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## Rent Regulations under the Police Power

Alan W. Boyd  
*University of Michigan*

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## RENT REGULATION UNDER THE POLICE POWER

CONDITIONS resulting from the widespread housing shortage caused by the cessation of building during the war have given rise to legislation which must seem startling indeed to much of the legal talent surviving from a generation ago. The outstanding example is to be found in the New York laws which so far have succeeded admirably in eluding the constitutional pitfalls relied upon to nullify them. Three provisions have borne the brunt of the attack. The first prevents the recovery of an unreasonable rent in an action at law, and places the burden of showing reasonableness upon the landlord.<sup>1</sup> Another suspends for two years the landlord's right to maintain summary proceedings for dispossession except in four instances.<sup>2</sup> These are: (a) where the tenant is objectionable, (b) where the landlord, being a natural person, desires the premises for his own personal use, (c) where the landlord desires to construct a new building on the site of the old one, and (d) where the building has been sold to a cooperative apartment company. A third provision suspends the right to maintain ejectment in the same manner.<sup>3</sup> In general, these provisions have been sustained,<sup>4</sup> but the last was declared invalid by the Supreme Court, Appellate Division of the First Department, in *Guttag v. Shatzkin*,<sup>5</sup> chiefly on the ground that it impaired the obligation of existing contracts in that it was the final enactment of the legislature culminating in the removal of every remedy, excepting in the particular instances stated, of an owner for the recovery of the possession of real property occupied by tenants whose terms had expired and who were under contract obligations expressed in the

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<sup>1</sup> C. 944 amending c. 136 of the April Laws.

<sup>2</sup> C. 942. Also c. 945 (unreasonableness a defense in action for summary eviction for non-payment of rent).

<sup>3</sup> C. 947.

<sup>4</sup> *Ullman Realty Co. v. Tamur*, 185 N. Y. S. 612; *Levy Leasing Co. v. Siegel*, 186 N. Y. S. 5; *People v. Fagan*, 186 N. Y. S. 24; *People v. La Fetra*, 186 N. Y. S. 58; *Brown Holding Co. v. Feldman* (D. C., S. D., N. Y., Dec. 15, 1920),

<sup>5</sup> 186 N. Y. S. 47 (Dec. 24, 1920).

leases or implied by law to vacate the premises and surrender possession thereof to their landlord.

The evils sought to be remedied are the charging of extortionate rentals made possible by the shortage, coupled with the fact that shelter is a necessity, and the impending wholesale evictions due to the inability of thousands of families to pay increased rentals.<sup>6</sup> In preventing the recovery of unreasonable rentals the legislature might seem to have achieved all that is desired, inasmuch as the landlord no longer has an object in exchanging one satisfactory tenant for another. Practically, however, it is obvious that the provision is futile so long as the landlord retains a menacing weapon over the head of the tenant such as the possibility of eviction without shelter available elsewhere. The net result of the legislation is to prevent the landlord from making an arbitrary change of tenants from which he can derive no lawful gain. If he desires to continue to use his property in the business of renting, and has a satisfactory tenant paying a reasonable rental, he has all that he is entitled to. This should be borne in mind throughout.

The chief constitutional objection, of course, is that the landlord is deprived of his property without "due process." The answer is that the business of renting houses is affected "with a public interest," and therefore subject to regulation under the police power. If the regulation of the housing business is a proper exercise of the police power, there remains the question of whether the means adopted are reasonably related to the end sought to be accomplished.<sup>7</sup> It is not proposed to enter into any extended discussion as to when businesses or property may be said to be so affected, but it is submitted that the principle of *Munn v. Illinois*<sup>8</sup> has been extended to nothing more closely analogous than the business of furnishing shelter to human beings. Whether the test applied is to be the peculiar possibilities of the particular industry as an instrument of oppression under existing economic conditions,<sup>9</sup> or what amounts

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<sup>6</sup> Message of the Governor (Sept. 20, 1920); *Levy Leasing Co. v. Siegel*, 186 N. Y. S. 5; Report of the Joint Legislative Committee on Housing, Sept. 20, 1920.

<sup>7</sup> *Ullman Realty Co. v. Tamur*, 185 N. Y. S. 612.

<sup>8</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>9</sup> 19 MICH. L. REV. 74.

to the same thing, perhaps, whether the social interest is sufficiently strong to counterbalance the interference with individual interests,<sup>10</sup> the business of renting seems a proper one for regulation. And the means are clearly reasonably related to the particular ends sought to be accomplished, despite the objection that they do not add one square foot to the supply of dwelling accommodations.<sup>11</sup>

A recent writer presents an interesting but, it is believed, an unsound view as to the nature of the New York laws and the basis on which they rest, or should be rested.<sup>12</sup> The theory advanced is that an appeal to the police power is not only unnecessary but improper. The provision preventing the recovery of an unreasonable rental is merely declaratory of an ancient power of courts of equity not dependent on any statute, namely, the power to set aside contracts shown to have been procured by duress. The provision suspending the right to maintain summary proceedings is justified on the ground that there is no vested right in a statutory remedy, and that the legislature can take it away altogether, if it so desires, by virtue of its ordinary power to legislate without any reference to police power. The provision suspending the right to maintain ejectment is apparently abandoned as hopeless. The shortage, together with the fact that housing is necessary, is relied upon as constituting such duress as to make the lease voidable. It works out thus: The landlord brings his action for the recovery of rent, and the tenant interposes the equitable defense that the contract was procured by duress. The contract is then set aside and the landlord falls back upon the implied contract and recovers the reasonable value for use and occupation. The flaw in the theory seems to be that there is no duress of the sort for which equity gives relief. True, the doctrine of duress has been considerably extended and some courts have used language indicating that all that is necessary is that the freedom of will of the contracting party is overcome so that there is no real meeting of minds.<sup>13</sup> One element of the early law still persists, however, and that is that the pressure must be

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<sup>10</sup> 33 HARV. L. REV. 838.

<sup>11</sup> Judge Blackmar (dissenting) in *People v. Fagan*, 186 N. Y. S. 24, 36 (Dec. 7, 1920).

<sup>12</sup> "The New York Landlord and Tenant Laws," VI CORN. L. QUART. I.

<sup>13</sup> 15 MICH. L. REV. 228.

wrongful, and it is not sufficient that a party is constrained to enter into a transaction by force of circumstances for which the other party is not responsible.<sup>14</sup> This theory would take care of the objection that preëxisting contracts are impaired, in rather neat fashion, but the writer is led to an odd conclusion as to the validity of the legislation if applied to subsequent contracts. He says that if it is held to apply to these a premium is placed on fraudulent conduct on the part of the tenant, in that he may accept any terms offered by the landlord for the sake of remaining in possession, knowing that the contract is presumptively void if the rent is higher than that of the year previous. It is rather difficult to perceive that any unconscionable advantage is taken by the tenant under the circumstances. He also concludes that it is invalid if applied to subsequent leases as an unconstitutional interference with private property, because it prevents the landlord from leasing his property at its market value. Obviously, this begs the whole question and is scarcely consistent with the duress theory. The only possible basis on which the legislation can be sustained would seem to be the police power of the state.<sup>15</sup>

Although the housing situation has resulted in a mass of legislation touching various aspects of it,<sup>16</sup> there seems to have been almost no litigation outside of New York except in the District of Columbia. In May of 1918, Congress passed the Saulsbury resolution,<sup>17</sup> which was held unconstitutional in *Willson v. McDonnell*,<sup>18</sup> This prohibited eviction so long as the tenant paid the rent and was satisfactory, in effect prolonging existing leases for the duration of the act. This was held invalid on the ground that as it affected only existing leases it discriminated in favor of landlords whose property was then unincumbered. The court refused to consider the question as to whether or not the business of renting had become

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<sup>14</sup> WILLISTON ON CONTRACTS, Vol. III, pp. 2833, 2836.

<sup>15</sup> The cases suggest no other basis. The situation has been said to be such as to warrant the exercise of the power of eminent domain. *Ullman Realty Co. v. Tamur*, 185 N. Y. S. 612; *Willson v. McDonnell*, 265 Fed. 432. Cf. Opinion of the Justices, 211 Mass. 624.

<sup>16</sup> See "Rent Regulation and the Housing Problem" in the Journal issued by the American Bar Association, January, 1921.

<sup>17</sup> 40 STAT. AT L. 593.

<sup>18</sup> *Willson v. McDonnell*, 265 Fed. 432.

"affected with a public interest." In October, 1919, Congress adopted the Ball Rent Law,<sup>19</sup> which was held unconstitutional in *Hirsch v. Block*.<sup>20</sup> The provisions covered much the same ground as the New York laws except that a rent commission was provided for, with power to regulate rents and service, whereas what amounts to regulation of rates in New York is left to the courts. A New York case<sup>21</sup> distinguishes the Ball law on the grounds that it was wider in scope than the New York laws and took away the right of trial by jury in actions to recover land in violation of the Seventh Amendment to the Federal Constitution. Whatever merit there may be in such distinctions, it is clear that the Court of Appeals for the District of Columbia would not uphold the New York legislation nor any other. The court says in part:

"Plaintiff had a vested estate and a reversion in fee in the property in question to come into possession on January 1, 1920. \* \* \* The right of reversion is a property right of which the plaintiff cannot be divested except by due process of law. \* \* \* Nor does this amount to the taking of private property for public use. Plaintiff and defendant are private citizens, engaged in a private business. \* \* \* The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service where the owner has devoted the business affected to a public use. \* \* \* In no case where the legislative power to fix rates has been upheld has the power to continue existing contracts in force after the time fixed by the parties for their termination, or to require the owner of the property to continue the business been sustained. \* \* \* A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power."

Contrast with this the much-quoted recent opinion of Judge

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<sup>19</sup> BALL RENT LAW, 41 STAT. AT L. 298.

<sup>20</sup> *Hirsch v. Block*, 267 Fed. 614. Cf. dissenting opinion of Chief Justice Smyth.

<sup>21</sup> *Ullman Realty Co. v. Tamur*, 185 N. Y. S. 612.

Baker in the case of the *American Coal Mining Company v. The Special Coal and Food Commission of Indiana*.<sup>22</sup>

"Are the sovereign people helpless in such a situation? (oppression by extortionate rates for fuel and housing made possible by shortages). They certainly are if the Fourteenth Amendment stopped the narrowing of these various circles within which persons theretofore might move freely with respect to life, liberty and property. But otherwise not. The police power is continuous. It has always existed, and necessarily must always exist. And it is as wide as any conceivable sovereignty can be."

The District of Columbia court evidently became so engrossed in a study of form that substance was completely ignored.

The obvious advantages of creating a rent commission to regulate housing conditions generally, and particularly rates, led to a proposed statute by Professor Wigmore in a recent article in the *ILLINOIS LAW REVIEW*.<sup>23</sup> Professor Wigmore rightly contends that a court is a poor piece of machinery for rate-making, especially since, theoretically, the effect of its decision must be confined to the case before it. The proposed statute applies only to future leases and provides no remedy for the wholesale evictions against which the New York laws have attempted to guard, other than to take away any substantial reason the landlord might have for making a change by limiting his return for the future to a reasonable amount. The author makes three claims of superiority for his measure which merit attention: First, that it is constitutional. This is conceded, the Court of Appeals for the District of Columbia notwithstanding. But it is yet to be demonstrated that the New York legislation is less meritorious in this respect. Second, that it is fair in that it imposes no arbitrary rule, but enables discrimination to be made between the grasping profiteer and the meritorious landlord. If each gets what he is justly entitled to and no more—i. e., a reasonable return—it is hard to see any possibility of such discrimination, and it is equally difficult to see how rentals could be regulated on

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<sup>22</sup>268 Fed. 563 (Sept. 6, 1920).

<sup>23</sup>"A Constitutional Way to Reach the Housing Profiteer," 15 *ILL. L. Rev.* 359.

any other basis. The third advantage, that a commission is superior to throwing the whole burden on the courts, may be conceded. Legislation which leaves the landlord able to dislodge a satisfactory tenant, however, would scarcely seem sufficient to counterbalance the obvious objections on the policy side to any and all regulation which will be discussed later.

Aside from the taking of property without due process, there is but one other constitutional objection to the New York legislation which deserves mention, which is that preëxisting contracts are impaired in violation of the Federal Constitution. This contention is supported in the February number of the HARVARD LAW REVIEW<sup>24</sup> and by the Supreme Court, Appellate Division of the First Department, in *Guttag v. Schatzkin*,<sup>25</sup> previously referred to. This view is believed to be untenable. It is said that in every case in which the impairment of existing contracts has been held valid the explanation is to be found in the fact that the contract apparently impaired has been that of a state purporting to bargain away a part of its sovereignty, in which case the contract is void *ab initio*, or that of a public utility in derogation of its common law duty to render a reasonable service to all, which is at least voidable. But it is conceded that a general law which incidentally impairs the obligation of private contracts is not for that reason invalid, and a distinction is attempted between such a law and the New York provisions on the ground that the latter attack the contract directly by taking away all remedies whereby the landlord can enforce the express or implied contract in every lease to give up possession at the end of the term. The primary purpose of the New York laws, however, is to protect the individual, not for his sake but because of the legislative finding, as expressed in the law, that in so doing public health, safety, and general welfare are best subserved.<sup>26</sup> If this is conceded, the attempted distinction is meaningless, and the law is clearly a general one which only incidentally impairs contracts between individuals.

"This power, which in its various ramifications is known

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<sup>24</sup> 34 HARV. L. REV. 426.

<sup>25</sup> *Guttag v. Schatzkin*, 186 N. Y. S. 47.

<sup>26</sup> *Levy Leasing Co. v. Siegel*, 186 N. Y. S. 5; Decision by the Court of Appeals, March 9, 1921, reversing *Guttag v. Schatzkin*.

as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."<sup>27</sup>

To the examples mentioned may be added the numerous cases where cities have passed ordinances restricting buildings of various sorts, such as frame houses, in particular districts. Preëxisting contracts are often impaired, but the ordinances are nevertheless valid.<sup>28</sup> The principle underlying these cases is indistinguishable from that which is applicable here. Why should contract rights be more sacred, where public welfare is involved, than other property rights? It is scarcely an answer to say that to hold otherwise is "going counter to the plain words of the Constitution." In reversing *Gutttag v. Schatzkin*, the Court of Appeals of New York, in a case decided since the foregoing was written, said:

"Laws directly nullifying some essential part of private contracts are rare, and are not lightly to be upheld by heavy and sweeping generalization on the common good, but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power."

The real distinction would seem to be between laws passed for the general welfare and those primarily for the benefit of one of

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<sup>27</sup> *Manigault v. Springs*, 199 11 3. 473.

<sup>28</sup> *Salem v. Maynes*, 123 Mass. 372, *Knoxville v. Bird*, 12 Lea. (Tenn.) 121; *New York v. Nerdje*, 68 App. Div. 370; see also *People v. Hawley*, 3 Mich. 336; *Re Ten-Hour Law for Street Ry. Corps.* (R. I.), 54 Atl. 602; *Commonwealth v. Intoxicating Liquor*, 115 Mass. 153; *Jamieson v. Indiana Nat. Gas and Oil Co.*, 128 Ind. 555.

the contracting parties.<sup>29</sup> The latter could never be justified as police power, but the former cannot be handicapped by contracts between individuals.

On March 7 an opinion was handed down by the Court of Appeals sustaining the law on all points,<sup>30</sup> and there would seem to be no doubt as to the constitutionality of the entire program. Some very serious questions of policy remain unsettled, however. Nothing is more obvious than the fact that any restrictive legislation is bound to drive capital out of the field and postpone the day when the fundamental evil, the shortage, is remedied.<sup>31</sup> Accompanying the newspaper report of the decision is the demand for repeal of the laws by the real estate associations, and the assurance that there will be no building while they remain in existence.<sup>32</sup> The choice between immediate relief and the indefinite postponement of ultimate relief, unless the state itself goes into the building business, is a most difficult one, and it remains to be seen whether the New York legislature has chosen wisely. The choice is for the legislature alone, however, not for the courts.

ALAN W. BOYD.

*University of Michigan Law School.*

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<sup>29</sup> FREUND ON POLICE POWER, pp. 583, 584.

<sup>30</sup> *New York Times*, March 9, 1921.

<sup>31</sup> "How to Meet the Housing Situation," ATLANTIC MONTHLY, March, 1921, p. 404; "Rent Regulation and the Housing Problem," from the Journal issued by the American Bar Association, January, 1921.

<sup>32</sup> *New York Times*, March 9, 1921, p. 4.