants.”¹⁸⁴ The theme that he was providing lifetime rent protection for “99 percent of New York tenants”¹⁸⁵ became an incantation to which the Governor clung to steadfastly through the rest of the rent regulation debate.

The Governor’s vacancy decontrol plan immediately won wide editorial endorsement. The *Albany Times Union* said the Governor had proposed a “worthy plan,” and noted that he looked “very much like a moderate in contrast to Mr. Bruno.”¹⁸⁶ *Newsday* described the plan as a compromise that was both “pragmatic” and “a good start.”¹⁸⁷ *The Times* said that the plan was a “reasonable compromise,”¹⁸⁸ an intriguing description not because it was out of keeping with the original goal of both the Governor and *The Times* to end regulation through enactment of vacancy decontrol, but because the same editorial frankly acknowledged that, “The landlords have been known all along to be ready to settle for ‘vacancy decontrol.’”¹⁸⁹

3. *The Purpose of Vacancy Decontrol*

The most cogent and straightforward explanation for why vacancy decontrol was so appealing to landlords came from *Crain’s New York Business*. “In a reasonably short space of time,” *Crain’s* wrote, vacancy decontrol would “move hundreds of thousands of

181. See Sorensen & Finnegan, *supra* note 177; Yan, *supra* note 176.

182. See Richard Pérez-Peña, *The Rent Battle: The Impact; Although Meant to Create Fluidity, Decontrol Could Freeze the Market*, N.Y. TIMES, June 13, 1997, at B4.

183. See Hernandez, *supra* note 173.

184. See *id.*

185. *Id.*

186. Editorial, *A Worthy Rent Control Plan*, TIMES UNION (Albany), May 14, 1997, at A10.

187. Editorial, *Pataki’s Rent Control Compromise A Good Start*, NEWSDAY, May 13, 1997, at A36.

188. Editorial, *A Way to Compromise on Rents*, *supra* note 30.

189. *Id.*

units to the free market.”¹⁹⁰ *Crain’s* confidence about the number of apartments likely to be quickly deregulated was based on New York’s previous experiment with vacancy decontrol, an experiment in which some 400,000 apartments wound up being deregulated in just a period of three years.¹⁹¹ But *Crain’s* made clear that it was not simply the direct effect of deregulating so many apartments that was so desirable about Governor Pataki’s vacancy decontrol plan. By deregulating those apartments, another strategic goal would be achieved at the same time: vacancy decontrol would “help undermine the political support for rent regulations.”¹⁹²

The importance of the political dimension spoken to by *Crain’s* cannot be overestimated. The strategy of trying to end government benefits or regulations through a multi-step process is, after all, not unique to rent regulation. The problem faced by rent regulation opponents, and their proposed solution, has actually been mirrored quite closely, for example, in the debate over the future of the social security system. When the benefits of a program are spread widely, opponents find that killing the program directly is difficult or impossible. Instead, the goal is to reduce the constituency that is directly aided by the program so that ultimately the program is seen as a “special interest” program, especially one that is only helping poorer citizens, and political opposition to killing the program outright becomes splintered and significantly less potent.¹⁹³ In the Social Security context, the means by which to narrow support for the program is seen to be privatization; in the rent regulation context, vacancy decontrol is an important step on the same road. And, as *Crain’s* pointed out in its editorial seeking to rally business support for the Pataki plan, expansion of luxury decontrol, another element of that plan, had the same political utility. The lowering of the income threshold for luxury decontrol was most important for being “the first step toward revamping the system into an income-based program.”¹⁹⁴

190. Editorial, *Viewpoint: Pataki’s Rent Effort Merits Biz Support*, *CRAIN’S N.Y. BUS.*, May 19, 1997, at 8 [hereinafter Editorial, *Biz Support*].

191. See *infra* text accompanying notes 234-238; see also W. Dennis Keating, *Rent Regulation in New York City: A Protracted Saga*, in *RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET* 151, 160 (W. Dennis Keating et al. eds., 1998).

192. Editorial, *Biz Support*, *supra* note 190.

193. See ROBERT KUTTNER, *THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE* 40-41 (1984) (“To win broad popular support, social programs must be of high quality and must serve the middle class as well as the poor”).

194. *Id.*

Once Governor Pataki's vacancy control plan was on the table, Assembly Speaker Silver immediately said he would not permit to pass containing such a provision to pass his house of the legislature;¹⁹⁵ Senate Majority Leader Bruno immediately said he would not permit a bill that did not contain a vacancy control provision to pass his chamber.¹⁹⁶ "The two leaders' comments underscore[d] what tenant groups have been saying for weeks: that vacancy decontrol will be the major battle ground" fought over until a final resolution is achieved.¹⁹⁷

Within two weeks, the Rent Stabilization Association had joined the issue, beginning an advertising campaign that said that, "The Pataki plan protects 99 percent of all tenants from losing their rent-controlled apartments."¹⁹⁸ In early June, Governor Pataki mailed a leaflet to millions of renters in New York State (at state expense) with the headline "Governor Pataki's Plan Will Protect New York Renters."¹⁹⁹ The mailing never mentioned vacancy decontrol, saying that only "a few millionaires" would be deregulated, and that all tenants but the "wealthiest few who earn more than \$175,000 a year will have the right to remain in their apartments for the rest of their lives."²⁰⁰

Michael McKee, the rent law campaign manager for Tenants & Neighbors, the state's largest tenants' group,²⁰¹ described the leaflet as "absolutely Orwellian,"²⁰² a characterization appropriately applied to the entire "99 percent protection" charade. It was one thing to argue about the extent to which tenants would be harassed in an attempt to cause them to vacate their apartments.²⁰³ The extent to which rents would increase when individual apartments were subjected to vacancy decontrol was also a point of dispute.²⁰⁴ But there was simply no question that the purpose of vacancy decontrol was to end rent regulation entirely. Whether it would take

195. See James Dao, *Bruno Makes Concessions on Rent Rule*, N.Y. TIMES, May 15, 1997, at B1.

196. See *id.*

197. See *id.*

198. See Richard Pérez-Peña, *Landlords Take Their Case, and Pataki's, to the Radio*, N.Y. TIMES, May 28, 1997, at B3.

199. See Richard Pérez-Peña, *Pataki Sends Fliers Touting His Rent Plan*, N.Y. TIMES, June 8, 1997, § 1, at 41.

200. See *id.*

201. See *id.*

202. See *id.*

203. See *infra* Part I.J. accompanying notes 234-248.

204. See *infra* Part I.I accompanying notes 205-233.

decades, like Governor Pataki sometimes claimed²⁰⁵ and Peter Salins seconded,²⁰⁶ or fourteen years, as a *Daily News* analysis suggested,²⁰⁷ could be debated. Whether the 125,000 units deregulated per year under New York's 1971-74 vacancy decontrol experience (the rate on which *Crain's* was counting)²⁰⁸ would be the rate that obtained could not be known for certain. Whether the effective end of regulation would come long before the last apartment was officially deregulated was less subject to question both because of the many apartments that already rented at market levels and because the political clout of pro-regulation forces would quickly dwindle. In any event, ending rent regulation entirely—the innocuous sounding “orderly transition to a free market” that Governor Pataki had long advocated²⁰⁹—was the ultimate goal.

The conceit of the Governor's “99 percent protection” formulation was that rent regulation in one's existing apartment was anything similar to an ongoing system of rent regulation. What would happen, for example, if one needed to move from the Bronx to Brooklyn to be able to take a new job? What if an elderly parent needed to move in with his grown child, and that family needed to find a larger apartment? What if a young couple were having a baby and wanted to move from a one-bedroom to a two-bedroom apartment? All would be out of luck. As *Daily News* columnist Jim Dwyer described the workings of the “99% protection” plan, “The way it works is this: You can have your rent-regulated apartment forever. But if you move, you will never get another one. You are now living in the last rent-regulated apartment of your life.”²¹⁰ Strange as it may sound, it appears that the Governor was confronted by the press on this point only once. He was entirely unresponsive: “When asked [during the second week of June] if his plan might pose a problem for anyone who needed to move, the Governor said, ‘I'm not going to talk about everybody, the possible

205. See Sorensen & Finnegan, *supra* note 177 (“Pataki contended his plan would keep regulations in effect for decades”).

206. Salins, *supra* note 34, at 64.

207. See Kimberly Schaye, *Bruno Bends Decontrol Deadline*, N.Y. DAILY NEWS, May 17, 1997, at 3.

208. See *supra* notes 190-194 and accompanying text.

209. See Michael Finnegan, *Dem Ads Rip Pataki, D'Amato on Rents*, N.Y. DAILY NEWS, Apr. 28, 1997, at 29.

210. Jim Dwyer, *Rail Story is Lost: Public Paved Way*, N.Y. DAILY NEWS, May 13, 1997, at 4.

thoughts of every individual,' and quickly turned to another question."²¹¹

Separate from the truth-in-advertising problem, vacancy decontrol presented four main issues. Two of these—potential rent increases and potential harassment—were discussed extensively. Two others—the issue of security of tenure and the question of the underlying plausibility of a truly competitive market-based rental market (the ostensible goal of vacancy decontrol)—were discussed little or at all.

I. What Would Happen to Rents?

The issue of the scope of rent increases had already become a touchstone for argument with the release of the de Seve report in March. In mid-May, researchers released details from a forthcoming report, this one commissioned by New York City's Rent Guidelines Board and by the Center for Real Estate and Urban Policy at N.Y.U. Law School ("RGB Study").²¹² Like the de Seve study,²¹³ the RGB study predicted that vacancy decontrol would cause large increases in rent for several neighborhoods in Manhattan (for example, an average of twenty-three percent in Chelsea, Clinton, and Midtown), and smaller rent increases in outer borough locations (for example, average increases of seven percent in several neighborhoods of Southern Brooklyn).²¹⁴ Increases over the long-term were expected to be even steeper.²¹⁵

While many anti-regulation advocates were happy enough to focus on the smaller increases projected for the outer boroughs, some took the view that rents would actually ultimately decline with the end of regulation. William Tucker's study for the Cato Institute argued that housing was more affordable in cities that did not have rent regulation.²¹⁶ He examined advertisements for apartments that were placed on a single Sunday in April 1997 in newspapers in eighteen major cities.²¹⁷ According to Tucker, "The most striking

211. See Pérez-Peña, *supra* note 182.

212. EDGAR O. OLSEN, *THE IMPACT OF VACANCY DECONTROL IN NEW YORK CITY: THE FIRST ESTIMATES FROM THE 1996 HOUSING AND VACANCY SURVEY* (1997), available at http://www.housingnyc.com/research/html_reports/olsen.html (last visited Nov. 9, 2003).

213. See *supra* notes 148-150.

214. See Dennis Hevesi, *Rent Decontrol Study: From No Impact to 30% Increases*, N.Y. TIMES, May 14, 1997, at B1.

215. See *id.*

216. See TUCKER, *supra* note 59, at 6.

217. See *id.* at 14.

observation is that the graphs of rents in free-market cities follow a standard bell curve. The vast majority of advertised rents cluster around the median [based on the 1990 U.S. Census], with between 33 and 40 percent below the census median. The median advertised rent is rarely more than \$50 above the census median.”²¹⁸

In contrast, in regulated New York and regulated San Francisco, the median advertised rents were “more than double the census median,” and fewer than “10 percent of advertised rents were below the census median.”²¹⁹ His conclusion: “Rent control in both these cities appears to make housing spectacularly unaffordable.”²²⁰

In some ways it is difficult to take the Tucker study seriously, as he altogether failed to take into account the skewing effect of looking only at apartments that are advertised. Affordable apartments—that is to say, rent regulated apartments—are the least likely to be advertised, as landlords have no difficulty in renting any but the least desirable of them. The census data Tucker himself relied on show this: for only 10 percent of the advertised rents to be below the census median, a substantially disproportionate percentage of the apartments not advertised had to be the ones below the census median that were either being lived in by New Yorkers, or the ones that could be rented without advertising.²²¹ In addition to the sampling error, he failed to take into account differences between and among cities in respect to the earning power of the wealthiest tier of potential renters or the size of that tier, let alone variables that have an impact on cost such as the extent of available land.

Nevertheless, the argument underlying Tucker’s show-and-tell was an important one for rent regulation opponents. The thesis was that the existence of a regulated sector of the market creates a “shadow market”—that is, the portion of the market that is unregulated.²²² “Because prices are pushed too low in the regulated sector, they are forced above what would otherwise be the market price in the unregulated sector.”²²³ Tucker apparently presumed that, with controls removed, a single unregulated market would adjust to create prices that were not too high, not too low, but just

218. *See id.* at 15.

219. *Id.* at 16.

220. *Id.*

221. *See id.* at 17 (“regulated apartments are essentially withdrawn from the market”). For a discussion of Tucker’s methodology, see *id.* at 16.

222. *See id.* at 6.

223. *Id.*

right.²²⁴ But just right for whom? Michael Schill, the professor at N.Y.U. who released the RGB Study, conceded that vacancy decontrol would most likely “lead to a decrease in housing opportunities for low-and moderate-income households.”²²⁵ That is, landlords, given the chance, would raise rents in desirable neighborhoods forcing some people out.²²⁶ At the higher end of the market, there might be fewer people chasing more available apartments. “But the less-affluent would compete with lower-income residents for affordable housing . . . making rents rise” at the lower end of the market.²²⁷

The least likely scenario would be that a market concerned, by definition, with maximizing profit would ever produce affordable housing. Though some anti-regulation opponents claimed that, in time, affordable housing would “filter down to all segments of the population,”²²⁸ there was no evidence to suggest that this theory operated in practice. “If deregulated markets work the way the supply-siders argue,” responded one opponent of deregulation, “then why do we have such terrible slums in cities like Houston and Miami? That’s where filtering should have worked, by now. They’ve never had regulation.”²²⁹ *Crain’s* reported that, even before any imposition of vacancy decontrol, a ripple effect was being demonstrated: the tight Manhattan market was already driving renters to the outer boroughs, with the result that previously “marginal” areas had become more popular, and rents in several desirable outer borough neighborhoods had jumped 20 percent in a year’s time.²³⁰

Anecdotal evidence may have had as much an impact on public opinion as anything else. At the end of April, the *Daily News* reported “an upper West Side landlord mistakenly jumped the gun on the threatened expiration of state rent laws, trying to slam one tenant with a staggering 337% hike.”²³¹ Explaining why he wanted to charge his tenant \$4,000 a month for a 375-square foot, one-

224. *See id.* at 19.

225. *See* Randy Kennedy, *Steepest Hikes are Expected Chiefly in Parts of Manhattan*, N.Y. TIMES, May 13, 1997, at B4.

226. *See id.*

227. *See* Ellen Yan, et al, *Will Rent Regulation Change the Face of Queens?*, NEWS-DAY, May 19, 1997, at A23.

228. *See* Hevesi, *supra* note 157.

229. *See id.* (quoting “one deregulation opponent, W. Dennis Keating”).

230. *See* Emily Denitto, *Manhattan Exodus: Boroughs Lure Renters With Space, Price*, CRAIN’S N.Y. BUS., May 19, 1997, at 1.

231. *See* Kimberly Schaye, *337% Rent Hike Tried by Landlord*, N.Y. DAILY NEWS, Apr. 29, 1997, at 6.

bedroom apartment, the landlord said: “He’s got a very spacious garden apartment, which is highly desirable.”²³² Prudently, landlord groups asked their members to refrain from such conduct while the debate was pending, fearing that more “horror stories” would harm their cause.²³³

J. How Much of a Threat was Landlord Harassment?

On the issue of whether vacancy decontrol would give landlords an incentive to harass their tenants so that the tenants would leave and the landlords could raise rents quickly and substantially, anti-regulation forces began and remained on the defensive. In part, this was because there had been prior experience with vacancy decontrol (from 1971 to 1974).²³⁴ The experiment with vacancy decontrol was ended because tenant advocates had successfully argued that there had been “enormous rent increases in decontrolled units . . . without improved maintenance; they also cited widespread illegal landlord harassment of tenants to force vacancies.”²³⁵ At the time, a report by then-Assemblyman Andrew Stein had found that decontrol had caused rents to skyrocket, “but had ‘neither stimulated new building construction’ nor ‘spurred renovation.’”²³⁶ Even more threatening, the District Attorneys of Brooklyn, Queens, and Manhattan had, by the end of the 1997 debate, banded together to warn of the dangers of landlord harassment.²³⁷ The Manhattan District Attorney,

who prosecuted dozens of cases during the tight real estate market in the early 80s in which landlords hired professional ‘vacaters’ to force tenants out, said vacancy decontrol would provide an irresistible opening for some landlords. ‘We are concerned that if you give corrupt landlords an incentive to get people out because of decontrol, they will go back to the professional goon squads.’²³⁸

232. *See id.*

233. *See* Philip Lentz, *Landlords Urged to Remain Cool if Controls End: Industry Fears Big Rent Increases, Evictions Would Harm Rent Battle*, CRAIN’S N.Y. BUS., June 9, 1997, at 1.

234. *See* Keating, *supra* note 191, at 160.

235. *See id.* at 160.

236. *See* Elizabeth Kolbert, *The Rent Debate: The Overview: Studies Suggest Tenants in Upscale Neighborhoods Would Be Hit the Hardest*, N.Y. TIMES, Apr. 6, 1997, § 1, at 38.

237. *See* Randy Kennedy, *Rent-Law Plan is Criticized by Prosecutors*, N.Y. TIMES, June 6, 1997, at B1 [hereinafter Kennedy, *Criticized by Prosecutors*].

238. *See id.*

One tactic for anti-regulation forces was to deny that harassment would be a problem. The Rent Stabilization Association claimed that the 1974 Stein Commission “reached conclusions based on a political agenda, and not on the facts.”²³⁹ The president of the Real Estate Board said, “The accusations [by the District Attorneys] about harassment are just not true,” pointing out that harassment complaints dropped during the period during which vacancy decontrol had been in effect.²⁴⁰ But the anti-regulation side was clearly worried on this issue. After all, even as ardent an anti-regulation advocate as William Tucker opposed the vacancy decontrol route to deregulation (preferring the elimination of all regulation in a single stroke) in part because of the threat of harassment.²⁴¹ Tucker wrote that “individual landlords [would] have every incentive to evict their regulated tenants since vacancy means deregulation of the apartment.”²⁴² Tucker was concerned that pressure would grow for the reimposition of regulation because of “a daily series of horror stories, with landlords doing everything from hiring thugs to setting fire to their buildings to get rid of low-rent tenants.”²⁴³ (Walter Block and his co-authors also opposed the technique of vacancy decontrol, but only because “it worked too slowly.”)²⁴⁴

Indeed, when the June 15th deadline approached, and it seemed possible that regulation might expire, New York City’s largest landlord group issued a call for their members to act responsibly, a call reflecting “their own apprehensions that some of their peers might use the expiration of the laws as an opportunity to immediately evict tenants or raise rents dramatically—actions that could cause panic and damage the efforts of their allies, State Senate Republicans, to craft legislation that would phase out rent laws.”²⁴⁵ Governor Pataki, recognizing the threat that the fear of harassment represented to his plan for vacancy decontrol, had included in his plan a proposal to increase both civil and criminal penalties for landlords found to have engaged in harassment of tenants.²⁴⁶ But

239. See Kolbert, *supra* note 236.

240. See Randy Kennedy, *The Rent Battle: The Landlords; Act Honorably, Worried Owners Urge Their Peers*, N.Y. TIMES, June 11, 1997, at B5 [hereinafter Kennedy, *The Rent Battle*].

241. See TUCKER, *supra* note 59, at 19.

242. See *id.*

243. See *id.*

244. Block et al., *supra* note 46, at 257.

245. See Kennedy, *The Rent Battle*, *supra* note 240.

246. See Dao, *supra* note 172.

pro-regulation forces, who had asserted that the decline in complaints during the previous experiment with vacancy decontrol was simply a function of the fact that tenants thought it futile to complain, questioned whether there would be real enforcement of the law.²⁴⁷ Asked by a reporter on June 2nd about the resources that would be devoted to prosecution, “the Governor declined to say how much money he would pledge to create a special office or to help district attorneys. ‘Let’s pass the law first,’ Mr. Pataki said.”²⁴⁸

K. Security of Tenure

The debate about the costs and benefits of abolishing rent regulation typically did not include a discussion of the fact that rent regulation provided tenants with security of tenure.²⁴⁹ This could well have been caused in significant part by widespread blindness to values other than that of the market.²⁵⁰ The absence of discussion was striking, though, as Richard Arnott, writing in the *Journal of Economics Perspectives*, pointed out in a footnote:

While not mentioned often in the economics literature on rent control, the issue of security of tenure is of considerable importance in the policy debate. Partly because of the cost of moving, but more importantly because of the value of having a secure and familiar home, many renters attach great importance to protection against eviction. Eviction may occur not only due to antisocial behavior or nonpayment of rent. . . One effect of rent control is to convert short-term leases into quasi-long-term leases. The control of rent restricts economic eviction. And the changes in landlord-tenant law that almost always accompany the imposition of rent control make (noneconomic) eviction more difficult.²⁵¹

In New York, the law had given rent stabilized tenants the ongoing right to continue their tenancies in one- or two-year increments (as the tenant desired), for as long as they liked (and for as long as they continued to pay the rent and abide by rules relating to tenant conduct).²⁵² It is not difficult to imagine the principal reasons why this feature of rent regulation would be something that regulation opponents ignored to extent they could get away with doing so.

247. *See id.*

248. *See Kennedy, Criticized by Prosecutors, supra* note 237.

249. *See* Richard Arnott, *Time for Revisionism on Rent Control?* 9 J. OF ECON. PERSPS. 99, 108 n.17 (1995).

250. *See infra* text accompanying notes 274-276.

251. *See* Arnott, *supra* note 249, at 108 n.17.

252. *See* RSL § 26-511(c)(4) (1969).

To have raised the question of security of tenure would have been to risk exposing the power dynamics that underlay the relations between landlords and tenants, and the profound changes to those dynamics that vacancy decontrol would bring about. In contrast to all rent-regulated tenants, no tenant who came to live in an apartment that had been decontrolled would be able to enjoy “the value of a secure and familiar home.”²⁵³ Independent of the question of how much rent a landlord might want to charge, a landlord of unregulated apartments wields substantially more power in relation to that landlord’s tenants than does a landlord of regulated apartments. Such a landlord—as was the case in 1997 and as remains the case today—is under no obligation to offer a tenant a written lease,²⁵⁴ let alone offer a lease of a particular duration, let alone offer a renewal lease if the tenant wanted one.²⁵⁵ The landlord would be able to refuse to renew a tenant’s lease for any reason or no reason, whether that tenant had lived in an apartment for two years or twenty years.²⁵⁶

The shift in the balance of power that deregulation would bring would resonate first and foremost in terms of the extent to which tenants would or would not be able to regard their apartments as their homes. The ideal of home ownership is deeply ingrained in the American narrative as a foundation of personal independence—both economic and political—and as a foundation of self-identity and relation to community.²⁵⁷ The fact that Americans, at the same time, have moved frequently is not inconsistent with the idea that home ownership places an individual in charge of his own

253. See Arnott, *supra* note 249.

254. See N.Y. REAL PROP. LAW § 235-b (2003) (establishing a warrantee of habitability for every “written or oral” residential lease); OFF. OF THE N.Y. STATE ATT’Y GEN., TENANT’S RIGHTS GUIDE (1999) (“Leases for apartments which are not rent stabilized may be oral or written.”), available at <http://www.housingnyc.com/resources/attygenguide.html>. (last visited Nov. 9, 2003).

255. See N.Y. REAL PROP. LAW § 232-a (1989).

256. It is true the prohibitions on discriminatory conduct (e.g., discrimination on the basis of race or national origin) would not be overturned. See N.Y. EXEC. LAW § 296(5)(a) (2003). Because there would be in an unregulated environment no entitlement to ongoing lease renewals, however, the remedy for discriminatory conduct would be much more limited than under rent regulation. It is unlikely that a court would order a landlord to provide ongoing lease renewals, so that even a discriminated against tenant would only obtain temporary relief.

257. See CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 78 (1977) (“Homeownership provides a sense of identity, of roots and of security, which is the stuff from which neighborhoods are made and which protect against social alienation.” (quoting then-Sect’y of Hous. and Urb. Devel. Carla Hills, Remarks Before the American Bar Association (Aug. 13, 1975))).

destiny (i.e., he can move or not as he will). There is no reason to believe that New Yorkers would be any less interested in being in charge of their own destinies than other Americans, yet deregulation means at root that the tenant is moved or not as his landlord wills.

The importance of security of tenure, as represented by the right to renew one's lease, has occasionally been acknowledged even by regulation opponents. As George Fallis, one such opponent, wrote in *Rent Control: The Citizen, The Market, and the State*, any assessment of why rent regulation exists ought to recognize the fact that "housing is a necessity and involves issues of fairness."²⁵⁸ He reported on empirical evidence gathered in the 1980s about people's attitudes regarding fair housing and wrote that, "It is clear that the community regards the relationship between landlord and tenant to be different than that between the lessor and lessee of other goods or between the seller and buyer of other goods."²⁵⁹ Specifically, refusing to renew a lease, except in extraordinary circumstances, was seen as unfair, violative of a perceived right to almost indefinite tenancy.²⁶⁰

Having their position seen as posing a threat to "the value of having a secure and familiar home" could hardly help the market populist bona fides of regulation opponents. As such, the primary public response was to deny that the threat existed. As we have seen, Governor Pataki focused on claiming that tenants could remain in an existing rent-regulated apartment for the rest of their lives. He did not discuss what would happen to them once they had to move to an unregulated apartment. Another way to deny that deregulation would dramatically shift the balance of power decisively towards landlords was to lean on what might be called the fiction of equality of power at the moment of contract. The Community Housing Improvement Program ("CHIP") was and is an anti-regulation trade association of apartment building owners in New York City.²⁶¹ CHIP published a booklet in 1997 to try to in-

258. George Fallis, *Rent Control: The Citizen, The Market, and The State*, 1 J. OF REAL EST. FIN. & ECON. 309, 311 (1988).

259. *Id.* at 313 (citing J. KNETSCH ET AL., RESIDENTIAL TENANCIES: LOSSES, FAIRNESS AND REGULATIONS 1984).

260. *Id.* (citing KNETSCH ET AL., *supra* note 259).

261. See Press Release, Cmty. Hous. Improvement Program, About CHIP (undated) ("Since 1966, Community Housing Improvement Program has served as the eyes and ears of New York City apartment building owners. . . . CHIP's mission has remained unchallenged throughout 40 years of leadership—to challenge rent regulations and help apartment owners survive in New York City."), available at <http://www.chipnyc.org/about.shtml> (last visited Nov. 11, 2003).

fluence the public debate over whether to continue rent regulation.²⁶² Posing the rhetorical question, “Will Ending Rent Regulation Result in More Evictions?” and answering, “No,” CHIP presented its view of how a free market works:

The issue of eviction is widely misunderstood. In a free market, leases are contracts with fixed terms, typically one or two years. At the end of the lease, either the building owner or renter may decide to renew, or not. If they both want to renew the lease, they negotiate terms. Most leases that tenants wish to renew are renewed. The tenant and owner come to terms because the tenant is a known quantity to the owner and in place. Finding a new tenant, and preparing an apartment for re-occupancy by a stranger costs the owner time and money and entails risk. Similarly, the apartment is a known quantity to a tenant. Occasionally, however, an owner will refuse to renew a lease because he knows the tenant to be unable to pay the rent; or someone who annoys other tenants; or vandalizes the property. The refusal to renew, or the inability to come to terms with a tenant, is not an eviction.²⁶³

In the world that CHIP wanted its readers to believe existed, landlords and tenants could negotiate as equals. The inconvenience to a landlord of having to find a new tenant was equivalent to the inconvenience of the tenant having to find a new home. Only rarely the two parties would fail to come to terms; indeed, only where the tenant was sufficiently “bad” to outweigh the costs to the landlord of finding a new tenant. Leaving aside for the moment the question of whether a truly “free” market (i.e., an actually competitive one) exists or could exist in New York, one is still left with the question of whether anything other than the illustrations given makes a bad tenant to whom an owner will not offer continued occupancy. The most obvious tenant characteristic that CHIP, not coincidentally, left out is the trait of being demanding of services and repairs. In the regulated environment, tenants can seek such services and repairs knowing that they are entitled to continued tenure. They can withhold rent for a landlord’s failure to maintain the warranty of habitability.²⁶⁴ They can petition the

262. See DAN MARGULIES, *CMTY. HOUS. IMPROVEMENT PROGRAM, OUT OF CONTROL: A COMPREHENSIVE GUIDE TO RENT REGULATION IN NEW YORK CITY* 14 (2d ed. 2002), available at <http://chipnyc.org/outofcontrol.shtml> (last visited Oct. 1, 2003). The guide was originally published during the debate in 1997.

263. *Id.* at 14.

264. See N.Y. REAL PROP LAW § 235-b (2003); see also *Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329 (1979).

New York State Department of Housing and Community Renewal for a reduction in rent when services are reduced (a mechanism available pursuant to the Rent Stabilization Code).²⁶⁵ In the “free market,” on the other hand, tenants would know that instead of the squeaky wheel getting the grease, the squeaky wheel would be shown the door as soon as the existing lease term expired. Landlords would have every incentive to get rid of any tenant who was not docile; only the most desperate or foolhardy tenant would dare complain.

If this scenario sounds like the situation that obtained in a company town, the rhetoric of less politically cautious opponents of rent regulation make clear that creating the rental housing analog to a company town would be desirable and appropriate. Walter Block and his colleagues, the authors of *Rent Control: An Economic Abomination*, believe that property owners should be able to exercise their property rights fully, but that rent regulation coerces those owners into relinquishing many of these rights.²⁶⁶ Block and his supporters use an analogy to the area of labor-management relations:

According to much labor law, and judicial findings, it is required of the employer that he “bargain fairly” with the employees. This holds even if his desire is not to bargain at all, but rather to fire them all. On the other hand, no such requirement is imposed on the workers. They are free to quit, even all together, at any time.²⁶⁷

A fair balance of power, apparently, would be the situation where the employer is “free” to seek, for example, to pay workers less than a minimum wage, and where the employees would be “free” either to accept the proposal or to go without work. Likewise, a fair balance of power in the landlord-tenant realm would be one where the landlord would be free to seek any rent, and the tenant would be free either to pay it or to go without a home. Rent regulation represents such a pernicious interference with the natural and normal order of things that Block and his co-authors describe such regulation as “akin to an infectious disease.”²⁶⁸

Interestingly, the use of a disease metaphor was not limited to a single article. An article in the *Small Property Owner*, focusing on landlords who are women, claimed that “women reel” under the

265. Rent Stabilization Code, N.Y. COMP. CODES R. & REGS. tit. 9, § 2523.4 (2003).

266. Block et al., *supra* note 46, at 258.

267. *Id.* at 261 n.12.

268. *Id.* at 260.

restraints of rent regulation. Indeed, “The toll in stress-related illness is incalculable.”²⁶⁹ William Tucker looked at a broader societal landscape, but described it in equally apocalyptic terms:

Rent control is a disease of the mind that soon becomes a disease of the market. Those cities that resist infection—merely by having a healthy tolerance for the rights of others—are rewarded with a normal competitive housing market in which housing is available at every price level. Those cities that succumb to the disease of rent control are doomed to never-ending, house-to-house warfare over an ever-diminishing supply of unaffordable housing.²⁷⁰

L. Could the Housing Market in New York City Actually Be Competitive?

Underlying all the anti-regulation rhetoric was the belief that when the disease of regulation has been conquered, the normal state of the housing market will actually be competitive. As adverted to earlier,²⁷¹ it is the assumption that an unregulated market is a competitive market (and that a competitive market works beneficially) that gives the theological underpinnings to rent regulation foes.

The opponents of rent regulation look at rental apartments with the same supply-and-demand analysis as they would in respect to any other commodity. As summarized by Tucker,

Consumers, of course, are inclined to buy more as prices fall and less as prices rise. Sellers act in an opposite manner. . . . At one point—and one point only—the interests of buyers and sellers will intersect. This is the “market-clearing price,” the point at which, given current economic circumstances, the desires of both groups are optimized.²⁷²

There can be temporary dislocations where either owners or buyers achieve an advantage, but “lacking government interference, the actions of buyers and sellers always push prices toward a

269. Adrian R. Tiemann, *Rent Regulation and Gender Gaps*, SMALL PROPERTY OWNER, Jan. 1997 (American Association of Small Property Owners, Washington, D.C.), available at <http://www.nationalcenter.org/RentControl497.html> (last visited Nov. 11, 2003).

270. TUCKER, *supra* note 59, at 21.

271. See *supra* text accompanying note 165.

272. TUCKER, *supra* note 59, at 7.

market-clearing level.”²⁷³ One can imagine this process working in respect to a variety of consumer products. Depending on individual economic circumstance and personal preference, and on the price, quality, and aesthetic appeal of various articles of clothing, a consumer theoretically has a wide range of choices. If a particular manufacturer is seen as producing dresses that are too expensive for a particular consumer, that consumer can easily switch to products of a different manufacturer. As much as a consumer may wish to trade in her old car for a new SUV, if she loses her job she will continue to limp along with her old Chevy. If gasoline prices rise significantly, she may decide (if she has not lost her job) that it makes more sense to purchase a Honda Civic with a hybrid engine that gets fifty miles-per-gallon instead of the SUV.

Despite the desire of rent regulation opponents to import this analysis wholesale into their assessment of rental housing markets, the applicability of such an analysis, and the associated assumption of competitive rental markets, is highly questionable. Richard Appelbaum and John Gilderbloom looked into this issue extensively in *Supply-Side Economics and Rents: Are Rental Housing Markets Truly Competitive?*²⁷⁴ They made a number of important observations worth noting here, but none more important than the fact that it is a mistake to treat rental housing as though it were just another commodity.²⁷⁵ First and foremost, housing is a necessity. Unlike, say, that new toaster-oven a consumer may be hankering for, “[p]eople are limited in their ability to forego housing consumption, and the demand for rental housing in particular in relatively price inelastic.”²⁷⁶

Compare the relative ability of landlords to react to changes in an unregulated market to the costs and consequences of tenants doing so. In such a market, landlords typically “retain the right to convert rental units to condominiums or nonresidential uses, to demolish units, to upgrade units out of the reach of low-income renters, to resell units at higher prices, to raise rents without restriction, to restrict rental arbitrarily to particular categories of tenants, and

273. *Id.* The push toward a market-clearing price is what Anthony Downs had referred to as the signaling process whereby rises in rents call forth changes in resource allocations. See DOWNS, *supra* note 63, at 23-24.

274. Richard G. Appelbaum & John I. Gilderbloom, *Supply-Side Economics and Rents: Are Rental Housing Markets Truly Competitive?*, in CRITICAL PERSPECTIVES ON HOUSING 165 (Rachel G. Bratt et al. eds., 1986).

275. See generally *id.* at 167-72 (discussing why housing does not meet the seven “frequently cited” criteria of market-competitive commodities.)

276. See *id.* at 171.

to evict without just cause.”²⁷⁷ For tenants to be able to match the bargaining power of such landlords, they would need to be able to move freely. But, in fact, “[c]onsumers of rental housing face many barriers to mobility.”²⁷⁸ Even leaving aside the barriers created by residential segregation (effectively limiting neighborhoods of choice for both minority and for white tenants),²⁷⁹ moving has many attendant costs. There is, first of all, the direct cost of the move. But this cost pales in comparison to the other costs involved. To move to a different neighborhood or region implies the ability to find a job in the new locale along with the inclination to embark on such a search.

As important, moving imposes non-economic costs. As most housing economists seem not to want to understand, “Housing is not a homogeneous commodity, in which all units are equivalent substitutes. A house is unique because of its amenities, size, architecture, age, quality, neighborhood, as well as its location within a neighborhood.”²⁸⁰ This means that the supply of housing available at any one time that meets the needs and desires of a tenant is but a fraction of the overall supply. A tenant is thus put in the position of having to bargain in a climate of limited supply, or else agree to give up a whole range of features desirable to him. If the move requires a tenant to abandon the neighborhood in which he has lived, even greater potential consequence result: “broken social ties, lost neighborhood attachments, and the uprooting of children to different schools.”²⁸¹ As a result of these imbalances in landlord-tenant power relations, “tenants have very little leverage in the competitive determination of rents.”²⁸²

In addition to the imbalances already discussed, there are other market factors that tend to maximize the bargaining power of landlords at the expense of tenants, if that power is not constrained by regulation. For example, landlords are significantly more organized than are tenants, giving rise to collusion in the setting of rents. “To the degree that ownership is concentrated,” wrote Appelbaum and Gilderbloom, “this may be accomplished directly by tacit or

277. *See id.* at 170.

278. *See id.* at 169.

279. *See* John A. Powell, *The Tensions Between Integration And School Reform*, 28 HASTINGS CONST. L.Q. 655, 691-92 (2001) (noting that racial factors have been “inscribed into residential patterns,” creating the false impression that people have free choice over where to live and where to send their children to school).

280. *See* Appelbaum & Gilderbloom, *supra* note 274, at 172.

281. *See id.* at 170.

282. *See id.*

even explicit agreement among the few individuals who dominate the local housing market.”²⁸³ New York, of course, is a rental housing market where ownership is significantly concentrated.²⁸⁴ Landlord trade associations facilitate and encourage this process. The Institute of Real Estate Management of the National Association of Realtors, for example, produced a pamphlet which urged property managers to “act together,” and advised them that, when they raise rents: “[S]end a notice to your competition. It’s the best mail they’ll get all day. Everyone is afraid to be the first to increase rents. Once your competition sees you doing it, they’ll very likely follow suit, thus making the rent increase a fact of life for all tenants.”²⁸⁵

Adding to the relative powerlessness of tenants is the fact that each individual transaction is small relative to the universe of transactions that make up the rental market. Hence, such a transaction has little or no impact on average rental prices (as distinct from the situation that theoretically would obtain if a significant proportion of available units were “negotiated in a single transaction”).²⁸⁶ Finally, though one of the crucial assumptions of market economists is that a competitive market requires both producers and consumers to “possess perfect knowledge of the market and take advantage of every opportunity to increase profits and utility, respectively,”²⁸⁷ tenants generally gather information less comprehensively than do their counterparts, and, in particular, rely on an information source—newspaper advertisements—that can be very much misleading:

It is likely that a heavy reliance on newspaper ads imparts an upward bias to rentals, since less expensive units are often passed on by word of mouth. Most tenants therefore come to believe that average rents are higher than they actually are and are therefore willing to pay more in what becomes a self-fulfilling expectation of high rents.²⁸⁸

Thus, despite the rhetoric of regulation opponents, it would appear as though the operation of an unregulated market would not actually be competitive, and the choices that would be available to tenants would be sub-optimal. Rent regulation opponents did not

283. *Id.* at 168.

284. *See supra* notes 108-109 and accompanying text.

285. *See Appelbaum & Gilderbloom, supra* note 274, at 168.

286. *Id.* at 167.

287. *See id.*

288. *Id.* at 170.

allow this fundamental flaw in their underlying theory to lessen their enthusiasm for deregulation. Indeed, what many seemed to be saying was that an unfettered market was sufficiently important to warrant the wholesale reallocation of costs to tenants. The need to relocate, for example, is not seen as a hardship to tenants, but as a positive social achievement. Peter Salins looked forward to the unregulated environment in which,

The middle-income families and singles who now live in Manhattan's best neighborhoods at bargain rent would settle for cheaper—and probably better—apartments in less fashionable parts of the city; and the young couples who under rent regulation now hang on to apartments poorly suited for raising families would become homeowners.²⁸⁹

Similarly, William Tucker saw the fact that a tenant might live in one apartment for a long time (even a lifetime) as representing only “hoarding,” a practice that deregulation would end.²⁹⁰

If tenants needed to double up, that too was acceptable to regulation opponents. Charles de Seve described this very practice as a positive illustration of the market principle that “demand is adjustable”; tenants who want “a higher quality or larger or better located apartment than might be affordable pool their resources.”²⁹¹ A consequence generally not discussed by regulation opponents is what it means for there to be a market-clearing price “given current economic circumstances.” Since housing is a necessity, and since some tenants will be unable or unwilling to relocate, they would have to pay whatever the landlord demanded. This would result in a higher percentage of their income going towards rent (and, as de Seve himself acknowledged frankly and without the slightest hint of regret, less disposable income available for other purposes).²⁹² For de Seve at least, this result was as it should be, a function of free choices made by tenants.

Other factors that appeared not to enter into the analysis of regulation opponents were the social costs of the consequences of der-

289. Salins, *supra* note 34, at 64.

290. TUCKER, *supra* note 59, at 9.

291. DE SEVE, *supra* note 119, at 3.

292. *Id.* at 6. This phenomenon had already existed in respect to the poorest tenants in New York, the tenants who had the fewest options in terms of relocation. According to the *Housing NYC: Rents, Markets and Trends '97*, approximately 29.5 percent of renters in non-regulated apartments paid 40 percent or more of their income on rent; approximately 32.4 percent of all renters (including those in regulated housing and in public housing) paid 40 percent or more of their income on rent. See *MARKETS & TRENDS*, *supra* note 23, at 102-03.

egulation. Charles de Seve wrote that the large increase in average rent that would ensue in “prime locations” such as “key areas of Manhattan” was “as it should be as the market takes account of the differential value of land throughout the City.”²⁹³ He did not address the fact that such relocations would tend to heighten economic and racial segregation by neighborhood. Likewise, the issue of “social capital”—touched upon briefly in the March 1997 debate in the State Assembly²⁹⁴—was not considered. In an unregulated environment, tenants who pioneered living in undesirable or marginal neighborhoods would be welcomed. The efforts that they made to improve those neighborhoods would be welcomed. As those neighborhoods began to be perceived as more desirable, however, their utility to their landlords would end. The landlords would want to capture all of the increased value of apartments in those neighborhoods, and many of the pioneers would be priced out.

The acceptance of such consequences can only reasonably be explained by the view that the values of the market trumped all others. A *Newsday* editorial illustrated its operative value system particularly explicitly. “No, rent regulation isn’t all bad,” the paper wrote. “It has worked to keep neighborhood populations stable over time. And it does make life easier for long-time middle-class residents.”²⁹⁵ Despite this, *Newsday* wanted rent regulation ended, editorializing that restrictions on increases in rents cause shortages and decline and represent “a flawed system that any Russian adult would quickly recognize.”²⁹⁶ Keeping neighborhoods stable and making life easier for the middle-class was ultimately not important enough.

M. Countdown to Expiration

At the beginning of June 1997, only two weeks remained before rent regulations were slated to expire. On one level, the lack of resolution was not surprising. In Albany, one observer wrote, “it is well known that nothing happens until everything happens and that the last hour counts more than the first six months.”²⁹⁷ On another level, the future of more than 2.5 million people was on the line;

293. DE SEVE, *supra* note 119, at 5.

294. NEW YORK STATE ASSEMBLY DEBATE TRANSCRIPTS 73-74 (Mar. 17, 1997) (statement of Mr. Stringer).

295. See Editorial, *This is Your City*, *supra* note 49.

296. *Id.*

297. Elizabeth Kolbert, *Avoidance and Obsession on Rent Laws*, N.Y. TIMES, June 9, 1997, at B1.

many people were beginning to believe that, in fact, regulations might actually be allowed to expire; and the level of tension continued to ratchet upward.

Pro- and anti-regulation groups took their messages to the airwaves.²⁹⁸ The New York State Tenants and Neighbors coalition produced a television commercial which asserted: “The Pataki-D’Amato decontrol plan means an end to rent protections. It is the wrong answer. So tell Pataki and D’Amato to join the Assembly Democrats and renew the rent protection laws now before the clock runs out.”²⁹⁹ Down to the end, anti-regulation groups avoided the phrase “vacancy decontrol,” or any mention that the point of the change in the law was to phase out rent regulation. The Rent Stabilization Association produced a television commercial asserting that:

Governor Pataki’s rent control plan protects all seniors, disabled and tenants making less than \$175,000 a year. It’s a good plan. Sadly, Assembly Democrat Speaker Sheldon Silver is playing politics with rent control. *The Times* says Silver is “playing a dangerous game that could harm tenants.” *The Daily News* says when “rent control laws expire on June 15, renters will have only Silver to blame.”³⁰⁰

This commercial illustrates just how important editorial support was to the landlords’ lobby. This support enabled the landlords to shield their self-interest in having tenant protections removed with what was apparently an independent, public-interest consensus that regulation needed to be dismantled. And, in the days and hours preceding the deadline, the editorialists did not give up. On June 10th, *Newsday* said yet again, “Vacancy decontrol offers the best hope of measured changeNot only is this fair, it offers a gradual shift to a free housing market.”³⁰¹ On June 13th, *The Times* described rent regulation as having “mutated into an entitlement for individual renters that is a bureaucratic nightmare for small landlords and does nothing to help create a supply of affordable housing.”³⁰² On June 15th, the *Daily News*, recalling the origins of

298. See Randy Kennedy, *The Ad Campaign; Tenant Group’s Scare Tactics About Landlords’ Scare Tactics*, N.Y. TIMES, June 10, 1997, at B4 (providing the script for the advertisement and analyzing its claims).

299. See *id.*

300. Randy Kennedy, *The Rent Battle: The Ad Campaign; Landlords’ Association Tries to Turn the Spotlight on Silver*, N.Y. TIMES, June 14, 1997, at 24.

301. Editorial, *Renters Won’t Forgive Albany for Decontrol Mess*, NEWSDAY, June 10, 1997, at A40.

302. Editorial, *A Generational Rent Gap*, N.Y. TIMES, June 13, 1997, at A24.

rent regulation during World War II, wrote that, "Nearly 54 years later, there are no Reds and no Nazis, and the Dnieper flows through an independent and democratic Ukraine. Rent control, shamefully, still rules New York's roosts."³⁰³

Countering these voices came support for the continuation of regulation from a number of sources. Tenant organizations had already staged large pro-regulation rallies, including one that "attracted thousands of angry tenants" to Albany.³⁰⁴ Now the rallies continued. At one, "[n]ot content with merely bringing their message to his district, tenant advocates lined up yesterday in front of the Maspeth home of Republican State Sen. Serphin Maltese, hoping to tip the legislative scale in favor of continuing rent regulation."³⁰⁵ Greater attention also began to be paid to the idea that vacancy decontrol might well have consequences beyond the precincts of Manhattan's well-to-do; that those forced out of Manhattan would in turn cause rents to rise in middle-class outer-borough neighborhoods such as Forest Hills, Brooklyn Heights, and Riverdale.³⁰⁶ "[A]s they begin to contemplate the ripple effect in their districts, legislators in the boroughs outside Manhattan have become more concerned about the governor's plan, stiffening the Assembly Democrats' resolve to maintain the current laws."³⁰⁷ As for vacancy decontrol itself, a report in *The Times* pointed out:

No one would ever again find a vacant rent-stabilized apartment, and that, renters say, is why the Pataki plan has evoked such ire [I]t has dawned on many people that under vacancy decontrol, they would have to choose between staying put and taking their chances in an unregulated market.³⁰⁸

Political warning clouds began to gather for anti-regulation forces. As the deadline came closer, anti-regulation leaders were being told, directly and indirectly, that their dream of the end of rent regulation through vacancy decontrol might be too costly politically to achieve in one legislative season. In early June, several Republican State Senators from New York City and its surround-

303. Editorial, *Rent Control's Memory Lane*, N.Y. DAILY NEWS, June 15, 1997, at 50.

304. *Tenants Threaten 'Capitol' Punishment: Protesters warn gov he'll pay at the polls*, N.Y. POST, May 21, 1997, at 4.

305. See Robert Ratish & Dan Morrison, *Takin it to the Streets/Groups Targeting Sen. Maltese's Swing Vote*, NEWSDAY, June 15, 1997, at A5.

306. See *Boroughs Fear Exodus from Manhattan*, TIMES UNION (Albany), June 1, 1997, at D7.

307. *Id.*

308. Pérez-Peña, *supra* note 182.

ing suburbs told Senator Bruno that they would “suffer severe political damage” if the Majority Leader insisted on forcing a vacancy decontrol bill through his house.³⁰⁹ A week later, *The New York Times* published a public opinion poll showing that Governor Pataki’s approval rating had fallen ten percent in just three months,³¹⁰ data that the Governor had presumably already been tracking through private polls.³¹¹

The crisis atmosphere was such that, on June 11th, New York City’s Mayor Rudolph Giuliani announced the creation of hotlines to provide tenants with information on their rights and, in the event that regulations expired, to respond to incidents of landlord harassment and other illegal landlord behavior.³¹² By the eve of the expiration of the law, the hotline was receiving “as many as 100 calls an hour from tenants wondering what would happen to their homes if the rent laws lapsed after [that night]. The anxious and bewildered voices of many callers,” wrote the reporter, “provided telling evidence of the impact the prolonged dickering in Albany is having on the lives of city residents.”³¹³

Also on June 11th, Senator Bruno formally fell into line with Governor Pataki on two issues. First, he agreed with the Governor’s proposal to lower the threshold for “luxury decontrol” from \$250,000 to \$175,000 (Bruno had wanted the threshold lowered to \$125,000).³¹⁴ Second, he backed away from his previous insistence on removing existing protections for the surviving life partner of an unmarried couple who had resided in a rent-regulated apartment (allowing the survivor to continue to be able to “inherit” the apartment in which he lived).³¹⁵ One Republican Senator, quoted on condition of anonymity, said, “It will be the Governor negotiating

309. See James Dao, *G.O.P. Waging Internal Battles on Rent Policy*, N.Y. TIMES, June 4, 1997, at A1 [hereinafter Dao, *Waging Internal Battles*].

310. See James Dao, *The Rent Battle: The Overview; G.O.P. Eases Stand in Rent-Law Fight*, N.Y. TIMES, June 12, 1997, at A1 [hereinafter Dao, *Rent-Law Fight*].

311. *Pataki Was Playing ‘Smart Politics,’* N.Y. POST, May 13, 1997, at 3 (“Republican insiders were also convinced that Pataki’s top political consultants . . . spent the past two weeks secretly polling New York City voters on the rent issue and on how they viewed Pataki’s involvement with them”).

312. See David L. Lewis, *Worried? City Will Lend You an Ear*, N.Y. DAILY NEWS, June 12, 1997, at 4.

313. See Clifford J. Levy, *The Rent Battle: The Tenants; City Workers Flooded With Phone Calls*, N.Y. TIMES, June 15, 1997, § 1, at 29.

314. See Dao, *Rent-Law Fight*, *supra* note 310.

315. See Sarah Metzgar, *Bruno Now Wants to Include Gays Under Rent Control*, TIMES UNION (Albany), June 12, 1997, at B2.

with [Speaker Silver] from now on.”³¹⁶ Indeed, the one thing that did not occur in this period was any legislative debate whatsoever.

Vacancy decontrol was the issue that was defying resolution. Senator Bruno said that, “Besides vacancy decontrol, we could settle the rest of this in 20 minutes.”³¹⁷ There was some talk of increasing the amount that landlords would be able to charge when a tenant vacated an apartment as an alternative to full decontrol.³¹⁸ *The Times* suggested that full vacancy decontrol should apply to apartments where the current tenants earned more than \$60,000 per year.³¹⁹ But time continued to pass, and no agreement was reached. Finally, the June 15th deadline arrived. It came and went. At midnight, rent regulation expired. But shortly thereafter, in the early morning hours of June 16th, Governor Pataki, Senator Bruno, and Speaker Silver announced that a tentative agreement had been reached.³²⁰

II. RESULTS OF THE DEBATE

A. The Rent Regulation Reform Act of 1997

It actually took several days before the tentative agreement was translated into legislative language that was agreeable to all parties, and, in that time, there were continued attempts to shape the result. On June 19th, the end product emerged: Chapter 116 of the Laws of 1997, known as the “Rent Regulation Reform Act of 1997.”³²¹

Governor Pataki, Senator Bruno, and their anti-regulation allies did not get their way insofar as vacancy decontrol did not make it into the final bill. In lieu of vacancy decontrol, however, there were several provisions designed to limit rent regulation or, as Governor Pataki put it in his memorandum approving the bill, the bill was expected to “restore market forces” and, over the course of six years, “bring the rent levels of three out of every four stabilized apartments to market levels.”³²² Landlords won a guarantee of a minimum increase of twenty percent each time an apartment

316. See Dao, *Waging Internal Battles*, supra note 309.

317. Gregg Birnbaum, *D-Day For Rent Regs*, N.Y. POST, June 15, 1997, at 13.

318. See James Dao, *Vacancy Issue Becomes Focus of Rent Debate*, N.Y. TIMES, June 10, 1997, at A1.

319. See Editorial, *End the Stalemate on Rent Laws*, supra note 105.

320. See James Dao, *The Rent Battle: The Overview; Tentative Agreement Reached to Preserve Rent Regulations*, N.Y. TIMES, June 16, 1997, at A1.

321. See Rent Regulation Reform Act, L. 1997 (“1997 RRRRA”), ch. 116, § 1.

322. Governor’s Bill Jacket, 1997 N.Y. LAWS ch. 116.

was vacated (the “special vacancy” allowance).³²³ In addition, landlords were given the right to increase the rent further if an apartment became vacant which had been occupied by the same tenant for at least eight years.³²⁴ In those cases, the vacancy “bonus” would be an increase of 0.6 percent for each year that the apartment had been occupied.³²⁵ Additionally, these increases were to be granted:

[I]n addition to any other increases authorized pursuant to [the Rent Stabilization Law] including an adjustment based upon a major capital improvement, or a substantial modification or increase of dwelling space or services, or installation of new equipment or improvements or new furniture or furnishings provided in or to the housing accommodation pursuant to this section.³²⁶

Finally, notwithstanding talk about the importance of affordable housing, the Act threw in an extra \$100 per month increase for any vacated apartment that had been renting for less than \$300 per month.³²⁷

The nature of the potential windfall for landlords is illustrated in the scenario set forth in Table 1, which deals with a recently vacated apartment occupied by the same tenant for 15 years at \$800 per month. Taking into account a modest investment by the landlord in improvements to the apartment (\$10,000), and of the scenario where, after four years, the new tenant moves on, the landlord will be able to achieve in only four years a doubling of the rent to \$1,600. Thus, an apartment that had been affordable to a family with a household income of \$38,293 (the median in New York City according to 2000 Census data)³²⁸ would have the potential of becoming in four years only affordable to a family with a household income in excess of \$75,000.³²⁹

In addition to permitting major changes in rent, the Act provided several ways of removing apartments from regulation altogether.³³⁰ One mechanism was to reduce the annual household income threshold for high rent, high income deregulation from

323. See 1997 RRRRA §§ 19-20 (amending RSL § 26-511(c)(5)(a) (1969)). The formula for a one-year renewal is slightly different.

324. See *id.*

325. See *id.*

326. See *id.*

327. See *id.*

328. See U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 3 (2000).

329. Calculations on affordability are based on the formula of allocating approximately 25 percent of gross monthly income to rent.

330. See 1997 RRRRA §§ 19-20.

TABLE 1. VACATING TENANT WHO HAD BEEN IN OCCUPANCY FOR 15 YEARS, \$800 RENTAL

Rent paid by vacating tenant	800.00
Special vacancy allowance for new two-year lease (20%)	+ 160.00
Vacancy bonus (0.6% x 15 = 9%)	+ 72.00
Landlord makes \$10,000 in improvements to apartment (improvements x 1/40)	+ 250.00
New rent for incoming tenant	1,282.00
After two years, tenant signs a 2-year renewal lease at a 4% increase	+ 51.28
Renewal rent for tenant in place	1,333.28
After another two years, tenant vacates, and landlord is allowed another 20% vacancy bonus	+ 266.66
New rent after four years	1,599.94

\$250,000 to \$175,000.³³¹ Another mechanism was to alter the method of calculating “luxury” vacancy deregulation.³³² This was one of the “sticking points” over which negotiators had labored in the aftermath of the tentative June 15th agreement.³³³ Prior to the Act, this provision (which was introduced in the 1993 Rent Regulation Reform Act) had applied to apartments renting for \$2,000 or more per month. The New York State Department of Housing and Community Renewal (“DHCR”) had interpreted this provision to allow deregulation of apartments that had not been renting for \$2,000 per month or more, but would be if one were to calculate the permitted increases.³³⁴ The New York City Council had overridden this interpretation, and had amended the Rent Stabilization Law to provide that deregulation would only apply “if the vacating tenant *actually paid* a legal rent of \$2,000 or more.”³³⁵

The Act restored the interpretation originally put forth by DHCR under Governor Pataki, and thus permitted decontrol of apartments that would legally rent for \$2,000 or more if permissible vacancy increases were taken into account.³³⁶ As implemented by

331. 1997 RRRRA §§ 14, 16, 17-b (amending RSL §§ 26-504.1; 26-504.3(b); 26-504.3(c)(1); 26-504.3(c)(2)).

332. See Richard Pérez-Peña, *The Rent Battle: The Overview; After Handshake Deal, Albany Bogs Down in Writing a Rent Bill*, N.Y. TIMES, June 17, 1997, at B4.

333. See *id.*

334. See WARREN A. ESTIS & JEFFREY TURKEL, *THE NEW YORK RENT REGULATION REFORM ACT OF 1997: ANALYSIS AND COMMENTARY* 12 (1997).

335. See *id.*

336. 1997 RRRRA § 15 (amending RSL § 26-504.2); see Governor’s Bill Jacket, 1997 N.Y. LAWS ch.116. The intent was to repeal the City Council’s amendment to the Rent Stabilization Law and require “the deregulation of a vacant apartment any time its maximum rent reached \$2,000, regardless of the rent level at the time of vacancy” See *id.*

the Rent Stabilization Code, an apartment would qualify for deregulation:

[W]here an owner installs new equipment or makes improvements to their individual housing accommodation qualifying for a rent increase. . .while such housing accommodation is vacant, and where the legal regulated rent is raised on the basis of such rent increase, or as a result of any rent increase permitted upon vacancy or succession . . . or by a combination of rent increases, as applicable, to a level of \$2,000 per month or more, whether or not the next tenant in occupancy actually is charged or pays \$2,000 per month.³³⁷

The practical impact was two-fold, and is illustrated by Table 2, below. This scenario is the same as that described previously (and illustrated by Table 1, above), except that the rent which had been paid by the vacating tenant in this example is \$1,200, and the amount of improvements made (or claimed to be made) by the landlord is \$18,500. Because the rent level could legally be over \$2,000 per month, the apartment is deregulated and the landlord is free to charge whatever it wishes.

TABLE 2. VACATING TENANT WHO HAD BEEN IN OCCUPANCY FOR 15 YEARS, \$1,200 RENTAL

Rent paid by vacating tenant	1,200.00
Special vacancy allowance for new two-year lease (20%)	240.00
Vacancy bonus (0.6% x 15 = 9%)	108.00
Landlord makes \$18,000 in improvements to apartment (improvements x 1/40)	462.50
Legal rent for incoming tenant	2,010.50

This provision does not only help those landlords where “market forces” would permit them to charge in excess of \$2,000 per month. Because the apartment is deregulated regardless of what the incoming tenant actually pays, the landlord, in effect, is able to purchase her way, by spending on renovations, permanently out of regulation. Thus, an incoming tenant, even if paying the same rent as the outgoing tenant, would have no security of tenure, no right to a particular term of lease, no right to a renewal lease, and none of the other rights provided pursuant to the Rent Stabilization Law.

To blunt criticism that the desire for vacancies would lead landlords to harass existing tenants until they left, the Act did effect

³³⁷ Rent Stabilization Code, N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11(r)(8) (i) (1997).

modest changes in anti-harassment law. The maximum civil penalty that could be imposed for such harassment was increased from \$1,000 to \$5,000, and a minimum penalty of \$1,000 was newly imposed.³³⁸ A criminal provision was added as well.³³⁹ The criminal provision, however, only applied where the landlord, intending to cause a tenant to vacate, intends to cause or recklessly causes physical injury to that tenant.³⁴⁰ The provision takes what would ordinarily be assault in the third degree, a crime based on the causing of any physical injury, which is a Class A misdemeanor, and converts it to a Class E felony (the lowest level of felony under New York law).³⁴¹ The former carries a maximum sentence of one year of imprisonment; the latter carries a maximum sentence of four years of imprisonment.³⁴² The criminal provision did not address in any way various forms of harassment (e.g., verbal abuse, denial of services, etc.) that do not involve physical injury.³⁴³

With the exception of these harassment provisions, all of the remaining major provisions of the Act tended to enhance the power of landlords in relation to that of tenants. One such important provision concerned the period for which tenants could be reimbursed for rent overcharges, and, crucially, the manner in which the overcharge was calculated. Prior to the Act, Court rulings had established that, although tenants could collect an award for overcharges for a period beginning on the date of the rent registration in place four years prior to a complaint (four to five years), the calculation of the proper rent would go back to the earliest date on which a proper "base rent" could be calculated (which could be 10 or 15 years, or even longer).³⁴⁴ Thus, a landlord who had been overcharging for a long time would "get away with" all but the last four years or so of overcharge, but would not get the benefit of those overcharges in calculating what the proper rent should be. The result is illustrated in Table 3, below.

338. See 1997 RRRRA § 28-b (amending RSL § 26-516(c)(2)).

339. See PENAL LAW § 241.05(1999).

340. See 1997 RRRRA § 28; see also PENAL LAW §§ 241.00, 241.05 (1999).

341. Compare PENAL LAW § 120.00 (1999), with PENAL LAW § 241.05 (1999).

342. Compare PENAL LAW § 70.15(1) (1999), with PENAL LAW § 70.00(2)(e) (1999).

343. See 1997 RRRRA § 28; see also PENAL LAW § 241.00, § 241.05 (1999).

344. See ESTIS & TURKEL, *supra* note 334, at 16-17.

**TABLE 3. LANDLORD OVERCHARGES OVER A 10-YEAR PERIOD—
PRIOR TO THE ACT**

Up to 10 years prior to complaint	\$200 per month
Up to 8 years prior to complaint	\$250 per month
Up to 6 years prior to complaint	\$300 per month
Up to 4 years prior to complaint	\$400 per month
Up to 2 years prior to complaint	\$500 per month

This landlord would have overcharged by a total of \$39,600. While the landlord would only be liable for an overcharge award in connection with the last four years of overcharges (i.e., \$21,600), the rent would be rolled back the full \$500 per month overcharge.

The Act put into effect a provision that allowed landlords to retain more of their ill-gotten gains. In addition to pegging the start date for rent overcharge liability at four years instead of the four-to-five year period in effect previously, the Act explicitly precluded examination of the rental history of a housing accommodation prior to the four-year period preceding the filing of a complaint, precluded a determination of an overcharge based on overcharging that occurred more than four years prior, and precluded calculating an award to the tenant based on overcharges that occurred more than four years prior.³⁴⁵ The very different result is illustrated in Table 4 below.

**TABLE 4. LANDLORD OVERCHARGES OVER A 10-YEAR PERIOD,
SUBSEQUENT TO THE ACT**

Up to 10 years prior to complaint	\$200 per month, but not considered an overcharge
Up to 8 years prior to complaint	\$250 per month, but not considered an overcharge
Up to 6 years prior to complaint	\$300 per month, but not considered an overcharge
Up to 4 years prior to complaint	\$400 per month, but treated as \$100 per month
Up to 2 years prior to complaint	\$500 per month, but treated as \$200 per month

This landlord, too, would have overcharged by \$39,600. In this case, however, the landlord doesn't merely "get away with" six years of overcharges; the Act ratified all overcharges prior to the four-year period before a complaint. The landlord is liable for only \$7,200 in overcharges, and the rent is rolled back only \$200 per month.

The system created under the Act has the potential for its biggest abuse where there is a large gap between market rents and regulated rents. In a neighborhood where it is not uncommon to be paying \$1,500 or \$1,600 per month, a landlord could charge that

345. See 1997 RRRRA § 33 (amending RSL § 26-516(a) (1969)).

amount, and hope that a new tenant fails to discover that the previous long-term tenant had only been paying \$600 or \$800. So long as the fraud is not discovered for four years, the illegal rent is ratified, and the landlord, at the next vacancy, would easily be able to remove the unit from regulation altogether under high rent, luxury decontrol.

In another attempt to shift power from tenants to landlords, new rules were imposed concerning the handling of rents claimed by landlords during the pendency of litigation in Housing Court. When tenants are sued by landlords, either for an alleged violation of a lease provision, or for non-payment of rent, the tenant often withholds rent. From the landlord's point of view, this creates the risk that, even if she were ultimately to prevail, she might not be able to collect the rent found to be due. From a tenant's point of view, however, the only effective way in many circumstances to complain about a lack of services is to withhold rent, and then, when the landlord sues for non-payment, to interpose a counterclaim for the landlord's failure to meet its statutory obligation to maintain services and conditions (the "warranty of habitability").³⁴⁶

The Act expanded the circumstances under which a tenant would be required to deposit rent into court during the pendency of litigation.³⁴⁷ Prior to the Act, tenants were already required to deposit rent into court after the second adjournment they requested.³⁴⁸ This requirement only applied to rent to come due in the future, and the requirement could be waived for "good cause shown." The requirement did not include adjournments that a tenant needed to obtain counsel, and the requirement would not apply where a building had "immediately hazardous violations of record."³⁴⁹

The Act abolished each and all of these restrictions.³⁵⁰ It also provided that in the case of a building with twelve or fewer units, the tenant must pay undisputed sums directly to the landlord during the pendency of the litigation,³⁵¹ a provision designed to meet the perceived hardship suffered by small landlords, or at least landlords of small buildings.

346. *See supra* note 264.

347. *See* 1997 RRRRA § 36 (amending ETPA § 745(2) (1974)).

348. *See* ESTIS & TURKEL, *supra* note 334, at 24.

349. *See id.* at 25.

350. *See* 1997 RRRRA § 36.

351. *See id.*

The Act also made relatively modest changes in the succession rights of family members who were not named tenants. Nieces, nephews, aunts, and uncles no longer automatically qualified as “family members” entitled to succeed to the rights of a named tenant.³⁵² For family members who did step into the shoes of the original named tenant, any members after the first would be treated as a new tenant, with the various vacancy and other increases applicable to such family members.³⁵³

Prior to the Act, landlords who failed to pay the requisite registration fee to the City for each rent stabilized apartment could not, as a penalty, seek or collect rent increases.³⁵⁴ The threat of these sanctions was a powerful incentive to comply with registration requirements. The Act removed this incentive, and placed the burden on the City to go out and try to collect unpaid fees.³⁵⁵

Even though new construction was not subject to rent regulation unless the developer took advantage of a tax abatement or other public benefit, the Act sought to respond to the perceived “double-cross” issue of the possibility that someday new construction might be subjected to regulation. The Public Housing Law was amended to provide for contracts in which a developer would commit to build and the State, in turn, would agree not to impose rent regulation on the new construction for fifty years.³⁵⁶

In what was described in *The Times* as “the best illustration of the power landlords’ lobbyists held over the law’s tiniest details,” power exercised “for the benefit of only a few developers,” the Act made it easier for landlords to demolish rent-controlled buildings that were already largely vacant but still had a few tenants in occupancy.³⁵⁷ Under the provision inserted at the last moment, an owner of a building with three or fewer tenants constituting ten percent or less of the apartments in the building could get an order requiring the tenants to leave, regardless of how long they had lived in the apartment (in some circumstances the landlord would be responsible for relocation costs).³⁵⁸ The president of the Real

352. See 1997 RRRRA § 21 (amending PUB. HOUS. LAW § 14(4)).

353. See 1997 RRRRA § 22 (amending RSL § 26-512(f) (1969)).

354. RSL § 26-517.1 (in effect prior to June 19, 1997).

355. See 1997 RRRRA § 30 (corresponds to RSL § 26-517.1, as amended).

356. See 1997 RRRRA § 27 (amending PUB. HOUS. LAW § 14(1)(w)).

357. See Randy Kennedy, *In Final Deal, the Hidden Power of a Paragraph*, N.Y. TIMES, June 29, 1997, § 1, at 28 [hereinafter Kennedy, *In Final Deal*].

358. See 1997 RRRRA § 38 (amending Rent & Rehabilitation Law, N.Y. CITY ADMIN. CODE § 26-408(b) (1969)). Note that this provision only applied to the smaller number of rent controlled tenants who, on this issue, had previously enjoyed greater protection than had rent stabilized tenants. See *id.*

Estate Board of New York, which represents New York City's largest developers, acknowledged that only five "significant members" of the Board had "cared deeply" about the issue.³⁵⁹ They got their way.

Finally, rent regulation remained a temporary measure, as it had always been. The Act was scheduled by its terms to expire in six years,³⁶⁰ making the period leading up to June 15, 2003 the next battleground between pro- and anti-regulation forces.

B. Winners and Losers

Notwithstanding the provisions of the Act described above, the virtually unanimous contemporaneous judgment was that the battle had been won by the tenants, and that landlords got very little at all. The news analysis in *The Times* stated that the "consensus here [in Albany] is that the big winner was [State Assembly Speaker] Silver, who stubbornly fought any significant change in the laws, and the tenant organizers."³⁶¹ A follow-up article described the result as "a retreat by Mr. Bruno and Mr. Pataki, followed by legislation that largely keeps rent protections in place for six more years."³⁶² *The Times* summed up its editorial view with the headline, "A Molehill of Rent Reform."³⁶³

This was indeed the consensus. "The governor merely provided modest relief to landlords," wrote *Crain's*.³⁶⁴ The deal was "little more than a half-step toward progress," wrote the *Albany Times Union*.³⁶⁵ The *Post* wrote that the "[l]ast-minute pact is big victory for Silver."³⁶⁶ The president of the landlords' Rent Stabilization Association complained that the agreement "was far from what is needed for the health of the city's rental housing market."³⁶⁷ And a Republican State Senator from Rockland County, a suburb of

359. See Kennedy, *In Final Deal*, *supra* note 357.

360. 1997 RRRRA § 17.

361. See James Dao, *The Deal; As Usual, Down to the Wire in Albany*, N.Y. TIMES, June 17, 1997, at A1.

362. See Dao & Pérez-Peña, *supra* note 38.

363. Editorial, *A Molehill of Rent Reform*, N.Y. TIMES, June 17, 1997, at A20.

364. Editorial, *Viewpoint: Will Pataki Add Insult to Injury?*, CRAIN'S N.Y. BUS., June 23, 1997, at 8.

365. See Marc Humbert, *Lose-lose on Rent Laws*, TIMES UNION (Albany), June 18, 1997, at A10.

366. Gregg Birnbaum et al., *Rent Protection is Saved at the Bell: Last-minute Pact Is Big Victory for Silver*, N.Y. POST, June 16, 1997, at 2.

367. See Mark Humbert, *Senate, Assembly Approve Rent Bill*, TIMES UNION (Albany), June 20, 1997, at A1.

New York City, joined the chorus, voicing his view that, “We got beat up . . . and didn’t accomplish anything.”³⁶⁸

The consensus certainly captured the critical fact that Governor Pataki and his anti-regulation allies had not succeeded in putting rent regulation on a certain path to destruction, as they had wished to do. In this vein, pro-regulation State Senator Catherine Abate, in the course of the thirty minute “debate” during which the State Senate to rubber-stamped the Pataki-Bruno-Silver agreement, said she thought “we averted disaster.”³⁶⁹ The consensus ignored, however, the significant progress anti-regulation forces had made on a number of fronts. As one tenant advocate put it: “We’ve got a situation where they’ve chipped away a lot . . . There will be less rent-regulated tenants next time around to fight back . . . And they will be back in six years to take away the rest.”³⁷⁰

On issue after issue, the Act represented a distinct shift in power from tenants to landlords. Even leaving aside the material gains landlords would begin to realize each time an apartment was vacated, they and their allies achieved a mechanism to push more apartments towards the deregulation point and more tenants out of the universe of those who are protected. *Crain’s* wrote in May 1997 that a key benefit of vacancy decontrol was that it would “help undermine the political support for rent regulations.”³⁷¹ While not achieving vacancy decontrol, the Act fueled the process of chipping away at rent regulation’s direct constituency. Moreover, Governor Pataki and other anti-regulation advocates appear to have had a real impact on public opinion. The only hopeful note struck in *Crain’s* debate post-mortem, in fact, was related to the battle for public opinion: “There are signs that New Yorkers can be mobilized to support change.”³⁷² Specifically, the *Times* poll cited by *Crain’s* showed forty-eight percent of New Yorkers supporting vacancy decontrol; the *Daily News* poll cited by *Crain’s* showed that poll respondents, on average, thought that those earning more than

368. See Michael Finnegan & Joel Siegel, *Pols Fear the Wrath of Voters*, N.Y. DAILY NEWS, June 17, 1997, at 6.

369. NEW YORK STATE SENATE DEBATE TRANSCRIPTS 5665 (Mar. 17, 1997) (statement of Ms. Abate). The Senate debate transpired on June 19, 1997. See *id.* For the length of the debate, see Humbert, *supra* note 367.

370. See Merle English, *Tenants Groups Split Over Rent Deal*, NEWSDAY, June 17, 1997, at A25.

371. See Editorial, *Biz Support*, *supra* note 190.

372. See Editorial, *Media and Rent: The Untold Story*, CRAIN’S N.Y. BUS., June 16, 1997, at 8.

\$78,000 per year should not have the protection of rent regulation.³⁷³

Given the controversy that attended the debate, however, and the fact that the same *Times* poll showed overwhelming support (over seventy percent) for the continuation of rent regulation in some form,³⁷⁴ anti-regulation advocates could not have been altogether confident that public debate would go their way when rent regulation next came up for extension. Though little-remarked upon, the decision reached by Governor Pataki and legislative leaders to extend rent regulation by six years—not five, not seven—was therefore of great political importance. Instead of having to face the potential ire of voters who support rent-regulation in a gubernatorial-election year (which would have resulted from a one- or five-year extension), or in a state-legislative election year (which would have resulted from an extension of one, three, five, or seven years), or even in a Mayoral-election year (which would have resulted from a four-year extension), they timed the next debate for a year after a gubernatorial election, a year in which no major electoral race was scheduled.

C. Aftermath: The 2003 Consolidation of the Gains of Anti-Regulation Forces

In the spring of 2003, New York State was convulsed in a battle over its budget. The Governor and Legislature, having not put New York's fiscal house in order the previous year (an election year), now had to face a series of unappetizing choices. The Governor, seeking to maintain his anti-tax credentials, was unwilling to sign on to any proposed increases in revenue. In a rare display of cooperation, the Republican Senate and the Democratic Assembly ultimately joined together to increase taxes over the Governor's veto.

Meanwhile, rent regulation waited on the sidelines. Tenant advocates, who wanted to end, or at least raise the threshold for, high-rent vacancy decontrol, were not able to muster much pressure or attention. The Governor, after all, had assured the public that he wanted to have the existing system maintained with only minor modifications.³⁷⁵ Senator Bruno had called for a lowering of

373. See Michael Finnegan, *N.Y.ers: Lower Lid on Income; 2 Out of 3 Favor Cut, Poll Sez*, N.Y. DAILY NEWS, June 5, 1997, at 4; Firestone, *supra* note 1.

374. See Firestone, *supra* note 1.

375. See Stephanie Gaskell, *Surprise! Bruno Backs Tenants In Rent Battle*, N.Y. POST, June 4, 2003, at 2.

the threshold of high rent vacancy decontrol, but it was believed he was only seeking to counterbalance the pro-tenant demands of Assembly Speaker Silver.³⁷⁶ Only as June 15th (expiration day) approached was there any sense of tension. As though to prove that the State Government was constitutionally incapable of acting in a timely fashion, the players did not reach agreement by June 15th. Instead, as the public waited, they passed a one-day “extender” of rent regulation.³⁷⁷ Ultimately, they did this four times.³⁷⁸

On June 20th, Senator Bruno, with the support of the Governor, executed what was universally described as a surprise: he had the Senate pass an *eight-year* extension of rent regulation with only minor modifications.³⁷⁹ Immediately after passing the bill, the Senate adjourned for the summer. The Assembly, knowing that inaction on the Senate bill would let the rent laws lapse, reluctantly followed suit with passage of its own.³⁸⁰ Assembly Democrats did not want “to gamble that the Senate would eventually come back for more negotiations, so they called it quits in what amounted to a weighty game of political chicken.”³⁸¹ The Governor immediately signed the bill into law.³⁸²

On its face, the 2003 Act did not seem to effect radical change. The law affirmed a regulation that allowed for decontrol based on a maximum permissible rent in excess of \$2,000 a month (even if a landlord had never actually rented for that sum), making it clear that a landlord who charged a tenant less than the maximum would be able to revert to the maximum when market conditions permitted³⁸³ and strengthened the already strong prohibitions on New York City enacting stricter rent regulation measures than the State had in place.³⁸⁴ In substance, however, the centerpiece of the 2003 Act was apparent continuity: the eight-year extension.³⁸⁵

376. See Juan Gonzalez, *Tenants Betting the Rent on Queens Pol*, N.Y. DAILY NEWS, June 12, 2003, at 37.

377. 2003 N.Y. LAWS ch. 70.

378. 2003 N.Y. LAWS chs. 70-73.

379. See S. 5693, 2003-2004 Reg. Sess. (N.Y. 2003), 2003 N.Y. LAWS ch. 82, available at <http://www.housingnyc.com/resources/renewal2003.html> [hereinafter 2003 Act]; Winnie Hu with David W. Chen, *Endgame in Albany: Rents Laws; Albany Extends Landlord Power Over Rent Curbs*, N.Y. TIMES, June 21, 2003, at A1.

380. See Hu with Chen, *supra* note 379.

381. See *id.*

382. See *id.*

383. See 2003 Act § 3.

384. See 2003 Act §§ 1 to 6-a.

385. See 2003 Act § 17.

Unlike 1997, no one described the 2003 Act as a victory for tenants, an easy conclusion when even the head of the Rent Stabilization Association was saying that, "We are glad that in fact the status quo has been maintained."³⁸⁶ The reason was clear. The longer the system that had been imposed in 1997 stayed in place, the more apartments would be deregulated as they priced out of the system. The process of deregulation has already begun. According to a tenant advocacy group, from 1991 to 2002, 148,000 occupied apartments were culled from the overall stock of rent-regulated apartments; 64,000 of these apartments were estimated to have been lost through conversion to co-op status, while 84,000 were estimated to be lost to high-rent vacancy decontrol.³⁸⁷ A report by the City's Rent Guidelines Board placed the number of apartments lost to high-rent vacancy decontrol in the shorter period from 1994 to 2002 at 24,370, but cautioned that this number was understated due to underreporting.³⁸⁸ If one instead extrapolated from what the Board considered more reliable 2001 and 2002 figures, then the figure for the full period of 1994 to 2002 would be 50,067.³⁸⁹

The numbers produced by Census Bureau's Housing and Vacancy Survey were also telling. The percentage of renter occupied housing renting for more than \$1,000 in gross rent³⁹⁰ rose from 15.9 percent in 1996 to 27.3 percent in 2002, an increase of more than 70 percent in terms of the share of all units represented in this price

386. See Hu with Chen, *supra* note 379.

387. TENANTS & NEIGHBORS, Rent Regulation: New York's Largest and Most Effective Affordable Housing Program (Feb. 2002), at <http://www.tandn.org/issuebriefs.cfm?contentid=31> (last visited Oct. 21, 2003); see Shaila K. Dewan, *Deregulation By Landlords is Increasing, Study Says*, N.Y. TIMES, Feb. 17, 2002, § 1, at 37. *The Times* report noted that a landlord representative asserted that the report was "self-serving" and designed only to "scare people and make politicians think that there is a crisis out there." See *id.*

388. N.Y. CITY RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY, 1994-2002 6 (2003), available at http://www.housingnyc.com/research/pdf_reports/changes94-02.pdf (last visited Nov. 17, 2003).

389. For the figures used in this arithmetic, see *id.*

390. Gross rent is a calculation that includes the cost of utilities whether paid directly to utility companies or through a landlord. See MOON WHA LEE, N.Y. CITY DEPT OF HOUS. PRESERVATION & DEV., SELECTED FINDINGS OF THE 2002 NEW YORK CITY HOUSING AND VACANCY SURVEY 5 (2003), available at <http://home.nyc.gov/html/hpd/pdf/hvs-initial-findings-2002.pdf> (last visited Nov. 17, 2003).

category.³⁹¹ The raw number of units renting for \$1,500 or more increased by 58.2 percent.³⁹²

It is evident that more units will continue to come out of regulation. The 2002 Housing and Vacancy Survey showed that there were 226,840 stabilized apartments that rented for \$1,000 or more.³⁹³ By a process of annual rent renewal increases, vacancy allowances, and capital improvement allowances, many of those apartments are either now or will within the next eight years be at or nearing the \$2,000 threshold cutoff for high-rent vacancy decontrol (if not lost to the rental market by conversion to cooperative or condominium ownership).

By imposing the eight-year extension, anti-regulation forces were able to achieve a static decontrol ceiling of \$2,000 for a period totaling fourteen years (1997-2011). In that time, of course, the value of 1997 dollars does not remain constant. Even if one were to use the Consumer Price Index and projections of that Index from the Office of Management and Budget and/or the Congressional Budget Office—conservative estimates because of the under-weighting of housing costs—it turns out that \$2,000 in 2011 is projected to be the equivalent of less than \$1,500 in 1997 dollars.³⁹⁴ In essence, therefore, anti-regulation advocates have reduced the threshold of “high rent” vacancy decontrol by at least 25 percent without having to take the politically more provocative

391. *Compare id.* at 21 tbl.13, with N.Y. CITY DEP'T OF HOUS. PRESERVATION & DEV., SELECTED FINDINGS OF THE 1999 NEW YORK CITY HOUSING AND VACANCY SURVEY 16 tbl.11 (1999), at <http://home.nyc.gov/html/hpd/pdf/hvs-initial-findings-1999.pdf> (last visited Nov. 17, 2003).

392. *See* LEE, *supra* note 390, at 2. The Census Bureau urges caution in comparing 2002 data with earlier data because the 2002 samples were based on 2000 census information, whereas the previous samples were based on 1990 census information. *See* U.S. CENSUS BUREAU, 2002 NEW YORK CITY HOUSING AND VACANCY SURVEY, at <http://www.census.gov/hhes/www/housing/nychvs/2002/statement.html> (last visited Nov. 17, 2003).

393. *See* U.S. CENSUS BUREAU, 2002 NEW YORK CITY HOUSING AND VACANCY SURVEY, RENTER OCCUPIED HOUSING UNITS BY RENT REGULATION STATUS, SERIES IA—TABLE 35, at <http://www.census.gov/hhes/www/housing/nychvs/2002/s1at35.html> (last visited Nov. 17, 2003).

394. These inflation numbers rely on analysis devised by Professor Robert Sahr of Oregon State University, who took his data from the Consumer Price Index through 2002. *See* ROBERT SAHR, INFLATION CONVERSION FACTORS FOR DOLLARS 1665 TO ESTIMATED 2013, at http://oregonstate.edu/dept/pol_sci/fac/sahr/sahr.htm#_Download_Conversion_Factors_1 (last visited Oct. 24, 2003). Sahr's estimates for the years 2003 to 2008 are averaged from the Office of Management and Budget (“OMB”) and Congressional Budget Office (“CBO”) estimates; thereafter, his estimates are based on CBO estimates only. *See id.* In no case does an projected annual inflation rate exceed 2.5 percent. *See id.*

step of actually changing the dollar figure that people associate with the threshold.³⁹⁵ In short, Republicans in Albany achieved what a post-passage analysis in *The Times* suggested was their goal all along: “to erode what they say is a system of government price-fixing that has outlived its usefulness.”³⁹⁶

CONCLUSION

Writing in 2000, Thomas Frank observed that: “Once Americans imagined that economic democracy meant a reasonable standard of living for all—that freedom was only meaningful once poverty and powerlessness had been overcome. Today, however, American opinion leaders seem generally convinced that democracy and the free market are simply identical.”³⁹⁷ This had been an old song from business; the difference was, he wrote, “this idea’s triumph over all its rivals; the determination of American leaders to extend it to all the world; the general belief among opinion-makers that there is something natural, something divine, something inherently democratic about markets.”³⁹⁸

By 2003, many market-based chickens had come home to roost, and with new business scandals emerging almost every day, the political landscape seemed, at least temporarily, to be in many ways changed from what it had been in the 1990s. Market theologians, while not in full retreat, were not in a position any longer to engage in what Frank called their “good cop/bad cop” routine (“The market will give you a voice, empower you to do whatever you want to do—and if you have any doubts about that, then the market will crush you and everything you’ve ever known”).³⁹⁹

In the course of the 1997 debate on rent regulation, however, the market theologians were in full battle cry. Since rent regulation had to go, the only question was how best to put it out of its misery. Basic to this effort was the characterization of free markets as natural and inevitable.⁴⁰⁰ The chief *Albany Times Union* reporter, to

395. In stark contrast to the inflation estimates, the renewal lease increases that were approved by the Rent Guidelines Board for the year beginning Oct. 1, 2003, were 4.5 percent for a one-year renewal and 7.5 percent for a two-year renewal. See N.Y. CITY RENT GUIDELINES BD., 2003 APARTMENT & LOFT ORDER #35 (2003), available at <http://housingnyc.com/Guidelines/orders/order35.html>.

396. See Hu with Chen, *supra* note 379.

397. THOMAS FRANK, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY 15 (2000).

398. *Id.*

399. *Id.* at 344.

400. See TUCKER, *supra* note 59, at 14 (stating that elimination of rent control is designed to return housing to the symmetry of the free market).

take but one example, was so enraptured by this technique that she repeated her catechism in article after article: she always described the rent laws as having “artificially” reduced rents.⁴⁰¹

The anti-regulation effort required the pretense that deregulation was calculated not to line the pockets of landlords, but to help people find housing, especially affordable housing. It required the assurance that everything would be better for tenants once market competition was restored—reasonable rents, more apartments. It required people to believe that vacancy decontrol was a compromise proposal, and would not actually end rent regulation as it was intended to do. It required people to believe that existing law constrained new construction more than it did. It required that the issue of security of tenure for tenants be ignored as best as possible. In short, it required that all values other than market values be suppressed.

But, though anti-regulation advocates tried hard, and although they spoke as though the nirvana they promised was “a nailed-shut scientific certainty,” they could not yet achieve all they wanted. Their arguments, as columnist Jim Dwyer put it in the *Daily News*, were “actually a matter of faith.”⁴⁰² He might have said their arguments were a matter of “smoke-and-mirrors.” During the debate, just as Governor Pataki did not want to discuss vacancy decontrol, he “avoided discussing whether he had any incentives to boost housing construction by saying efforts should first be devoted to resolving the rent-regulation battle.”⁴⁰³ In the end, for all the talk of wanting to deregulate to achieve more affordable housing, the law actually passed had no provision for creating affordable housing. For all the talk of market competitiveness, it turns out that examining the idea of such competitiveness is very different from assuming the truth of the idea. It turns out that the idea, as applied to the New York housing market, is illusory.

Some might say that the debate could have proceeded differently. It could have proceeded with the recognition that certain crucial areas at the intersection of economic activity and public interest have traditionally been regulated. As Frank Padavan, the rare Republican State Senator who favored rent regulation said,

401. See, e.g., Sarah Metzgar, *Clock ticking on talks to end rent-law impasse*, TIMES UNION (Albany), June 15, 1997, at A1; Sarah Metzgar, *Weighing the Price of Rent Deal*, TIMES UNION (Albany), June 17, 1997, at A1.

402. Jim Dwyer, *Wanted: Tenants Who Pay For What They Get*, N.Y. DAILY NEWS, June 12, 1997, at 4.

403. See Yan, *supra* note 176.

“When you say ‘control,’ that smacks of Big Brother. But we have regulated utility rates . . . insurance companies, hospitals. The concept of the state regulating certain aspects of life is not limited to this issue.”⁴⁰⁴ The debate could have proceeded with an examination of a variety of methods other than deregulation designed to create more housing: restoring government funding, making it more difficult to convert rental apartments to cooperative units, permitting residential development in areas previously zoned to be commercial or industrial, redirecting the advantages that have long accrued to those who flee the city for the suburbs, and to those who purchase over those who rent. It could have recognized the analogous context of regulation of minimum wages where, “[c]ontrary to predictions based on competitive models or the labor market, recent increases in state minimum wages have not had a discernable impact on employment.”⁴⁰⁵ It could even have recognized that for all the talk of the glorious early twentieth century days of the free market having created massive amounts of new housing on its own, New York’s housing actually relied on and followed the expansion of the subways and the elevated trains, projects undertaken at a public cost of \$1.478 billion (a cost during a time “when \$1 billion really meant something”).⁴⁰⁶

But the ideological stakes in the debate over rent regulation have always been high. Richard Arnott, writing in 1995 about why a disproportionately high percentage of journal articles on empirical housing analysis take rent regulation as their subject, suggested that, “The debate over rent control has been a battleground between those who believe in the free market and those who do not. The echoes of the debate carry over to other policy arenas where its resolution has far more quantitative import.”⁴⁰⁷ There was no reason to expect the 1997 debate to be any different.

And, in reality, it was especially difficult to imagine that a more truthful and enlightened debate could actually have been conducted in the political circumstances that obtained in 1997. Landlords had not suddenly become more altruistic; their allies had not suddenly become more honorable. Rent regulation remained a symbolic battleground for those who sought deregulation of everything, everywhere. What anti-regulation advocates saw was a

404. See Katti Gray, *Padavan’s Stance on Rent Typically Independent*, NEWSDAY, June 30, 1997, at A21.

405. Arnott, *supra* note 249, at 117.

406. See Dwyer, *supra* note 210.

407. Arnott, *supra* note 249, at 117.

golden opportunity to apply at the local level, a trend toward deregulation that had been enriching the few and hobbling the social protections provided by the state for many years. Their lust for greater profits and greater power in relation to tenants was not new, nor was their knowledge that their underlying aims were unpopular. What they had was a Governor, a State Senate, and a unanimous editorial class, all of whom thought nothing of making sacrifice at the altar of the market, regardless of consequences. It was a chance they couldn't afford to miss.

In the course of the debate, William Eimicke, a former State Housing Commissioner and an observer who had expressed reservations about the rent regulation system, was asked about criticism that the conduct of the State Legislature in respect to rent regulation "has been guided largely by one equation: Tenants outnumber landlords."⁴⁰⁸ His response was telling: "If you're arguing that it's because the people want it, excuse me. This is a democracy."⁴⁰⁹ A democracy ought to be a place in which people choose among competing policy prescriptions, and are not be subjected to theological discourses about the wisdom and inevitability of the market, discourses that insist that talk of alternatives is either quixotic or subversive. A democracy ought to be a place in which no participant in a policy debate—let alone the Governor—knowingly and relentlessly attempts to deceive and mislead the people as to the purpose and consequences of the policy choice being proposed.

In this light, therefore, the anti-regulation campaign of 1997 was thus fundamentally anti-democratic. It was a campaign that, as confirmed by the Legislature's action in 2003, has set rent regulation on the path to elimination. It was a campaign that, as *Crain's* observed at the time, had the utility of helping "undermine the political support for rent regulations."⁴¹⁰ Nevertheless, there were still in 2003 close to one million rent stabilized housing units.⁴¹¹ Whether rent-regulated tenants will see the consequences of the current system and seek to change it before their political clout disappears is a question that remains to be answered.

408. Sam Roberts, *The Rentocracy; The Case for Rent Regulation*, N.Y. TIMES, May 4, 1997, § 6, at 43.

409. *See id.*

410. *See* Editorial, *Biz Support*, *supra* note 190.

411. *See* U.S. CENSUS BUREAU, *supra* note 393. The exact number, according to the Census Bureau, is 988,393. *See id.*

APPENDIX**CHRONOLOGY OF NEW YORK CITY RENT
REGULATION SYSTEM⁴¹²**

- 1920 Rents laws preventing evictions and regulation rents are passed.
- 1921 United State Supreme Court upholds New York rent regulations.
- 1929 New York City's rent laws expire and are not renewed by the state legislature.
- 1942 President Franklin D. Roosevelt signs the Emergency Price Control Act, the enabling legislation establishing federal wartime rent controls.
- 1943 Federal rent control is administratively imposed in New York City.
- 1947 The Federal Housing and Rent Act of 1947 exempts apartments built after February 1947 from national rent control.
- 1950 The New York State legislature passes the Emergency Housing Act of 1950 that establishes the State Temporary Rent Commission to oversee New York State's rent control system.
- 1962 The Emergency Housing Act of 1962 gives New York City the responsibility of administering its rent control system.
- 1969 Rent stabilization begins in New York City. Rents in buildings built after 1947 and previously decontrolled units in buildings of six or more units are brought under rent stabilization. The Rent Guidelines Board, the Rent Stabilization Association, and the Conciliation and Appeals Board (CAB) are established to administer rent stabilization.
- 1970 New York City approves the Maximum Base Rent system, introducing the concept of economic rent to the city's rent-controlled stock.
- 1971 The Vacancy Decontrol Law of 1971 is imposed by the state, providing for the decontrol of all controlled and stabilized units after a change in tenancy.
- 1974 The Emergency Tenant Protection Act terminates vacancy decontrol for rent-stabilized apartments and requires that vacated rent-controlled units in building of six or more units come under rent stabilization after a free-market rent (subject to tenant challenge as excessive) is negotiated with the new tenant.
- 1984 New York State once again assumes full responsibility for administering New York City's rent regulation system. The CAB is eliminated.

412. All material in this appendix through 1993 (except that in brackets) is taken from Keating, *supra* note 191, at 153 tbl.11.1.

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1993 The Rent Regulation Reform Act extends the rent regulation system through 1997 [and introduces high rent vacancy decontrol and high rent, high income decontrol].

1997 Rent Regulation Reform Act of 1997 extends rent regulation, but seeks to cut back on the number of regulated units.

2003 Legislature, with only minor modifications, extends the 1997 regime for another eight years.

