NYSBA SPRING 2012 | VOL. 40 | NO. 2

N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

Inside

NYSBA

Rent Stabilization Constitutional? Not Now

By Adam Leitman Bailey and Dov Treiman

When looking at Rent Stabilization from a constitutional point of view, two facts clearly emerge. First, as forty-year-old emergency legislation, it is clearly unconstitutional. Second, no judge subject to reelection or reappointment is going to agree with the first point. Thus, if anyone seeks to bring suit to establish the undeniable fact that Rent Stabilization cannot pretend to be constitutional, it will have to be to a federal district court.

A Preview

In *Patterson v. Daquet*, a New York City Civil Court decision from 1969, the court found the Rent Stabilization Law unconstitutional on many grounds, including the non-temporary nature of the so-called emergency. Oddly, the court wrote *without citing to any authority*:

> The Legislature may, in the exercise of its police power, impinge to some extent upon normal constitutional rights and privileges during a temporary emergency in order to safeguard the public health and safety. Once such emergency conditions have terminated, the emergency regulations must also cease immediately.[1]

Amazingly, *Patterson* has quietly vanished into the dustbin of history. And yet, it seems now that it was amazingly prescient.

Origins of Police Power

Neither the Federal Constitution nor the New York State Constitution mentions any so-called police power. Rather, the police power is a completely judicially created idea, which springs from the political philosophies of our founding fathers. It is generally, if inaccurately, attributed to Abraham Lincoln.

> "The Constitution is not a suicide pact" is a rhetorical phrase in American political and legal discourse. The phrase expresses the belief that constitutional restrictions on governmental power must give way to urgent practical needs. It is most often attributed to Abraham Lincoln, as a response to charges that he was violating the United States Constitution by suspending habeas corpus during the American Civil War. Although the phrase echoes statements made by Lincoln, and although the sentiment has been enunciated several other times in American history, the precise phrase "suicide pact" was first used by Justice Robert H. Jackson in his dissenting opinion in *Terminiello v. Chicago*, a 1949 free speech case decided by the U.S. Supreme Court. The phrase also appears in the same context in *Kennedy v. Mendoza-Martinez*, a 1963 U.S. Supreme Court decision written by Justice Arthur Goldberg.[2]

However, the idea of "police power" goes back to an earlier date. In *Brown v. State of Maryland*, the phrase made its debut in United States Supreme Court jurisprudence. In defining the limits of federalism, Chief Justice Marshall's opinion addressed the question of how much the States could regulate an activity that would impact on the Federal government's exclusive competence to deal with interstate commerce and tariffs. Here, without citation to authority, Marshall spoke of the existence of a "police power" of the states to regulate the health and welfare of their citizens.[3] Obviously, however, this "police power" could not be construed an exception to the Fourteenth Amendment rights of due process until after the passage of that amendment two generations later, in the wake of the Civil War, 1868.

It was in the *Slaughter-House Cases* that the Supreme Court gave definition to "police power." It wrote:

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.
>
> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence

> in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another aminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State;… and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."[4]

Rent Regulation as Police Power

It is thus clear that the "police power" does not rest on the existence of an emergency, and allows for regulation of industries for the general well being of a State's populace. Thus, it must be admitted that there are possible forms of rent regulation that are constitutionally permissible.

It is thus possible that Rent Stabilization was constitutional when it was passed. In *Block v. Hirsh*, the United States Supreme Court established that rent controls were constitutional to deal with a *national* emergency. Core to the court's upholding of the rent control system in Washington, D.C. were three factors—that housing in Washington was then under something of a monopoly, that the measure was enacted as a response to the ongoing emergency of World War I, and that the statute was set to expire at the earlier of the end of the war or two years.[5] Critical therefore is Justice Holmes's statement:

> But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present…But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. …A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.[6]

Note that according to Justice Holmes, a permanent regulation would not be justifiable, but a temporary regulation may or may not be justifiable under the Constitution. As the New York Court of Appeals stated in *East New York Sav. Bank v. Hahn*, "An extraordinary remedy which is appropriate and legitimate in an exigency resulting from abnormal conditions may be inappropriate and beyond the limits of the power of a State if temporary impairment of the obligation of a contract is continued after the exigency has passed."[7]

Thus, by its permanent nature Rent Stabilization fails one of the first qualifications necessary to allow rent regulation in spite of the due process clause.

However, it must be realized that Rent Control has been historically upheld as a proper exercise of the "police power" of the government. This point is clearly brought home by *Pennell v. City of San Jose*, in which the Supreme Court wrote:

> Appellants do not claim, as do some amici, that rent control is *per se* a taking. We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Id., at 440, 102 S.Ct., at 3178. And in *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." Id., at 252. Despite amici's urgings, we see no need to reconsider the constitutionality of rent control *per se*.[8]

Regulatory and Physical Takings

While the *Slaughterhouse Cases* do not state what the limits of the police power are, and therefore give us no guidance as to whether or not rent stabilization goes too far under the police power, the development of the doctrine of "regulatory taking" does give us that definition. This doctrine is generally regarded as taking its theoretical underpinnings from the writings of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, in which Holmes wrote on behalf of the Court:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.[9]
>
> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short of the present act.[10]

Holmes's last reference here is to the Court's upholding of rent control under the emergency conditions surrounding World War I. Even in his mention of those cases, he implies that even in an emergency, regulations can go "too far."[11]

Without finding the case before it ripe for determination whether there was a regulatory taking, in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, the Supreme Court wrote:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.[12]

In looking at rent regulation as "takings" law, the decisions divide the situations into "physical takings" and "regulatory takings." Under *Yee v. City of Escondido, California*, "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'"[13] Thus, *Yee* found that there was no physical taking because:

> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. Cal. Civ. Code Ann.

> § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.[14]

Note the sharp contrast between the conditions in *Escondido* and the conditions in New York City. Look at this same paragraph rewritten accurate to the facts of New York City rent stabilized apartments:

> But the New York City Rent Stabilization Law, authorizes the very thing. When a person succeeds to an apartment, a landlord is compelled to accept the successor. The State compels landlords, once they have rented their property to tenants, to continue doing so. A rent stabilized landlord cannot evict a rent stabilized tenant except on certain limited grounds. Put bluntly, the government indeed requires physical invasion of petitioners' property. While some tenants were invited by landlords, others are forced upon them by the government.

Yee also states:

> Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice "a kind of gauntlet," in that they are not in fact free to change the use of their land. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute. A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.[15]

Needless to say, Rent Stabilization both on its face and as applied does indeed "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." Yet there is other language in *Yee* that appears to reason to the exact opposite. In *Yee*, the appellants did not properly bring the question of regulatory taking before the Court.[16] Because the value in *Yee* rests entirely on consideration of situations strongly differing from the facts and the procedural context of *Yee*, it must be considered wholly dicta, and, in the end, nothing but a signpost of what the Court's analysis *could* be. Yet, when one looks at the overall development of physical takings law and regulatory takings law, New York's rent stabilization seems to come within both of those categories.

That, however, does not end the analysis.

Inception and Termination of Emergency

It is generally recognized that *all* or *any* of the Constitution's protections for individuals or for the government itself can be suspended in times of national or statewide emergency. The United States Supreme Court wrote in *Home Bldg. & Loan Ass'n v. Blaisdell*:

> [W]hile the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases… even though valid when passed." It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.[17]

In *Chastleton v. Sinclair*, the Supreme Court noted:

> We repeat what was stated in *Block v. Hirsh*, 256 U.S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. In *Newton v. Consolidated Gas Co.*, 258 U.S. 165, a statutory rate that had been sustained for earlier years in *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, was held confiscatory for 1918 and 1919.[18]

From this, we see two important principles: First, the Legislature's declaration of emergency, while owed deference by the Courts, is not binding upon it. Second, the now familiar principle that once the emergency has passed or any other set of facts has arisen not in the original declaration, the law valid when enacted can fall into being invalid for further enforcement.

New York's own Court of Appeals had occasion to weigh in on the ideas of police power and its exercise during emergencies such as the Great Depression. Although calling it "reserved power," meaning powers not surrendered by the States to the Federal government under our dual sovereignty constitutional federation, *People by Van Schaick v. Title & Mortgage Guarantee Co. of Buffalo* defines the exercise of that power in a way that makes it clear that where it involves a taking, the emergency that justifies it must be both acute and of limited duration, writing:

> It has been said that "while emergency does not create power, emergency may furnish the occasion for the exercise of power." (*Home Building & Loan Assn. v. Blaisdell, supra.)* Extraordinary conditions may call for extraordinary remedies. Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the State and whether the remedy adopted by the State is reasonable and legitimate. An individual may not justly complain of a reasonable legislative invasion of his usual rights or a reasonable legislative restriction of his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community.[19]

The decision implies in dicta that once the emergency ends, so too would the exercise of emergency power, writing:

> True, when normal conditions are restored, when strict enforcement of the obligations of mortgage investments no longer constitutes an imminent danger to the vital interests of the community, further operation of the statute may be unreasonable. On such question we do not now pass. We consider now only whether the present remedy provided for present conditions is reasonable and legitimate. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." (*Chastleton Corp. v. Sinclair, 264 U. S. 543, 547*.) Failure by the Legislature to limit the operation of the law to a definite term does not render the law invalid so long as the conditions which justify the passage of the law remain.[20]

Thus, even if there was really a housing emergency in 1969[21] or 1974[22] the sheer fact that the emergency, such as it is, has endured for 42 years during which period wars have come and gone, the economy has had its ups and downs, people have fled to New York and from it,[23] neighborhoods have been blighted and recovered, in short life has had its ups and downs, all of this does not bespeak "emergency" at all. The legislation has simply become the normal way of doing business for New York and repeal is simply too politically unattractive for anyone seeking re-election. We do not in this article point to the numerous studies that indicate that Rent Stabilization itself inflates rents and manufactures shortages. Rather, we simply posit that without a war or a Great Depression, nothing that goes on for 40+ years can be called by any true speaker of English "an emergency."

Emergency Defined

One may question whether the police power lies to address a purely local emergency. Amazingly, in the statutes of the State of New York, there are only three references to the powers of the government in a localized emergency and one of those three is the area of rent regulation. The other two are the General Business Law §396-r that prohibits price gouging during a local emergency and Executive Law Article 2B that, *inter alia*, confers emergency power on local executives to issue necessary decrees during emergency situations. However, the wording of the two non-rent statutes give insight into the Legislature's understanding of the word "emergency."

General Business Law §396-r implies its definition of "emergency" as "periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances." Of note in this definition is the use of "severe," mere shortages not constituting an emergency. Also noteworthy is "other extraordinary adverse circumstances," clearly implying that the other listed conditions are also "extraordinary." Yet, one would be hard pressed to argue that any condition that persists for 40 years is "extraordinary." The other conditions in the list by their very nature clearly contemplate something of short duration. It further clarifies the nature of "emergency" where it defines "abnormal disruption of the market" as:

> [R]esulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.[24]

No rational person would argue against the idea that this list presents a fairly decent and comprehensive encapsulation of our understanding of the word "emergency."

Similarly, Executive Law §20(2)(a) describes a disaster as:

> [O]ccurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident, water contamination, bridge failure or bridge collapse.

Executive Law §24(1) builds on this definition in §20(2), writing, "in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof…." Thus, by it, the Legislature sees "disaster" as previously defined (fire, flood, etc.) as being a "similar public emergency." This is all well and rational as it completely comports with the general public understanding of "emergency." None of these other conditions recognized by the Legislature could extend for a period of forty years.

However, the Iowa Supreme Court observed in *First Trust Joint Stock Land Bank of Chicago v. Arp*:

> Emergency in order to justify the intervention of the reserve police power must be temporary or it cannot be said to be an emergency. If a so-called emergency exists beyond a temporary period then it is no longer an emergency but a status and can furnish no basis or authority for legislative action in contravention of or inconsistent with the provisions of the State and Federal constitutions. The existence of an emergency is necessarily a fact question. While declaration of the executive and pronouncements of the legislature are entitled to great weight and should be carefully considered, yet, the fact question still exists, and this can be determined by record facts, history of current events, and common knowledge and information. In other words, a court, in determining the existence of an emergency, may and should take judicial notice of conditions existing at the time the emergency or its continued existence is questioned.[25]

Thus, does the *First Trust* distinguish between an "emergency" and a "status?" We prefer to think of the distinction as between an "emergency" and "ongoing bad governance."

While the Legislature speaks of a "housing emergency," we have been unable to find anywhere in the legal literature support for the idea that a particular bodily need would constitute an "emergency" from the point of view of governance, takings, and due process, but will allow for the idea. Yet, under *First Trust Joint Stock, supra*, that idea still would only mean that Rent Stabilization could have been constitutional for a limited period. Whatever that period may have been, it has long expired.

Rent Stabilization's Achilles Heel

Perhaps daunting for the attorney who would mount the challenge to Rent Stabilization is the realization that the United States Supreme Court has always accepted the idea that a particular set of rent regulations could constitute an unconstitutional taking, but has never yet found any set of regulations that actually do so. However, New York's own State Court of Appeals has not been so reticent. In *Manocherian v. Lenox Hill Hosp.*, the Court found the perpetual existence of the corporate tenant a reason to declare unconstitutional the conferral on it of the rights of selecting its subtenants in perpetuo because it would mean that the rent stabilized apartments to which it held leases would be under stabilization forever.[26]

Impliedly, therefore, the court recognized that the perpetual existence of rent stabilization presented a problem and only struck down the statute when a particular apartment was *guaranteed* never to come back into the free market. In doing so, it carefully distinguished its own decision in *Braschi v. Stahl Assocs. Co.* that had not only upheld but expanded the right of succession.[27] This, however, brings us back to our first point, to wit, that no State appellate judge would dare find Rent Stabilization as a whole unconstitutional, at least not one seeking re-election or re-appointment.

In any event, there are two features about *Manocherian* that made it a relatively poor vehicle for striking down Rent Stabilization as a whole. First is the doctrine that courts should only decide as much as is before them and no more. Second, at the time of *Manocherian*, the Emergency Tenant Protection Act was only 20 years old and may not have been perceived to be quite as perpetual as it now undoubtedly is. When the law in question approximates the age of some of the judges who are going to decide its constitutionality, it is much easier to see it as a permanent fixture than when it is still in its teen years or barely out of them.

This is brought particularly home by some of the language of *Manocherian* itself where the Court wrote, "[t]he statute vests renewal rights in an entity of unlimited existence, a notion directly contrary to another goal of the RSL and ETPA—to free up apartments, fairly and appropriately, as soon as practicable."[28] One cannot readily imagine anyone saying something of the kind in 2012 with a straight face.

Therefore, there are two aspects of Rent Stabilization that simply cannot withstand takings analysis under any of the cases we have discussed thus far: the right of a spouse to be added to a lease when primarily residing in the apartment with the tenant of record[29] and the rights of family and family-like persons to succeed to apartments.[30] Where these provisions run afoul of the Constitution in a scenario where Rent Stabilization exists forever can be found in the United States Supreme Court literature that actually sustains rent regulation. For example, in *Yee v. City of Escondido, supra,* the Court wrote in sustaining the statute before it, "Petitioners' tenants were invited by petitioners, not forced upon them by the government." This, of course, is true neither of spouses nor of successors.

Yee went on to note, "While the 'right to exclude' is doubtless, as petitioners assert, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance."[31] Of course, the succession regulations in Rent Stabilization do indeed take away that right.[32]

Doctrine of Unfair Burden

In *Armstrong v. United States*, the Supreme Court laid down the much-to-be quoted doctrine that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[33]

Speaking of this standard, *Manocherian* states, "[t]here is no 'precise mathematical calculation' for determining when an adjustment of rights has reached the point when 'fairness and justice' requires that compensation be paid."[34] Thus, for one who seeks to rely on "fairness and justice" to overturn Rent Stabilization, it will be an uphill battle, for, in all fairness, it can be stated with absolute certainty that giving one litigant "justice" is merely to deprive other persons of the same—at least to their own perceptions.[35]

Conclusion

Studies have shown that Rent Stabilization has caused the very disruptions it seeks to alleviate[36] and anecdotal evidence suggests that some landlords have become wealthy precisely because they were able to work the shortages created by Rent Stabilization to their profit. But these all are beside the point. Our Constitution has at its heart freedom of choice. We accept that choices properly become constricted by emergencies, but only by real ones. For this, even if it qualified historically, Rent Stabilization simply no longer does.

Endnotes

1. 62 Misc. 2d 106, 108, 308 N.Y.S.2d 173, 176 (N.Y. Civ. Ct. Kings County 1969).
2. *See* WIKIPEDIA, http://en.wikipedia.org/wiki/The_Constitution_is_not_a_suicide_pact (last visited Feb. 2, 2012).
3. 25 U.S. 419, 443-44 (1827).
4. 83 U.S. 36, 62 (1872) (citations omitted).
5. 256 U.S. 135, 156 (1921).
6. *Id.* at 156-157.
7. 293 N.Y. 622, 627, 59 N.E.2d 625, 626 (1944).
8. 485 U.S. 1, 12 n. 6 (1988) (emphasis added).
9. 260 U.S. 393, 413 (1922).
10. *Id.* at 415-16 (citations omitted).
11. *See id.* at 415. "Too far" has become the buzz phrase in regulatory takings analysis.
12. 473 U.S. 172, 199 (1985). *See also id.* at n. 17.
13. 503 U.S. 519, 527 (1992).
14. *Id.* at 527-28.
15. *Id* at 528 (citations omitted).
16. *Id.* at 526.
17. 290 U.S. 398, 442 (1934).
18. 264 U.S. 543, 547-48 (1924) (citations omitted).
19. 264 N.Y. 69, 94, 190 N.E. 153, 161-62 (1934).
20. *Id.* at 95-96, 190 N.E at 162 (1934).
21. The Rent Stabilization Law was established in 1969 and is a modification and successor regulatory scheme to Rent Stabilization. *See* NEW YORK CITY RENT GUIDELINES BOARD, http://www.housingnyc.com/html/glossary_defs.html#dhcr (last visited Feb. 2, 2012).
22. Rent Stabilization's expansion as the Emergency Tenant Protection Act of 1974. *See id.*, http://www.housingnyc.com/html/glossary_defs.html#dhcr (last visited Feb. 2, 2012).
23. The 2010 census, marking a decrease in New York's relative population to other states, required that New York lose two congressional seats. *See* UNITED STATES CENSUS 2010, http://2010.census.gov/2010census/data/apportionment-pop-text.php (last visited Feb. 2, 2012).
24. N.Y. GEN. BUS. LAW § 396-r(2) (McKinney 2011).
25. 225 Iowa 1331, 1334-35, 283 N.W. 441, 443 (1939).
26. 84 N.Y.2d 385, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994).
27. *See* 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).
28. *Manocherian*, 84 N.Y.2d at 399, 643 N.E.2d at 486, 618 N.Y.S.2d at 864.
29. *See* N.Y. COMP. CODES RULES & REGS. tit. 9, § 2522.5(g)(1) (2012).
30. *See id.* §§ 2522.8(b), 2523.5(b).
31. 503 U.S. 519, 528 (1992) (citation omitted).
32. *See* N.Y. COMP. CODES RULES & REGS. tit. 9, § 2523.5(d).
33. 364 U.S. 40, 49 (1960).
34. 84 N.Y.2d 385, 392, 643 N.E.2d 479, 482, 618 N.Y.S.2d 857, 860 (1961).
35. In Joseph Stein's *Fiddler on the Roof*, the beggar upbraids his usual benefactor for being less generous than the previous week, to which the benefactor replies, "I had a bad week." To this the beggar responds, "So, if you had a bad week, why should I suffer?"
36. *See* PETER SALINS & GERARD MILDNER, SCARCITY BY DESIGN: THE LEGACY OF NEW YORK CITY'S HOUSING POLICIES (1992).

Adam Leitman Bailey is the founding partner and Dov Treiman is a partner in the Manhattan law firm of Adam Leitman Bailey, P.C.