rents with high profits, a reduction in those profits may allow them to stay in business and still earn more than they could in other businesses. The implied warranty would simply redistribute wealth between landlords and tenants but would not result in a decrease in the supply of housing.

c. Even if one landlord cannot afford to stay in the rental housing business, another could still operate the building profitably. A landlord who cannot afford to repair an apartment and is prevented from evicting a particular tenant until the apartment is brought up to housing code standards may not be able to pay her monthly mortgage payments or property taxes if the tenant stops paying rent. If the landlord sells the building, or the bank forecloses on it for failure to pay the mortgage, or the city forecloses for failure to pay taxes, someone else may purchase the property at a much lower price than that paid by the original owner because of the repairs needed to continue operating the business. If the new owner's down payment and monthly mortgage payments are sufficiently low, she may be able to use rent receipts not only to make repairs but also to pay her mortgage, taxes, and insurance. Her initial costs are less; therefore the implied warranty is less burdensome since rental payments are sufficient to pay for current maintenance costs. If this happens, the property can still be used for rental housing purposes and will not be taken out of the rental housing market. [p*802]

Section 2. DIRECT GOVERNMENT INVERVENTION IN THE HOUSING MARKET

It is clear from the preceding materials that America has a housing problem. The precise nature and extent of the problem are matters of some controversy. But however you choose to define the problem, there are undeniably a great many people, most of whom are either in a low income bracket or are members of minority groups, or both, who live in substandard housing as defined by a local housing code or by the Federal Government. There are also a great many people who have no housing at all.

While there is considerable disagreement about the figures, most recent studies suggest that over the course of the last generation American housing [p*803] stock has improved: There are fewer substandard housing units now than there were in the past. *See*, *e.g.*, PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 7 (1988) (reduction in "substandard" housing stock since World War II from more than 40% to less than 5%; others would put the number between 10 and 15 percent[1]). Not surprisingly, this improvement in the housing stock has led to an increase in its cost for the poor, and the increasing unaffordability of housing for the poor is one of the causes of the complex phenomenon of homelessness. *See generally Symposium on Homelessness*, 4 NOTRE DAME J.L.ETHICS & PUB.POL'Y 223–383 (1989).

[1] I Lowry, *Housing Policy for the 1990s: A Planners Guide*, 55 J. AM. PLAN. A. 93 (1989), citing JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 1988 (1988).

Many of the recent cases that depart from received doctrines in the landlord-tenant area have done so, at least in part, in order to ameliorate the "housing problem." But judge-made law can affect the housing problem only indirectly. The courts cannot appropriate public funds to build new housing or rehabilitate old housing, nor can they directly regulate the price of rental housing. Legislatures, however, can do and have done all of these things, and in order to round out the picture of the various ways in which the law has tried to deal with the housing problem, we now turn briefly to the various legislative efforts at direct intervention in housing markets.

A. RENT CONTROL

PENNELL v. CITY OF SAN JOSE

Supreme Court of the United States
485 U.S. 1 (1988)

REHNQUIST, C.J. . . .

The city of San Jose enacted its rent control ordinance (Ordinance) in 1979 . . . . At the heart of the Ordinance is a mechanism for determining the amount by which landlords subject to its provisions may increase the annual rent which they charge their tenants. A landlord is automatically entitled to raise the rent of a tenant in possession[1] by as much as eight percent; if a tenant objects to an increase greater than eight percent, a hearing is required before a "Mediation Hearing Officer" to determine whether the landlord's proposed increase is "reasonable under the circumstances." The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including "the hardship to a tenant." § 5703.28(c)(7). . . . If either a tenant or a landlord is dissatisfied with the decision of the hearing officer, the Ordinance provides for binding arbitration. A landlord who attempts to charge or who receives rent in excess of the maximum rent established as provided in the Ordinance is subject to criminal and civil penalties.

[The Court's discussion of whether the plaintiffs had standing is omitted.] . . .

Turning now to the merits, we first address appellants' contention that application of the Ordinance's tenant hardship provisions violates the Fifth and Fourteenth Amendments' prohibition against taking of private property for public use without just compensation. In essence, appellants' claim is as [p*804] follows: § 5703.28 of the Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to § 5703.28(c)(7) and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents—that objective has already been accomplished by considering the first six factors—instead, it serves only the purpose of providing assistance to "hardship tenants." In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord's property to individual hardship tenants; the Ordinance forces private

[1] Under § 5703.3, the Ordinance does not apply to rent or rent increases for new rental units first rented after the Ordinance takes effect, § 5703.3(a), to the rental of a unit that has been voluntarily vacated, § 5703.3(b)(1), or to the rental of a unit that is vacant as a result of eviction for certain specified acts, § 5703.3(b)(2).

individuals to shoulder the "public" burden of subsidizing their poor tenants' housing. As appellants point out, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is '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.'" *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 318–319 (1987) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered—it states that "the Hearing Officer *shall* consider the economic hardship imposed on the present tenant"—but it then goes on to state that if "the proposed increase constitutes an unreasonably severe financial or economic hardship . . . he *may* order that the excess of the increase" be disallowed. § 5703.29 (emphasis added). Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294–295 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.*, was "premature," 452 U.S., at 296, n. 37, and "not ripe for judicial resolution," *id.*, at 297, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining. Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. . . . [p*805]

Appellants also urge that the mere provision in the Ordinance that a hearing officer may *consider* the hardship of the tenant in finally fixing a reasonable rent renders the Ordinance "facially invalid" under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision. The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: "Price control is 'unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . .'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 769–770 (1968) (quoting *Nebbia* v. *New York*, 291 U.S. 502, 539 (1934)). In other contexts we have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly [citations omitted] or a discrepancy between supply and demand in the market for a certain product [citation omitted]. Accordingly, appellants do not dispute that the Ordinance's asserted purpose of "prevent[ing] excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing in the City of San Jose," § 5701.2, is a legitimate exercise of appellees' police powers.[2] Cf. *Block* v. *Hirsh*,

[2] 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 (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 (citing, *inter alia*, *Bowles* v. *Willingham*, 321 U.S. 503, 517–518 (1944)). And in *FCC* v. *Florida Power*

256 U.S. 135, 156 (1921) (approving rent control in Washington, D.C., on the basis of Congress' finding that housing in the city was "monopolized"). They do argue, however, that it is "arbitrary, discriminatory, or demonstrably irrelevant," *Permian Basin Area Rate Cases*, *supra*, at 769–770, for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low-income tenants by requiring that "hardship to a tenant" be considered in determining the amount of excess rent increase that is "reasonable under the circumstances" pursuant to § 5703.28. As appellants put it, "[t]he objective of alleviating individual tenant hardship is . . . not a 'policy the legislature is free to adopt' in a rent control ordinance." Reply Brief for Appellants 16.

We reject this contention, however, because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. [Citation omitted.] Indeed, a primary purpose of rent control is the protection of tenants. See, *e.g.*, *Bowles* v. *Willingham*, 321 U.S. 503, 513, n. 9 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living"). Here, the Ordinance establishes a scheme in which a hearing officer considers a number of factors in determining the reasonableness of a proposed rent increase which exceeds eight percent *and* which exceeds the amount deemed reasonable under either § 5703.28(a) or § 5703.28(b). The first six factors of § 5703.28(c) focus on the individual landlord—the hearing officer examines the history of the premises, the landlord's costs, and the market for comparable housing. Section 5703.28(c)(5) also allows the landlord to bring forth any other financial evidence—including presumably evidence regarding his own financial status—to be taken into account by the hearing officer. It is in only this context that the Ordinance allows tenant hardship to be considered [p*806] and, under § 5703.29, "balance[d]" with the other factors set out in § 5703.28(c). Within this scheme, § 5703.28(c) represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. Cf. *Bowles* v. *Willingham*, *supra*, at 517 (considering, but rejecting the contention that rent control must be established "landlord by landlord, as in the fashion of utility rates"). We accordingly find that the Ordinance, which so carefully considers both the individual circumstances of the landlord and the tenant before determining whether to allow an *additional* increase in rent over and above certain amounts that are deemed reasonable, does not on its face violate the Fourteenth Amendment's Due Process Clause.[3]

We also find that the Ordinance does not violate the Amendment's Equal Protection Clause. . . . In light of our conclusion above that the Ordinance's tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords differently on the basis of whether or not they have hardship tenants. The Ordinance distinguishes between landlords because doing so furthers the purpose of ensuring that individual tenants do not suffer "unreasonable" hardship; it would be inconsistent to state that hardship is a legitimate factor to be considered but then hold that appellees could not tailor the Ordinance so that only legitimate hardship cases are redressed. Cf. *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 145 (1948) (Congress "need not control all rents or

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Corp., 480 U.S. 245 (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*.

[3] The consideration of tenant hardship also serves the additional purpose, not stated on the face of the Ordinance, of reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe. By allowing tenant hardship to be considered under § 5703.28(c), the Ordinance enables appellees to "fine tune" their rent control to take into account the risk that a particular tenant will be forced to relocate as a result of a proposed rent increase.

none. It can select those areas or those classes of property where the need seems the greatest"). We recognize, as appellants point out, that in general it is difficult to say that the landlord "causes" the tenant's hardship. But this is beside the point—if a landlord does have a hardship tenant, regardless of the reason why, it is rational for appellees to take that fact into consideration under § 5703.28 of the Ordinance when establishing a rent that is "reasonable under the circumstances."

For the foregoing reasons, we hold that it is premature to consider appellants' claim under the Takings Clause and we reject their facial challenge to the Ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The judgment of the Supreme Court of California is accordingly

Affirmed.

KENNEDY, J., took no part in the consideration or decision of this case.

SCALIA, J., with whom O'CONNOR, J., joins, concurring in part and dissenting in part. . . .

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co*. v. *Chicago*, 166 U.S. 226, 239 (1897), provides that "private property [shall not] be taken for public use, without just compensation." We have repeatedly observed that the purpose of this provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness [p*807] and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) [further citations omitted].

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as "unfair." That justification might apply to the rent regulation in the present case, apart from the single feature under attack here.

Appellants do not contest the validity of rent regulation in general. They acknowledge that the city may constitutionally set a "reasonable rent" according to the statutory minimum and the six other factors that must be considered by the hearing officer (cost of debt servicing, rental history of the unit, physical condition of the unit, changes in housing services, other financial information provided by the landlord, and market value rents for similar units). San Jose Municipal Ordinance 19696, § 5703.28(c) (1979). Appellants' only claim is that a reduction of a rent increase below what would otherwise be a "reasonable rent" under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor—the hardship to the tenant as defined in § 5703.29. I think they are right.

Once the other six factors of the ordinance have been applied to a landlord's property, so that he is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage.

The seventh factor, the "hardship" provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. And even if the neediness of renters could be regarded as a problem distinctively attributable to landlords in general, it is not remotely attributable to the *particular* landlords that the Ordinance singles out—namely, those who happen to have a "hardship" tenant at the present time, or who may happen to rent to a "hardship" tenant in the future, or whose current or future affluent tenants may happen to decline into the "hardship" category.

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to [p*808] such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*, *supra*, at 49, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals. Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants. . . .

Notes and Questions

1. *The History of Rent Control*

Rent control has typically been a wartime or postwar phenomenon. The housing shortage following World War I induced the imposition of controls in the District of Columbia and in some states. During World War II Congress authorized the imposition of rent controls in much of the nation as part of its wartime price control program. When federal rent controls were terminated in the late 1940s and early 1950s, they were frequently replaced by state and local controls. By the late 1950s, however, most of these postwar controls had expired or been repealed, with the notable exception of New York City's rent control law, and the rent control laws of a few other municipalities in New York State.

The temporary, emergency nature of these laws induced courts to uphold them as constitutional. Thus in 1922, during an era of judicial hostility to economic regulations, the United States Supreme Court held that a District of Columbia rent control law did not violate constitutionally protected property rights.[1] Courts similarly approved controls imposed during and after World War II.[2]

Since the early 1970s, however, a new rent control movement has arisen that has resulted in a judicial reexamination of the constitutional provisions protecting the property rights of owners of rental housing. In such places as Brookline, Massachusetts, Washington, D.C., and Fort Lee, New Jersey, local governments, acting under the authority of state or federal law, have enacted ordinances controlling rents. Many of these ordinances were adopted following, or in anticipation of, the expiration of federal rent controls temporarily imposed under the

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[1] Block v. Hirsh, 256 U.S. 135 (1921). . . .

[2] *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Bowles v. Willingham, 321 U.S. 503 (1944); [further citations omitted].

> Economic Stabilization Act of 1970. Pursuant to this act, the President had promulgated regulations limiting rent increases to two and one-half percent per year, although landlords could obtain additional hardship increases. Unlike the earlier temporary wartime controls, the new ordinances have been designed to prevent expected perpetual inflationary rent increases. Typically, they allow for automatic annual increases of no more than a specified percentage of the previous year's rent. They also, however, permit landlords to apply to municipal rent boards for additional increases to cover operating costs, or to pay for capital improvements, special repairs, or increased property taxes. These new rent control laws are often described as "emergency measures," and may, by their terms, expire within two or three years. Nevertheless, once such laws are enacted, they are rarely permitted to expire. [p*809]

Note, *Rent Control and Landlord's Property Rights: The Reasonable Return Doctrine Revived*, 33 RUTGERS L.REV. 165, 166–69 (1980).

2. *How Rent Control Works*. Rent control legislation presents a broad range of legal, administrative and economic issues. Most rent control statutes and ordinances exempt certain categories of rental units. *See*, *e.g*. the San Jose ordinance, described in the principal case, *supra*, p. S357 n.1. These may include owner-occupied units, luxury units of specified types and new buildings, at least on their initial leasing. The methods and procedures for determining permissible rent levels and adjustments in those levels vary considerably, with many ordinances utilizing a fair rate of return formula similar to that used in economic regulation of public utilities. Some ordinances provide for mandatory rent decreases where the level of services provided is reduced. And most ordinances also contain some form of eviction control. *See Braschi v. Stahl Assocs. Co.*, *infra*, p. S366. For a comprehensive discussion of the administrative techniques involved and suggestions for improvement, see Baar, *Guidelines for Drafting Rent Control Law: Lessons of a Decade*, 35 RUTGERS L.REV. 723 (1983); *see generally* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 7.1–7.10 (1980 & Supp.1990).

3. *The Validity of Rent Control*

The enactment of rent controls in several states during the 1970s has provoked the modest revival of a long-quiescent constitutional doctrine that prices, rates, or charges may not be fixed so low as to effect a confiscation of property, or deny the regulated business a just and reasonable return. With varying success, landlords have challenged the constitutionality of laws sharply limiting rent increases that have been enacted by state and local governments in the District of Columbia, Massachusetts, New Jersey, and other states. Most of these cases have arisen in state courts, where widely differing approaches to the reasonable return question have been developed. Recently the District of Columbia Court of Appeals upheld a law forbidding any greater rent increases than were necessary to give landlords an eight percent return on the assessed value of their properties. Balancing the interests of tenants and landlords, the court held that the law was a reasonable, and therefore constitutional, exercise of the police power. The Supreme Judicial Court and lower courts of Massachusetts have permitted local rent control authorities to devise their own standards for determining the minimum rent necessary to give landlords a reasonable return. By contrast, the New Jersey Supreme Court, in *Helmsley v. Borough of Fort Lee*,[3] held unconstitutional a rent control ordinance that limited rent increases to two and one-half percent per year and prohibited landlords from passing on to tenants increases in operating costs resulting from inflation. The court found that the ordinance would have a foreseeable confiscatory effect upon landlords' income.

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[3] 78 N.J. 200, 394 A.2d 65 (1978), *appeal dismissed*, 440 U.S. 978 (1979).

> The reasonable return doctrine, which has long been a rule of public utilities law, has its basis in the due process clauses of the fifth and fourteenth amendments, the taking clause of the fifth amendment, and analogous provisions of state constitutions. . . .
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> In an attempt to strike down or modify these controls, landlords have increasingly resorted to the courts. The earliest suits challenged the authority of municipalities to control rents, but the success of these suits was limited. Landlords therefore in the late 1970s began to challenge the laws on grounds that they violated statutory or constitutional prohibitions against deprivation of property rights. In particular, they have invoked the [p*810] contract, equal protection, taking, and due process clauses of the United States and state constitutions. Landlords have also challenged the administrative relief provisions of rent control laws, claiming that they contain procedural inadequacies.

Note, *Rent Control*, *supra*, note 1, at 165–66, 169–70 (1980).

While the principal case seems to have settled the basic issue of the federal constitutionality of rent control—at least for the time being—there remain those who regard rent control as *per se* unconstitutional:

> Rent control statutes operate to take part of the landlord's interest in his reversion and to transfer it to the tenant. In the typical case they do so by compelling the landlord, usually in the context of lease renewal, to convey an additional term of years for the benefit of the tenant, at a price determined by the state, typically through a specific administrative board or housing court established for the purpose. That renewed lease is an interest in property, just like the original lease. Its transfer deprives the landlord of the immediate right to possession that was reserved in the original conveyance. The voluntary lease is a transfer of property from landlord to tenant. The coerced renewal of a lease under the rent control statutes is hardly voluntary, but it is most surely a transfer from landlord to tenant. Thus, there is a "taking of private property" both for the student of ordinary English and the conveyancing master.

Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L.REV. 741, 744–45 (1988). Professor Epstein's article produced seven responses, all opposed. *Responses* [*to Epstein*], *id*., at 1215–80. Professor Epstein remains unconvinced. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, *id*., at 1281.

4. *The Wisdom of Rent Control*. Granted that rent control, properly implemented, is constitutional, at least for the time being, the debate remains about its wisdom. What do you think of rent control as a device for ensuring that adequate housing is available at all? To what extent can it supplement or substitute for strict enforcement of housing codes? Suppose the rent levels in any American city were frozen for the next five years. What do you think would happen? Can such consequences be avoided in a rent control system which permits rent increases, with the approval of a governmental agency, where the landlord can establish increased costs?

Many economists, including almost all of those who prefer market solutions to economic problems, argue that rent control is unwise:

> The most politically appealing government intervention into housing markets during periods of inflation is rent control. This is the case because rent control is very much like drinking to excess—its benefits are realized first and the costs are paid at a later date. Rent controls have a strong political appeal because those who benefit initially from paying lower rentals far outnumber those who receive incomes from residential rental property. . . .
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> Rent controls usually are instituted by fixing nominal or dollar rentals at existing levels . . . . [A]s money income and other money prices rise with inflation, nominal rentals, though sometimes adjusted upward over time, tend to lag behind other prices. Thus, real or general price index deflated rentals tend to fall below their previous levels as inflation proceeds. As

real rentals fall below their market equilibrium levels, the aggregate amount of space in rented accommodation demanded on the market increases.

In the short run, however, the amount of rental space in existence remains unchanged. Consequently, a rental housing shortage develops, that [p*811] is, at the control price, the quantity of rental space demanded exceeds the quantity of rental space supplied. Given this situation, those persons living in rental housing tend to remain in it longer than they otherwise would because it becomes progressively cheaper relative to the prices of other commodities to do so. In like manner, because of the increased cheapness relative to the prices of other commodities, some who might otherwise become home buyers seek out rental accommodation instead. Because fewer rental dwellings become vacant and more people are searching for vacant apartments, it becomes progressively more difficult to find rental accommodation on the market, and the vacancy rates in the rental housing sector tend to decline.

If there were only short-run effects of rent control they would be harmful enough. However, in the long run, the stock of rental housing tends to decline relative to population. This occurs, in part, because the owners of rental properties find it less profitable to continue to rent them. . . . [S]ince the prices of owner-occupied units have not been subject to controls in this country, rent controls make it desirable for owners of apartments to convert them to cooperative or condominium units. . . . Since the real returns to rental property tend to decline because of controls, it becomes profitable to their owners to seek out alternative uses for them where possible.

Even if rented units cannot be shifted to the owner-occupied stock, the owners of rental property can, in the long run, still evade controls. Owners do so by gradually withdrawing their capital from the dwellings they own by not making repairs, let alone improvements, in these dwellings. As landlords do so, the effective or quality-adjusted size of the rental housing stock tends to decline over time, thus worsening the housing shortage. Not only are more households seeking rental accommodation of a given quality level, but the stock of higher quality rented dwellings tends to decline. Exacerbating the problem, the number of potential renters increases as the city's population grows, while the potential returns to investment in new rental units continues to decline. Even if new units may be exempt from controls, potential investors in rented property may fear that new units will subsequently be made subject to controls, the actual experience in New York City. On both scores—the deterioration of the existing rental stock and the failure to add to it—the long-term effects are far more serious than the initial impact of rent control.

In the long run, as the stock of rental accommodation declines, the maximum rental rate which a dwelling of given quality will fetch on the market increases. . . . Although it is not legally possible for landlords to charge this higher rental directly, an economist would expect owners to find ways of doing so. . . . Though sometimes inefficient and wasteful of resources, such practices illustrate the fact that rent controls, by reducing the stock of rental accommodation in the long run, may actually increase rather than reduce apartment rentals.

Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 693–96 (1983). Professor Muth's article produced this response from one of the leading advocates of rent control:

Let me begin my criticism by insisting that Professor Muth should not treat rent control categorically. In his paper, he fails to differentiate between highly restrictive controls, such as those experienced during wartime and in New York City during the late 1960's, and "moderate" controls, such as those found currently under New York City's rent stabilization program. . . .

> Having drawn this distinction between rigid and moderate controls, let me examine the several steps in Professor Muth's argument. First, his [p*812] keystone assumption, the failure of controlled rents to keep abreast of other prices, is unsupported by the available data. What the data show is that throughout post-war America, nominal rentals have lagged behind other prices, *without regard* to the presence of rent controls. . . .
>
> Second, Professor Muth does not develop a clear relationship between the imposition of rent control and the increase in conversion of rental units to condominiums and cooperatives. . . .
>
> Third, Professor Muth argues that rent controls inevitably lead to disinvestment and depletion of the housing stock. . . . Those who cast the blame upon rent controls must indicate why cities like Newark, Baltimore, Cleveland, and Detroit, which have been free of controls since World War II, suffer as badly from housing disinvestment as does New York City.
>
> Fourth, I believe an underground economy does exist with respect to New York City's controlled units. . . . Even if the presence of an underground economy is conceded, that does not advance Professor Muth's case against rent controls unless he can also demonstrate that such controls produce a housing shortage. . . .
>
> Fifth, during the past two decades, the size of newly built apartment projects has risen steadily. I think it follows from this that the ownership of rental units has become more concentrated. Concentration, I believe, usually denotes wealth, indicating that owners as a group are more affluent than their tenants. This suggests that rent controls, insofar as they redirect wealth from owners to tenants, may not be distributionally neutral. . . .

Berger, *Commentary on Redistribution of Income Through Regulation of Housing*, *id*. at 733, 734–37. This produced the following exchange between them:

> BERGER: . . . I know of no definitive study that concludes that rent regulations are responsible for housing abandonment. If no definitive study reaches that conclusion, it seem to me that it is erroneous for any economist, including yourself, to argue that there is a connection between rent regulation and abandonment.
>
> MUTH: I don't think that is the case at all. Economics is not like sociology. Sociology is a collection of studies on different topics. There is no sociology on topics in which intensive empirical studies have not been done. On the other hand, economics does have a body of theory which is applicable to a wide range of phenomena. An economist can say, with a fair degree of certainty in some cases, that such and such is the likely cause of such and such action even though there has not yet been a definitive empirical study. . . .

Fishel (ed.), *Panel Discussion: Redistribution and Regulation of Housing*, *id*. at 767, 772–73. The entire *Emory* symposium is well worth reading. For a recent review of the economic arguments, see Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV.L.REV. 1835 (1988).

5. In Fisher v. City of Berkeley, 475 U.S. 260 (1986), the appellants attempted to convert some of these economic arguments into legal arguments by contending that Berkeley's adoption of rent control by popular initiative was pre-empted by the Sherman Anti-Trust Act's prohibition on price-fixing. The Court rejected the argument by a vote of eight justices to one. In Yee v. City of Escondido, 503 U.S. 519 (1992), p. S561, *infra*, the Court seems to have put paid to the argument that rent control is *per se* unconstitutional.

6. The principal case is discussed in Clarke, *Rent Control and the Constitutional Ghosts and Goblins of Laissez-faire Past*, 14 U.DAYTON L.REV. 115 (1988), and noted in 12 HARV.J.L. & PUB.POL'Y 274 (1989). [p*813]

BRASCHI v. STAHL ASSOCS. CO.

Court of Appeals of New York
74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989)

TITONE, J. In this dispute over occupancy rights to a rent-controlled apartment, the central question to be resolved on this request for preliminary injunctive relief . . . is whether appellant has demonstrated a likelihood of success on the merits [citation omitted] by showing that, as a matter of law, he is entitled to seek protection from eviction under New York City Rent and Eviction Regulations 9 NYCRR 2204.6(d) . . . . That regulation provides that upon the death of a rent-control tenant, the landlord may not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family* who has been living with the tenant" (emphasis supplied). Resolution of this question requires this court to determine the meaning of the term "family" as it is used in this context. . . .

Appellant, Miguel Braschi, was living with Leslie Blanchard in a rent-controlled apartment located at 405 East 54th Street from the summer of 1975 until Blanchard's death in September of 1986. In November of 1986, respondent, Stahl Associates Company, the owner of the apartment building, served a notice to cure on appellant contending that he was a mere licensee with no right to occupy the apartment since only Blanchard was the tenant of record. In December of 1986 respondent served appellant with a notice to terminate informing appellant that he had one month to vacate the apartment and that, if the apartment was not vacated, respondent would commence summary proceedings to evict him.

Appellant then initiated an action seeking a permanent injunction and a declaration of entitlement to occupy the apartment. By order to show cause appellant then moved for a preliminary injunction, pendente lite, enjoining respondent from evicting him until a court could determine whether he was a member of Blanchard's family within the meaning of 9 NYCRR 2204.6(d). After examining the nature of the relationship between the two men, Supreme Court concluded that appellant was a "family member" within the meaning of the regulation and, accordingly, that a preliminary injunction should be issued. The court based this decision on its finding that the long-term interdependent nature of the 10–year relationship between appellant and Blanchard "fulfills any definitional criteria of the term 'family.'"

The Appellate Division reversed . . . [but] granted leave to appeal to this court, certifying the following question of law: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" We now reverse. . . .

The present dispute arises because the term "family" is not defined in the rent-control code and the legislative history is devoid of any specific reference to the noneviction provision. All that is known is the legislative purpose underlying the enactment of the rent-control laws as a whole.

Rent control was enacted to address a "serious public emergency" created by "an acute shortage in dwellings," which resulted in "speculative, unwarranted and abnormal increases in rents" (L 1946 ch 274, codified, as amended, at McKinney's Uncons Laws of NY § 8581 *et seq*). These measures were designed to regulate and control the housing market so as to "prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive [p*814] practices tending to produce threats to the public health * * * [and] to prevent uncertainty, hardship and dislocation" (*id*.). Although initially designed as an emergency measure to alleviate the housing shortage attributable to the end of World War II, "a serious public emergency continues to exist in the housing of a considerable number of persons" (*id*.). Consequently, the Legislature has found it necessary to continually reenact the rent-control laws, thereby providing continued protection to tenants.

To accomplish its goals, the Legislature recognized that not only would rents have to be controlled, but that evictions would have to be regulated and controlled as well (*id*.). Hence, section 2204.6 of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6), which authorizes the issuance of a certificate for the eviction of persons occupying a rent-controlled apartment after the death of the named tenant, provides, in subdivision (d), noneviction protection to those occupants who are either the "surviving spouse of the deceased tenant or *some other member of the deceased tenant's family* who has been living with the tenant [of record]" (emphasis supplied). The manifest intent of this section is to restrict the landowners' ability to evict a narrow class of occupants other than the tenant of record. The question presented here concerns the scope of the protections provided. Juxtaposed against this intent favoring the protection of tenants, is the over-all objective of a gradual "transition from regulation to a normal market of free bargaining between landlord and tenant" (*see, e.g*., Administrative Code of City of New York § 26–401). One way in which this goal is to be achieved is "vacancy decontrol," which automatically makes rent-control units subject to the less rigorous provisions of rent stabilization upon the termination of the rent-control tenancy (9 NYCRR 2520.11[a]; 2521.1[a][1]).

Emphasizing the latter objective, respondent argues that the term "family member" as used in 9 NYCRR 2204.6(d) should be construed, consistent with this State's intestacy laws, to mean relationships of blood, consanguinity and adoption in order to effectuate the over-all goal of orderly succession to real property. Under this interpretation, only those entitled to inherit under the laws of intestacy would be afforded noneviction protection (*see*, EPTL 4–1.1). Further, as did the Appellate Division, respondent relies on our decision in *Matter of Robert Paul P*. (63 NY2d 233), arguing that since the relationship between appellant and Blanchard has not been accorded legal status by the Legislature, it is not entitled to the protections of section 2204.6(d), which, according to the Appellate Division, applies only to "family members within traditional, legally recognized familial relationships" (143 AD2d 44, 45). Finally, respondent contends that our construction of the term "family member" should be guided by the recently enacted noneviction provision of the Rent Stabilization Code (9 NYCRR 2523.5[a], [b][1], [2]), which was passed in response to our decision in *Sullivan v Brevard Assocs*. (66 NY2d 489), and specifically enumerates the individuals who are entitled to noneviction protection under the listed circumstances (9 NYCRR 2520.6[o]).

However, as we have continually noted, the rent-stabilization system is different from the rent-control system in that the former is a less onerous burden on the property owner, and thus the provisions of one cannot simply be imported into the other (*Sullivan v Brevard Assocs*., 66 NY2d 489, 494, *supra*; *see, 8200 Realty Corp. v Lindsay*, 27 NY2d 124, 136–137). Respondent's reliance on *Matter of Robert Paul P*. (*supra*) is also misplaced, since that case, which held that one adult cannot adopt another where none of the incidents of a filial relationship is evidenced or even remotely intended, was [p*815] based solely on the purposes of the adoption laws (*see*, Domestic Relations Law § 110) and has no bearing on the proper interpretation of a provision in the rent-control laws.

We also reject respondent's argument that the purpose of the noneviction provision of the rent-control laws is to control the orderly succession to real property in a manner similar to that which occurs under our State's intestacy laws (EPTL 4–1.1, 4–1.2). The noneviction provision does not concern succession to real property but rather is a means of protecting a certain class of occupants from the sudden loss of their homes. The regulation does not create an alienable property right that could be sold, assigned or otherwise disposed of and, hence, need not be construed as coextensive with the intestacy laws. Moreover, such a construction would be inconsistent with the purposes of the rent-control system as a whole, since it would afford protection to distant blood relatives who actually had but a superficial relationship with the deceased tenant while denying that protection to unmarried lifetime partners.

Finally, the dissent's reliance on *Hudson View Props. v Weiss* (59 NY2d 733) is misplaced. In that case we permitted the eviction of an unrelated occupant from a rent-controlled apartment under a lease explicitly restricting occupancy to "immediate family". However, the tenant in *Hudson View* conceded "that an individual not part of her immediate family" occupied the apartment (*id*., at 735), and, thus, the sole question before us was whether enforcement of the lease provision was violative of the State or City Human Rights Law. Whether respondent tenant was, in fact, an "immediate family" member was neither specifically addressed nor implicitly answered . . . .

Contrary to all of these arguments, we conclude that the term family, as used in 9 NYCRR 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units (*see also*, *829 Seventh Ave. Co. v Reider*, 67 NY2d 930, 931–932 [interpreting 9 NYCRR 2204.6(d)'s additional "living with" requirement to mean living with the named tenant "in a *family unit*, which in turn connotes an arrangement, whatever its duration, bearing some indicia of permanence or continuity" (emphasis supplied)]).[1] In fact, Webster's Dictionary defines "family" *first* as "a group of people united by certain convictions or common affiliation" (Webster's Ninth New Collegiate Dictionary 448 [1984]; [further citations omitted]). Hence, it is reasonable to conclude that, in using the term "family," the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics. Appellant Braschi should therefore be afforded the opportunity to prove that he and Blanchard had such a household. [p*816]

This definition of "family" is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction.[2] This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates (*see*, Real Property Law § 235–f; [further citation omitted]) or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death.[3]

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[1] Although the dissent suggests that our interpretation of "family" indefinitely expands the protections provided by section 2204.6(d) . . ., its own proposed standard—legally recognized relationships based on blood, marriage or adoption—may cast an even wider net, since the number of blood relations an individual has will usually exceed the number of people who would qualify by our standard.

[2] We note, however, that the definition of family that we adopt here for purposes of the noneviction protection of the rent-control laws is completely unrelated to the concept of "functional family," as that term has developed under this court's decisions in the context of zoning ordinances [citations omitted]. Those decisions focus on a locality's power to use its zoning powers in such a way as to impinge upon an individual's ability to live under the same roof with another individual. They have absolutely no bearing on the scope of noneviction protection provided by section 2204.6(d).

[3] Also unpersuasive is the dissent's interpretation of the "roommate" law which was passed in response to our decision in *Hudson View Props. v Weiss* (59 NY2d 733). That statute allows roommates to live with

The determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services [citations omitted]. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control. Appellant's situation provides an example of how the rule should be applied.

Appellant and Blanchard lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men's families were aware of the nature of the relationship, and they regularly visited each other's families and attended family functions together, as a couple. Even today, appellant continues to maintain a relationship with Blanchard's niece, who considers him an uncle.

In addition to their interwoven social lives, appellant clearly considered the apartment his home. He lists the apartment as his address on his driver's license and passport, and receives all his mail at the apartment address. Moreover, appellant's tenancy was known to the building's superintendent and doormen, who viewed the two men as a couple. [p*817]

Financially, the two men shared all obligations including a household budget. The two were authorized signatories of three safe-deposit boxes, they maintained joint checking and savings accounts, and joint credit cards. In fact, rent was often paid with a check from their joint checking account. Additionally, Blanchard executed a power of attorney in appellant's favor so that appellant could make necessary decisions—financial, medical and personal—for him during his illness. Finally, appellant was the named beneficiary of Blanchard's life insurance policy, as well as the primary legatee and coexecutor of Blanchard's estate. Hence, a court examining these facts could reasonably conclude that these men were much more than mere roommates.

Inasmuch as this case is before us on a certified question, we conclude only that appellant has demonstrated a likelihood of success on the merits, in that he is not excluded, as a matter of law, from seeking noneviction protection. Since all remaining issues are beyond this court's scope of review, we remit this case to the Appellate Division so that it may exercise its discretionary powers in accordance with this decision.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to that court for a consideration of undetermined questions. The certified question should be answered in the negative.

BELLACOSA, J. (concurring). My vote to reverse and remit rests on a narrower view of what must be decided in this case than the plurality and dissenting opinions deem necessary. . . .

The application of the governing word and statute to reach a decision in this case can be accomplished on a narrow and legitimate jurisprudential track. The enacting body has selected an unqualified word for a socially remedial statute, intended as a protection against one of the

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the named tenant by making lease provisions to the contrary void as against public policy (Real Property Law § 235–f [2]). The law also provides that "occupant's" (roommates) do not automatically acquire "any right to continued occupancy in the event that the tenant vacates the premises" (§ 235–f[6]). Occupant is defined as "a person, other than a tenant or a member of a tenant's immediate family" (§ 235–f[1][b]). However, contrary to the dissent's assumption that this law contemplates a distinction between related and unrelated individuals, no such distinction is apparent from the Legislature's unexplained use of the term "immediate family."

harshest decrees known to the law—eviction from one's home. Traditionally, in such circumstances, generous construction is favored. . . . The best guidance available to the regulatory agency for correctly applying the rule in such circumstances is that it would be irrational not to include this petitioner and it is a more reasonable reflection of the intention behind the regulation to protect a person such as petitioner as within the regulation's class of "family". In that respect, he qualifies as a tenant in fact for purposes of the interlocking provisions and policies of the rent-control law. . . .

The reasons for my position in this case are as plain as the inappropriate criticism of the dissent that I have engaged in ipse dixit decision making. It should not be that difficult to appreciate my view that no more need be decided or said in this case under the traditional discipline of the judicial process. Interstitial adjudication, when a court cannot institutionally fashion a majoritarian rule of law either because it is fragmented or because it is not omnipotent, is quite respectable jurisprudence. We just do not know the answers or implications for an exponential number of varied fact situations, so we should do what courts are in the business of doing—deciding cases as best they fallibly can. Applying the unvarnished regulatory word, "family", as written, to the facts so far presented falls within a well-respected and long-accepted judicial method.

SIMONS, J. (dissenting). I would affirm. The plurality has adopted a definition of family which extends the language of the regulation well beyond the implication of the words used in it. In doing so, it has expanded the class indefinitely to include anyone who can satisfy an administrator that he or she had an emotional and financial "commitment" to the statutory tenant. Its interpretation is inconsistent with the legislative [p*818] scheme underlying rent regulation, goes well beyond the intended purposes of 9 NYCRR 2204.6(d), and produces an unworkable test that is subject to abuse. The concurring opinion fails to address the problem. It merely decides, ipse dixit, that plaintiff should win. . . .

A limited exception to the general rule that rent-controlled properties, when vacated, become subject to rent stabilization is found in section 2204.6(d). It provides that: "(d) No occupant of housing accommodations shall be evicted under this section where the occupant is either the *surviving spouse of the deceased tenant or some other member of the deceased tenant's family* who has been living with the tenant" (9 NYCRR 2204.6[d] [emphasis added]).

Occupants who come within the terms of the section obtain a new statutory rent-controlled tenancy. Those eligible are identified by the italicized phrase but nowhere in the regulations or in the rent-control statutes is the phrase or the word "family" defined. Notably, however, family is linked with spouse, a word of clearly defined legal content. Thus, one would assume that the draftsman intended family to be given its ordinary and commonly accepted meaning related in some way to customary legal relationships established by birth, marriage or adoption. The plurality, however, holds that the exception provided in the regulation includes relationships outside the traditional family. In my view, it does not. . . .

Central to any interpretation of the regulatory language is a determination of its purpose. There can be little doubt that the purpose of section 2204.6(d) was to create succession rights to a possessory interest in real property where the tenant of record has died or vacated the apartment [citation omitted]. It creates a new tenancy for every surviving family member living with decedent at the time of death who then becomes a new statutory tenant until death or until he or she vacates the apartment. The State concerns underlying this provision include the orderly and just succession of property interests (which includes protecting a deceased's spouse and family from loss of their longtime home) and the professed State objective that there be a gradual transition from government regulation to a normal market of free bargaining between landlord and tenant. Those objectives require a weighing of the interests of certain individuals living with the tenant of record at his or her death and the interests of the landlord in regaining possession of

its property and rerenting it under the less onerous rent-stabilization laws. The interests are properly balanced if the regulation's exception is applied by using objectively verifiable relationships based on blood, marriage and adoption, as the State has historically done in the estate succession laws, family court acts and similar legislation [citation omitted]. The distinction is warranted because members of families, so defined, assume certain legal obligations to each other and to third persons, such as creditors, which are not imposed on unrelated individuals and this legal interdependency is worthy of consideration in determining which individuals are entitled to succeed to the interest of the statutory tenant in rent-controlled premises. Moreover, such an interpretation promotes certainty and consistency in the law and obviates the need for drawn out hearings and litigation focusing on such intangibles as the strength and duration of the relationship and the extent of the emotional and financial interdependency [citations omitted]. So limited, the regulation may be viewed as a tempered response, balancing the rights of landlords with those of the tenant. To come within that protected class, individuals must comply with State laws relating to marriage or adoption. Plaintiff cannot avail [p*819] himself of these institutions, of course, but that only points up the need for a legislative solution, not a judicial one [citations omitted].

Aside from these general considerations, the language itself suggests the regulation should be construed along traditional lines. Significantly, although the problem of unrelated persons living with tenants in rent-controlled apartments has existed for as long as rent control, there has been no effort by the State Legislature, the New York City Council or the agency charged with enforcing the statutes to define the word "family" contained in 9 NYCRR 2204.6(d) and its predecessors and we have no direct evidence of the term's intended scope. The plurality's response to this problem is to turn to the dictionary and select one definition, from the several found there, which gives the regulation the desired expansive construction. I would search for the intended meaning by looking at what the Legislature and the Division of Housing and Community Renewal (DHCR), the agency charged with implementing rent control, have done in related areas. These sources produce persuasive evidence that both bodies intend the word family to be interpreted in the traditional sense.

The legislative view may be found in the "roommate" law enacted in 1983 (Real Property Law § 235–f, L 1983, ch 403). That statute granted rights to persons living with, but unrelated to, the tenant of record. The statute was a response to our unanimous decision in *Hudson View Props. v Weiss* (59 NY2d 733 [further citation omitted]). In *Hudson View* the landlord, by a provision in the lease, limited occupancy to the tenant of record and the tenant's "immediate family". When the landlord tried to evict the unmarried heterosexual partner of the named tenant of record, she defended the proceeding by claiming that the restrictive covenant in the lease violated provisions of the State and City Human Rights Laws prohibiting discrimination on the basis of marital status. We held that the exclusion had nothing to do with the tenants' unmarried status but depended on the lease's restriction of occupancy to the tenant and the tenant's "immediate family". Implicitly, we decided that the term "immediate family" did not include individuals who were unrelated by blood, marriage or adoption, notwithstanding "the close and loving relationship" of the parties.

The Legislature's response to *Weiss* was measured. It enacted Real Property Law § 235–f(3), (4) which provides that occupants of rent-controlled accommodations, whether related to the tenant of record or not, can continue living in rent-controlled and rent-stabilized apartments *as long as the tenant of record continues to reside there*. Lease provisions to the contrary are rendered void as against public policy (subd [2]). Significantly, the statute provides that no unrelated occupant "shall * * * acquire any right to continued occupancy in the event the tenant vacates the premises or acquire any other rights of tenancy" (subd [6]). Read against this background, the statute is evidence the Legislature does not contemplate that individuals unrelated to the tenant of record by blood, marriage or adoption should enjoy a right to remain in

rent-controlled apartments after the death of the tenant (*see*, Rice, *The New Morality and Landlord-Tenant Law*, 55 NYS Bar J [No. 6] 33, 41 [postscript]). . . .

. . . [T]he rent-stabilization regulations provide under similar circumstances that the landlord must offer a renewal lease to "any member of such tenant's family * * * who has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship" (9 NYCRR 2523.5[b][1]; *see also*, 2523.5[b][2]). Family for purposes of these two provisions is defined in section 2520.6(o) as: "A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfa-[p*820]ther, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant or permanent tenant".

All the enumerated relationships are traditional, legally recognized relationships based on blood, marriage or adoption. That being so, it would be anomalous, to say the least, were we to hold that the agency, having intentionally limited succession rights in rent-stabilized accommodations to those related by blood, marriage or adoption, intended a different result for rent-controlled accommodations; especially so when it is recognized that rent control was intended to give way to rent stabilization and that the broader the definition of family adopted, the longer rent-controlled tenancies will be perpetuated by sequentially created family members entitled to new tenancies. These expressions by the Legislature and the DHCR are far more probative of the regulation's intended meaning than the majority's selective use of a favored dictionary definition.

Finally, there are serious practical problems in adopting the plurality's interpretation of the statute. Any determination of rights under it would require first a determination of whether protection should be accorded the relationship (i.e., unmarrieds, nonadopted occupants, etc.) and then a subjective determination in each case of whether the relationship was genuine, and entitled to the protection of the law, or expedient, and an attempt to take advantage of the law. . . .

By way of contrast, a construction of the regulation limited to those related to the tenant by blood, marriage or adoption provides an objective basis for determining who is entitled to succeed to the premises. That definition is not, contrary to the claim of the plurality, "inconsistent with the purposes of the rent-control system" and it would not confer the benefit of the exception on "distant blood relatives" with only superficial relationships to the deceased (pluriality opn, . . .). Certainly it does not "cast an even wider net" than does the plurality's definition (plurality opn, . . .). To qualify, occupants must not only be related to the tenant but must also "[have] been living with the tenant" (*see*, 22 NYCRR 2204.6[d]). . . .

Rent control generally and section 2204.6, in particular, are in substantial derogation of property owners' rights. The court should not reach out and devise an expansive definition in this policy-laden area based upon limited experience and knowledge of the problems. The evidence available suggests that such a definition was not intended and that the ordinary and popular meaning of family in the traditional sense should be applied. If that construction is not favored, the Legislature or the agency can alter it as they did after our decisions in *Hudson View Props. v Weiss* (59 NY2d 733, *supra*) and *Sullivan v Brevard Assocs.* (66 NY2d 489, *supra*).

Accordingly, I would affirm the order of the Appellate Division.

KAYE and ALEXANDER, JJ., concur with TITONE, J; BELLACOSA, J., concurs in a separate opinion; SIMONS, J., dissents and votes to affirm in another opinion in which HANCOCK, J., concurs; WACHTLER, C.J., taking no part.

Order reversed, with costs, and case remitted to the Appellate Division, First Department, for consideration of undetermined questions. Certified question answered in the negative.

Notes and Questions

1. In Sullivan v. Brevard Assocs., 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96 (1985), cited in the principal case, a unanimous court held that [p*821] under the Rent Stabilization Law (as opposed to the Rent Control Law), a landlord need offer a renewal lease only to a tenant of record and is not obliged to offer a renewal lease to a relative (sister in this case) of the tenant who occupies the apartment with the tenant during a portion of the term. The *Sullivan* case is distinguished in the principal case. Is the distinction persuasive?

2. Despite the court's attempt to distinguish other situations in which definitions of "family" are called for, the principal case has a number of obvious issues in common with such cases as *Beal v. Beal*, *supra*, p. S295, and *Moore v. City of East Cleveland*, *infra*, p. S519 (which, in turn, raises issues quite similar to those distinguished in the court's footnote 2, *supra*, p. S368). How should courts resolve such issues? Is the fundamental difference among the three opinions in the principal case a difference in method or in the way in which the judges view the material that they find employing a common method?

3. While the principal case is a case about rent control, it is also a case about entitlements. In this regard it raises issues that we will consider at a more theoretical level in Chapter 7, in particular, the *Bentham*, *Demsetz*, and *Reich* excerpts, *infra*, pp. S613, S614, S631.

4. The principal case is noted in 35 VILL. L.REV. 361 (1990) and 25 HARV.C.R.-C.L.L.REV. 183 (1990).

B. PUBLICLY-ASSISTED RENTAL HOUSING

1. Introduction—Justification for Direct Government Financial Intervention in Housing Markets

The primary means of direct government intervention in housing markets is through spending money. Money may be spent on the acquisition of land through use of the eminent domain power and on building government-owned housing on that land, or on a bewildering variety of aids and subsidies to private individuals or corporations, including mortgage guarantees, rent supplements, direct loans or grants. Some programs are designed to facilitate home ownership. Others are directed toward rental markets. This summary text will focus on the latter.

The justification for financial intervention has varied with the particular program under discussion, the time at which it was inaugurated and the political persuasion of the supporter. Of all the government housing programs those designed to aid low income families have had the most diverse justifications. To some they are simply a method of income redistribution. To others there is a kind of moral imperative attached to housing itself. If society can afford adequate housing for all, then no one should live in anything less. Perhaps the most common justification, however, is that slum housing is the cause of a variety of social ills, ranging from crime to the high cost of providing public services in slum areas, which it is in the legitimate interest of society to have eliminated. Since the private market seems incapable of eradicating slum housing, the government is justified in intervening.

The last justification was relied upon by the courts in the 1930's to sustain use of the eminent domain power by public housing authorities. *See* McDougal & Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 47–48 (1942). There clearly is a correlative relationship between inadequate housing and (1) crime and juvenile delin-[p*822]quency rates, (2) disease and relatively high infant mortality, and (3) higher costs for public services such as police and fire protection. *See* Special Project, *Public Housing*, 22 VAND.L.REV. 875, 880–82 (1969). But the causal relationship remains unproven. *See, e.g.*, Dean, *The Myths of Housing Reform*, 14 AM. SOCIOLOGICAL REV. 281 (1949); D. WILNER, R.

WALKLEY, T. PINKERTON & M. TAYBACK, THE HOUSING ENVIRONMENT AND FAMILY LIFE: A LONGITUDINAL STUDY OF THE EFFECTS OF HOUSING ON MORBIDITY AND MENTAL HEALTH (1962). Today, the lack of proof of this causal relationship may seem irrelevant. The eminent domain power has been considerably expanded since the 1930's. Moreover, many public housing programs rest on the broader power of the Congress "To lay and collect Taxes . . . and provide for the . . . general Welfare of the United States . . . ." U.S. CONST.art.I,§ 8, cl.1. But doubts about the "social ills" justification may help explain, in political terms, why public housing programs have often been inadequately funded.

Today it is commonly argued that decent housing is a legitimate end in itself. *See, e.g.*, Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV.C.R.-C.L.L.REV. 207 (1970). It has seemed clear that private capital is unlikely ever to provide adequate housing for low-income groups. Building and financing costs are high, pushing rents on new units beyond what many low-income families can, or choose, to pay. Low-income housing is costly to maintain, and turnover, vandalism, tenant neglect, and the difficulty of collecting rents add to the costs. Thus low-income housing involves greater risks, higher costs, and lower returns than other comparable investments. These factors, coupled with the stigma of owning low-income housing, have much to do with the almost total lack of investment in low-income housing, without the aid of government subsidy, since World War II. *See generally* Note, *Government Programs to Encourage Private Investment in Low Income Housing*, 81 HARV.L.REV. 1295 (1968).

2. Federal "Public Housing Programs"—A Brief Description

A complete description of federal public housing programs would require more pages than is justified in a basic property course. What follows is a general overview of the more significant federal programs. A variety of methods have been used by the government to assist in the provision of low-income housing. Project subsidies are tied to particular housing projects. They may take the form of direct construction or financing assistance to developers, as well as rent subsidies for those renting in that project. Project subsidies may be the best available method of quickly increasing housing production. Housing allowances are paid to low-income families and may be expended for housing anywhere by those families. Both techniques have been utilized. In addition, the government can, and does, provide other forms of cash payments which are not restricted to expenditure for housing. Such payments cannot be characterized as housing programs. For an evaluation of each of these types of assistance, *see* REPORT OF THE PRESIDENT'S COMM'N ON HOUSING (1982).

Basic Public Housing. This is the program that most people mean when they refer to "public housing." It is the oldest of the federal programs of housing assistance for low-income families, having been initiated by the United States Housing Act of 1937, ch.896, 50 Stat. 888 (1937), *as amended*, 42 U.S.C.A. § 1437–1437u (West 1978 & Supp.1991). Despite the proliferation of other programs, the basic public housing program still has the largest number of units to its credit. The program is currently administered [p*823] through the Department of Housing and Urban Development (HUD). But HUD does not construct or operate basic public housing projects. It funds the construction, or purchase and rehabilitation costs, of projects owned and managed by local housing authorities. Such authorities are a creation of local government units, pursuant to state enabling legislation.

Specific public housing projects must be approved by HUD prior to construction. Once such approval is obtained, HUD executes an annual contributions contract with the local authority, pursuant to which HUD agrees to pay the capital costs of the program in annual contributions for a period of up to forty years. When the project nears completion, the authority issues bonds to finance the project, backed by the contributions contract. At the inception of the program, the authority was required to meet operation and maintenance expenses. Today, however, HUD is

also required to provide additional subsidies designed to hold each tenant's rent and utility charges to a maximum of 30 percent of his or her income.

Primary management responsibility for each project rests in the local authority. It has the responsibility for operation and maintenance of the project and for determining who is to be allowed to live there, what the rent levels shall be, and who is to be evicted, all subject to the supervision of HUD. For a more detailed description of the basic housing program, see Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L.REV. 878, 894–99 (1990), and sources cited.

Beginning in the late 1960's, and up to the present time, conventional public housing has come under severe attack. Government requirements seemed to produce higher costs and greater delay in construction than are experienced in the private sector. Various forms of graft and corruption have been reported. Most projects in major cities were high-rise structures, often built on downtown urban renewal land and segregated from the rest of the community. Many viewed "the projects" as singularly unattractive places to live, places characterized by deteriorating building quality, overly bureaucratic management, overcrowding, vandalism and crime. *See, e.g.*, L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION (1968). Numerous explanations have been offered, ranging from inadequate funding (attributed in part to the majority of the middle class's unwillingness to bear additional costs) through mismanagement, to the confusing division of responsibility between federal and local governments. *See* E. MEEHAN, PUBLIC HOUSING POLICY 7–11, 169–81 (1975). Some would argue that these criticisms were exaggerated. *See* Schill, *supra*, at 897–99, and sources cited. Whatever the reasons for the perceived failures in the public housing program, other types of housing assistance were put in place, as discussed below. Despite the fact the relatively little basic public housing has been constructed in the last generation, it remains, however, a large program, with over 1.3 million units of housing, housing 3.5 million people. Schill, *supra*, at 897.

The "Section 8" New Construction and Existing Housing Programs. Enacted as Section 8 of the Housing Community and Development Act of 1974 (*as amended*, 42 U.S.C.A. § 1437f (West 1978 & Supp.1991)), this program is designed directly to subsidize rental by low-income families of units in privately-owned structures. Rental assistance payments, defined as the difference between fair market value of the rented unit and a stated percentage of the tenant's income (no more than 30%), are made to the landlord. There are two sub-parts to Section 8, one dealing with the rental of privately owned existing housing, the other with rental in new or substantially rehabilitated housing. [p*824]

Under the existing housing program, which is by far the larger of the two programs, HUD annually contracts with the local housing authority which in turn contracts with qualified landlords to make assistance payments, under the formula stated above. The local authority prescribes tenant eligibility standards (in terms of income etc.) must approve the lease, inspects the premises to insure it meets physical standards, and has the sole authority to evict. Rental must be at or below a HUD-prescribed maximum.

Under the new construction or substantial rehabilitation program, public agencies or private developers agree with HUD to build or rehabilitate structures, reserving a certain percentage of the units for rental to a mix of qualified lower and very-low income tenants. The units must meet standards prescribed by HUD. HUD contracts to make the rental assistance payments (using formulae similar to those used under the existing program) directly to the landlord for units rented to such low-income tenants. Unlike the existing housing program, the landlord assumes all of conventional responsibility, including autonomy in the selection and eviction of tenants.

The existing housing program has met with substantial success, with in excess of 874,000 households receiving assistance by 1987. A somewhat different Freestanding Voucher Program

aided 82,000 households. (The voucher program differs from the certificate program in that the recipient may pay more than 30% of income for rent and will receive the subsidy up to the federally-prescribed maximum rent even if he or she manages to find and apartment for less than that amount.)

For fuller descriptions of the Section 8 programs, *see* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 13.9 (1980 & Supp.1990); Schill, *supra*, at 899–900 and sources cited.