
THE DYNAMICS OF LANDLORD- TENANT LAW AND RESIDENTIAL FINANCE: THE COMPARATIVE ECONOMICS OF HOME OWNERSHIP

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I. INTRODUCTION

The British housing market has undergone a radical transformation since the First World War. Until the 1910s, Great Britain was a nation of renters. In 1914, only ten percent of British families owned their own homes.¹ The private rental sector — consisting almost exclusively of individual landlords — dominated the market, supplying housing to ninety percent of the population.

Today, Britain has one of the highest rates of owner occupancy in the world: almost seventy percent in 1990² and growing annually.³ Owner occupancy served as the cornerstone of the housing policy advanced by former Prime Minister Margaret Thatcher's Conservative Government from 1978 to 1990. Current trends in the British housing market directly reflect Thatcher's call for a "property-owning democ-

1. A.E. Holmans, *Housing Tenure in England and Wales: The Present Situation and Recent Trends*, in GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 9, at 10 (Eric J. Thompson ed., 1979).

2. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 136 (Tom Griffin ed., 1991) (reporting that rate of owner occupancy increased from 43% in 1961 to 67% in 1989). See also Wendy Travis, *Recovery Led by First-time Buyers*, THE SUNDAY TIMES (London), Feb. 23, 1992, at 29 (noting that, while the housing market has been slow during the past two years, first-time buyers seek entry-level homes).

3. Andrew Yates, *Changes Urged to Push Up Number of Homeowners*, THE SUNDAY TIMES (London), June 3, 1990, § 5, at 11 (reporting the National Housing Forum's prediction that the proportion of owner occupancy will continue to increase over coming years and the Forum's concern is that ordinary families may be priced out of the housing market).

racy.”⁴ While Prime Minister John Major has called for an increased role for housing associations in the private rental sector,⁵ he has not deviated from Thatcher’s focus on private home ownership.

Drastic changes in landlord-tenant law accompanied Britain’s transformation from a nation of renters to a nation of homeowners. English landlord-tenant law of the 1910s subjected dwelling units to the same regime of rules developed centuries before for agrarian leases. The timeworn phrase “caveat lessee” aptly described the results of that regime. Housing tenants were at their landlord’s mercy in matters relating to the habitability of the premises,⁶ security of tenure,⁷ and rental price escalations.⁸

However, beginning with emergency regulations imposed during the First World War, tenants gained valuable rights in these areas. The tide toward greater tenant rights began with wartime restrictions on landlords, and it never completely receded during subsequent decades. British rental housing became a regulated industry — indeed, a heavily regulated industry. Notwithstanding shifts in emphasis occasioned by changes in government, rental housing in the 1990s continues to function as a regulated industry rather than a private market where actors have substantial latitude in decisionmaking.

Existing scholarship amply describes the evolution of British residential landlord-tenant law,⁹ but treats the topic as a self-contained set of legal doctrine, noting only occasionally the decline in private rentals.

4. The term “property-owning democracy,” which Thatcher popularized, dates back to the 1920s. NOEL SKELTON, *CONSTRUCTIVE CONSERVATISM* 17 (1924) (“Until our educated and politically minded democracy has become predominantly a *property-owning democracy*, neither the national equilibrium nor the balance of the life of the individual will be restored.” (emphasis added)). Ironically, Winston Churchill and Anthony Eden appropriated the slogan well before Thatcher on the eve of the Labour Party’s 1946 nationalization program. See DAVID BUTLER & ANNE SLOMAN, *BRITISH POLITICAL FACTS 1900-1979*, at 248 (5th ed. 1980).

5. See Nicholas Wood, *Private Rent Plan Approved*, *THE TIMES* (London), Feb. 15, 1991, at 8 (noting Major’s recommendation that housing associations manage rental dwellings for private landlords).

6. See *infra* notes 124-25 and accompanying text for a discussion of these conditions.

7. See *infra* notes 105-09 and accompanying text for a discussion of the lack of security of tenure at common law.

8. See *infra* notes 60-62 for a discussion of private rental market pricing before the First World War.

9. See, e.g., JOHN GREVE, *PRIVATE LANDLORDS IN ENGLAND* 9-20 (Occasional Paper on Social Admin. No. 16 (1965)); HILL AND REDMAN’S *LAW OF LANDLORD AND TENANT* C1-C44 (Michael Barnes ed., 18th ed. 1992) [hereinafter HILL AND

This article attempts to place the evolution of British landlord-tenant law in a broader perspective in two respects. First, it examines the dynamic relationship between landlord-tenant law and home finance law, which until now have been perceived as discrete, unrelated bodies of doctrine. Second, it explores the interplay between those two systems of law, the markets in which they operate, and the society in which they exist. Ultimately, this article correlates the drastic changes in the British housing market with a powerful shift in the law governing residential landlords, which diverged from the law governing the primary housing lenders, the British building societies.

The relationships between law, market transactions, politics, and cultural aspects of society invariably are complex and diffuse. So it is with this topic. Nevertheless, a key theme is evident: legal change dramatically affected the market choices made by individuals, thereby revolutionizing housing throughout the nation.¹⁰ The market has moved from the rental market — a sphere harnessed by regulation — to the building societies — a sphere where the providers of housing capital are largely unregulated. This market transformation contrasts the modern tendency to dismiss the idea that law affects real world behavior.¹¹

Looking at how legal changes impact housing markets also teaches a new lesson about the landlord-tenant reform movement. Legal reforms may restructure markets even absent such an intent. Tenants' rights advocates did not intend to end private rentals. The transformation of Britain from a nation of renters to a nation of homeowners is remarkable in that, despite its magnitude, it was unforeseen by British reformers of landlord-tenant law. The proponents of legal change focused on

REDMAN]; JILL E. MARTIN, RESIDENTIAL SECURITY 3-5 (1989); MARTIN PARTINGTON, LANDLORD AND TENANT 1-36, 152-57 (2d ed. 1980).

10. See *infra* Part II for a thorough explication of the changes in British housing patterns.

11. See, e.g., G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 220-21 (1980) (rejecting theories about tort litigants' behavior on grounds that those individuals are totally unaware of negligence, accident prevention, and other fundamental tort concepts); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 671-85 (1986) (demonstrating that informal norms developed by rural neighbors, rather than legal rules of trespass, are used to resolve disputes arising from trespassing livestock); Howard Latin, *Activity Levels, Due Care, and Selective Realism in Economic Analysis of Tort Law*, 39 RUTGERS L. REV. 487, 488 (1987) (criticizing law and economics literature for making broad behavioral assumptions, without considering "great variations in the actual risk-assessment capabilities and propensities of actors in diverse settings").

short-term distributional issues between existing landlords and their tenants, disregarding the long-term societal change that came as a byproduct.¹²

It is interesting to compare American housing developments with those in Great Britain. While there has been extraordinary ferment in American residential landlord-tenant law,¹³ in most American jurisdictions legal controls over the landlord-tenant relationship are not nearly as pervasive as in Britain. In some localities in the United States where rent control is in place, the degree of state control over the rental market approaches that of Britain. Meanwhile, as Britain leaves the building societies virtually unchecked by substantive regulation, American savings and loan associations, the traditional backbone of residential finance, are subject to a regulatory scheme closely resembling the ones that govern banks and other financial institutions. Indeed, the present American climate undeniably is shifting toward greater regulation rather than deregulation of savings and loans.¹⁴ While the financial troubles afflicting the savings and loan industry are not attributable to home lending practices, the federal government's solution to the crisis dictates heightened regulatory controls, which impact the home lending practices of those institutions.¹⁵

12. See *infra* Part III for a full discussion of this conclusion.

13. See, e.g., Olin C. Browder, *The Taming of a Duty — The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 116-41 (1982) (analyzing the impact of the warranty of habitability on new tort duties of landlords for personal injuries); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 545-75 (1982) (scrutinizing landlord-tenant law's shift away from private law and private ordering to regulation in the public interest); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 578-83 (1984) (evaluating changes in the warranty of habitability, rent control, and other areas of landlord-tenant law); James C. Smith, *Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept*, 35 U. KAN. L. REV. 505, 547-55 (1987) (analyzing the interaction of the warranty of habitability, contract and tort damage rules, and equitable relief).

14. Congress comprehensively restructured the regulatory system for savings and loan associations and other financial institutions, including the deposit insurance program in 1989. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.). For analysis of this statute, and its possible effects, see generally Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Reregulation:" The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1103 (1990). See also Symposium, *Striking the Right Balance: Federal and State Regulation of Financial Institutions — Banking Regulation*, 53 BROOK. L. REV. 1, 1-80 (1987) (exploring various aspects of financial institution regulation).

15. See, e.g., *Tighter U.S. Mortgage Rules Set*, N.Y. TIMES, June 1, 1991, § 1, at 35

What will happen next in the American housing market? The British experience suggests that in a housing market where private decision-making is given substantial reign, capital devoted to housing finance will decline as consequence of regulation. When capital is mobile, even if only over the long run, it migrates to unregulated or less regulated investment outlets. This tendency seems to be at work in one important American submarket — that market subject to rent control. In areas subject to rent control, the level of regulation on landlords clearly exceeds that imposed on the lenders who finance home purchases.¹⁶ British history suggests that the number of landlords will begin to wither away in those areas, replaced by owner occupiers. Data from the 1990 Census verify that, to a small but significant extent, such a movement has begun.¹⁷

II. BRITISH HOUSING MARKET: CONTEXT FOR PRIVATIZATION

A. *Private Rental Market*

1. Demographic Trends and Social Change Since 1914

The modern history of British housing begins with the First World War. On the eve of Sarajevo, Britain was a nation of renters, with many families living in tenements little different than those portrayed by Dickens a generation earlier.¹⁸ No less than ninety percent of all

(reporting Federal Housing Administration decision to restrict closing cost financing and raise substantially mortgage insurance premiums, thereby making loans more expensive and making it harder for loan applicants to satisfy income criteria).

16. See *infra* Part III(C)(2) for a discussion of this phenomenon.

17. See *infra* note 72 and accompanying text.

18. Charles Dickens, a persistent and insightful social critic of Victorian England, focused upon the human suffering wrought by industrialization. In *A Christmas Carol*, for example, the Phantom shows Scrooge dilapidated working class housing. “[In this] obscure part of the town . . . [t]he ways were foul and narrow; the shops and houses wretched; the people half-naked, drunken, slipshod, ugly. Alleys and archways, like so many cesspools, disgorged their offenses of smell, and dirt, and life, upon the straggling streets, and the whole quarter reeked with crime, with filth, and misery.” *A Christmas Carol*, in CHARLES DICKENS, CHRISTMAS BOOKS 66 (Chapman & Hall 1869) (1843).

Other contemporary observers also chronicled the severe deficiencies of nineteenth century working class housing. Best known is Peter Gaskell’s indictment of urban districts, where working class families crowded into “[f]ilthy, unfurnished [tenements], deprived of all the accessories to decency or comfort,” with an even lower class living in cellars which were “the very picture of loathsomeness — placed upon the soil, though partly flagged, without drains, subjected to being occasionally overflowed, seldom cleaned—every return of their inmates bringing with it a further succession of filth.” PETER GASKELL, THE MANUFACTURING POPULATION OF ENGLAND 133, 139 (Arno Press 1972) (1833). Both Gaskell’s contemporaries and subsequent historians have dis-

households were renters,¹⁹ the vast majority situated in multi-family buildings.²⁰ Throughout the Victorian age, industrialization and its concomitant rapid urban growth placed increasing strain on the bottom end of the rental market — working-class housing. The impact on housing quality was severe. Population densities rose, with houses originally built for one family subdivided into several residences; some landlords even divided single rooms.²¹ Cheap, cramped, new housing covered almost all available open space.²² Slums expanded, especially in large cities such as London, Glasgow, and Liverpool. New construction, even though usually very poor quality, failed to keep pace with the rising demand for worker housing, partly because industrial expansion drew investment capital away from housing into transportation and manufacturing.²³

Landlords constituted a diffuse market. Virtually all landlords were private individuals and small investors not companies or public entities, and most owning only one or a few houses.²⁴ Politically, land-

agreed on whether a large segment of urban workers, or only the very poorest, lived in such horrible housing. See, e.g., FRIEDRICH ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 33 (W.O. Henderson & W.H. Chaloner trans. & eds., Macmillan 1958) (1845) (stating that houses with three to four rooms and a kitchen were the norm for workers). See also JOHN BURNETT, *A SOCIAL HISTORY OF HOUSING 1815-1985*, at 54-77 (2d ed. 1986) (accepting the view that worker housing varied considerably in quality, with the average in quality exceeding that of prior centuries and of farm laborers).

19. Holmans, *supra* note 1, at 10 (graphing the decrease in private rental housing stock from 1914 to 1977).

20. Tenement houses, terraces, back-to-backs, lodging houses, and cellar dwellings were the prevalent housing types for urban workers. Housing built in rural areas for workers during the nineteenth and early twentieth centuries was also often multi-family. Middle-class housing tended to be terraces. For a detailed study of the physical and social characteristics of these housing forms, see BURNETT, *supra* note 18, at 49-50 (rural cottages), 58-79 (cellar dwellings, lodging houses, tenement houses, back-to-backs, and terraces), 121-216 (various housing forms from 1850 to 1914).

21. See *id.* at 64-69. The term "tenement" refers to subdividing an existing house designed for one family into separately-occupied floors or single rooms. See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2355 (Philip Babcock Gove et al. eds., 1986) (defining tenement as "a single room or set of rooms for use by one tenant or family" and tenement house as "a dwelling house divided into separate apartments for rent to families").

22. Infilling of scarce urban land usually occurred by the construction of "back-to-backs," where houses were built in double rows, with each house having party walls on three sides. See BURNETT, *supra* note 18, at 70-77.

23. See *id.* at 14-18.

24. See, e.g., DAVID ENGLANDER, *LANDLORD AND TENANT IN URBAN BRITAIN 1838-1918*, at 51 (1983) (noting that in several cotton towns most landlords held be-

lords were weaklings. They tried, without detectable success, to persuade the government to limit the local property taxes (in Britain, called "rates"), which had risen precipitously since the 1890s.²⁵ Failing to secure rate relief, landlords raised rents at a time of declining real wages, thereby inciting tenant militancy that presaged the wartime housing crisis.²⁶

The housing rental market was economically competitive, with few monopoly characteristics. Urban markets generally lacked concentration of ownership, with many owners renting similar houses and with no trade organizations to set or recommend rents.²⁷ In the country, however, locational monopolies often existed with landowners owning most or all of the cottages in certain parishes.²⁸ In both urban and rural housing markets, the tenants' demand curve influenced prevailing rents more heavily than the landlords' supply curve. While there was considerable migration from the country to the cities, both areas had a shortage of worker housing in the sense that there were more households than available houses.²⁹ Workers, whether in factories or on farms, earned very low wages,³⁰ the majority of which went to buy food.³¹ This capped the amount most workers could devote to rent at

tween six and eight dwellings each). See also GREVE, *supra* note 9, at 27-28 (finding in 1962 that 95% of the remaining private landlords owned less than ten tenancies).

25. See ENGLANDER, *supra* note 24, at xvii-xviii. Englander views the crunch of rising taxes as a major cause of landlord-tenant friction and thus of rent control, eventually resulting in government regulation of housing: "The relation between rates and rents . . . constitutes a unifying framework essential to a proper understanding of the conflict between landlord and tenant." *Id.* at xvii.

26. See *id.* at 193-233 (discussing the 1915 rent strikes, which politicized housing and led to rent control).

27. See, e.g., *id.* at 51 (finding that a "diffuse pattern of ownership seems to have prevailed" in most urban housing markets).

28. For a general discussion of rural housing patterns, see BURNETT, *supra* note 18, at 121-34.

29. See *id.* at 124-26 (discussing agricultural workers' emigration to the cities); 137-39 (remarking on rural housing shortage of about 120,000 dwelling units, irrespective of the extent of overcrowding and dilapidation); 148-54 (finding urban scarcity evidenced primarily by overcrowding and private market unable to solve the problem through building due to tenants' inability to pay higher rents).

30. At the end of the nineteenth century, approximately one-third of the British population was classified as poor. *Id.* at 96.

31. During the nineteenth century, high food prices relative to wages drove down what workers could afford for housing. The average worker spent one-half to two-thirds of his wages on food. See *id.* at 67.

approximately one-sixth of their income.³² Consequently, the tenants' demand curve was very elastic. Small rent increases often led to abandonment or eviction; displaced tenants doubled up in accommodations elsewhere, heightening overcrowding.³³

Wartime regulations provided the impetus for radical, permanent change in the British housing market. During modern wars, many nations have enacted economic controls to subordinate the private markets to the wartime effort. Governments usually design such controls to serve two purposes: to assign economic priority to the manufacture of military hardware and supplies, and concomitantly, to even out citizens' war-induced hardships by restraining profiteering. During the First World War, Britain was no exception: when war-induced housing shortages presented the potential for marked increases in private rents, the government responded with rent freezes.³⁴

Typically, politicians conceive wartime economic controls as temporary measures to be terminated or phased out after the cessation of hostilities. After the Armistice of 1918, however, Britain failed to revert to the housing regulations which existed prior to World War I. The social climate changed during the war years. The media portrayed landlords, many of whom had sought surplus rents³⁵ at the cost of

32. The percentage spent on rent in Victorian Britain was related inversely to income level, with the poorest working class families spending substantially more than 16% of their income for rent. *Id.* at 96 (finding nineteenth century average proportion of rent was 16%). Middle class tenants spent a substantially smaller proportion of their income on rent. The commentators of the day considered 10% as a maximum recommended yardstick for rent. *Id.* at 100-01.

33. Low wages also explain why speculative builders failed to provide a number of new units sufficient to satisfy demand. At the rent levels many tenants could pay, a market return could not be earned even for the cheapest, most austere one-bedroom terraces or cottages. See BURNETT, *supra* note 18, at 126 (finding that a builder could not make the 8% to 10% annual return on cost needed to make homes a profitable investment).

34. The definitive treatment of the varied economic effects of the First World War on Britain is A.C. PIGOU, *THE POLITICAL ECONOMY OF WAR* (1940).

35. Wartime rent increases were thought to be "surplus" in the economic sense of being unrelated to increases in landlords' production costs. Instead, the increases reflected greater economic rents attributable to the ownership of a scarce resource. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (3d. ed. 1986) (comparing economic rents attributable to the actual scarcity of the resource at issue with economic rents inherent in monopolies where the scarcity is artificial). Such profiteering is entirely consistent with a competitive land market. Because the supply of housing is virtually inelastic in the short run, demand sets the price. During the war, demand for rental housing soared with the influx of workers to manufacturing centers. See *infra* text accompanying notes 63-65 for a brief analysis of this phenomenon.

working-class families, as a group of villains.³⁶ The restrictions eased slowly. Moreover, the release of restrictions was incomplete; some rental houses remained controlled.³⁷ Triggered by the wartime housing experiences, social consensus emerged to back long-term public control of rents charged by private landlords.³⁸

Whether the British landlords of the 1910s and the following decades were either predatory scoundrels richly deserving extinction,³⁹ or simply capitalists seeking to maximize investment returns, is debatable. Naturally, different commentators have offered different judgments, mirroring a more recent American debate as to the social merits of so-called slumlords.⁴⁰

36. See, e.g., *The Increase of Rents*, THE TIMES (London), Nov. 26, 1915, at 9, col. 2 (editorializing on the first rent bill which, although balanced overall, notes "the attempt of house-owners and of mortgagees to shift their war burdens on to the tenants and the mortgagors seems a monstrous thing to do"); SPECTATOR, Dec. 7, 1918, at 652 (stating that "housing of the working classes is largely atrocious" and "owners of slum property are determined opposers of its destruction or improvement" who manipulate the public health authorities to block change); *Strike Against Higher Rents at Glasgow*, MANCHESTER GUARDIAN, Oct. 8, 1915, at 9 (reporting that women and children carried banners proclaiming: "Our husbands, sons, and brothers are fighting the Prussians of Germany. We are fighting the Prussians of Patrick [a Glasgow district];" politician made speech at local government hearing denouncing landlords who "were making profit out of the national crisis" and whose "rapacity" threatened to put wives and children of soldiers and sailors into the street); *Tenants on Strike: Bloodsucking the Poor in Germany and Britain*, FORWARD, Oct. 16, 1915, at 5 (stating that landlords are "bloodsuckers" who "demand their pound of flesh" from "widows, orphans and the poor").

37. See *infra* text accompanying notes 60-80 for a discussion of the course of rental controls.

38. See MARIAN BOWLEY, *HOUSING AND THE STATE 1919-1944*, at 2-10, 182-85, 205-08 (1945) (contemporary account explaining that continued rent control was due to economic problems of the building industry, coupled with changes in "social policy" reflected by rising popular expectations of better working-class housing and a persistent belief that wartime controlled rents represented "fair" price for housing). See also W.R. CORNISH & G. DE N. CLARK, *LAW AND SOCIETY IN ENGLAND 1750-1950*, at 186-87 (1989) (finding that extension of rent control to middle-class tenants forced the Conservative party to accede to rent control as matter of political necessity).

39. In English culture, social animosity towards the landlords' most visible agents—the bailiff who collects rents and manages the estate—dates back at least to Elizabethan times. See WILLIAM SHAKESPEARE, *THE WINTER'S TALE* act 4, sc. 3, where, during a conversation between Autolycus and the Clown, the conversants attach scorn to "knavish professions" of "process-servers" and "bailiff."

40. Compare, e.g., Bruce Ackerman, *Regulating Slum Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971) (urging a government policy of housing subsidies to combat deteriorating slum conditions and slumlords); Duncan Kennedy, *The Effect of the Warranty of*

According to the benign view, in the decades preceding the First World War, the British government financed its social welfare programs through rising property tax rates, which economically burdened many British landlords. Consequently, many rent increases reflected a pass-through of higher property tax rates rather than increasing profits.⁴¹ During the War, many landlords showed compassion towards their working-class tenants, actually reducing rents or cutting back on evictions for nonpayment of rent.⁴² The rent-gouging landlords were just a few bad apples. Under the benign view, the inauguration of rent control largely reflects the landlords' political impotence: the government singled out landlords because they were generally small businessmen, with nowhere near the political clout carried by industrialists.⁴³ When workers organized against the government to obtain increases in

Habitability on Low Income Housing: "Milking" and Class Violence, 15 FLA. ST. U. L. REV. 485 (1987) (claiming that tenement landlords will exploit their tenants in the absence of an enforced warranty of habitability); Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967) (suggesting the recognition of "slumlordism" as an actionable tort on which tenants could sue), with, e.g., Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973) (disputing the real world effectiveness of Ackerman's model); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975) (criticizing the RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT (Tentative Draft No. 2, 1974) for proposing the adoption of the warranty of habitability on grounds that such proposal constituted unsound public policy).

41. Historian David Englander, while occasionally criticizing the conduct of some landlords, espouses the benign view. "Property owners were, in fact, victims of an inequitable system of local taxation that was increasingly unable to shoulder the burden of social and civic reforms heaped upon it by central and local government." ENGLANDER, *supra* note 24, at xvii-xviii.

42. In fact, Walter Long, the legislator who introduced the first Rent Act, stated in parliamentary debate:

[T]his policy of rent-raising has not been universal, and has not been what one may call very widespread. . . . Although it is true that this movement is not general in the country, and although it is true that it is, I believe, limited to a certain number of special areas, yet, where it exists, it constitutes a very grievous and very serious burden upon those who are the least able to bear any additional burdens as the result of war.

76 PARL. DEB., H.C. (5th ser.) 421 (1915).

43. See *Correspondence*, 144 LAW TIMES 395 (1918):

Many thrifty men in the past, especially small tradesmen and working men, have invested their savings in the purchase of small houses, with a view to making a provision for their old age, when they become wholly or partially incapacitated for work, and also to provide for their sons and daughters.

Id. See also ENGLANDER, *supra* note 24, at 300 ("Owners of house property were politically marginal figures. Starved of capital, [they were] suffocating beneath the moun-

their standard of living, it was easier to extract rent concessions from private landlords rather than real wage increases from the captains of industry.⁴⁴

In contrast, critical views of residential landlords as a group emanated from militant tenants. In Glasgow, for example, large demonstrations protested against "the Hun at Home."⁴⁵ Local political leaders also raged about "this horde of blood suckers."⁴⁶ At the national level, Lloyd George, addressing the House of Commons, warned of "the unpatriotic course adopted by certain house-landlords in taking advantage of the national need to extort increased rents."⁴⁷ Many scholars also criticized landlords' conduct, both during and after the war.⁴⁸

The benign assessment of landlords' behavior appears more credible than the critical portrayal because there is no solid historical evidence that large numbers of landlords in fact oppressed tenants.⁴⁹ However, whichever version of social truth one accepts, the fact remains that for

tainous weight of local taxation, and subject to damaging attacks from left-wing critics. . . .").

44. Indeed, at least some industrialists actively supported their workers' demands for rent concessions, perceiving the opportunity for a more stable work force without cost to them. See ENGLANDER, *supra* note 24, at 216-17 (noting that rent strikers had the support of some "major industrialists" and that "industrialists in general remained sympathetic towards the tenants").

45. See *Tenants on Strike*, *supra* note 36, at 50. See also ENGLANDER, *supra* note 24, at 223 (discussing impact of women and children demonstrating with signs vilifying "the Hun at Home" during rent strike in Glasgow).

46. See *Strike Against Higher Rents in Glasgow*, *supra* note 36, at 8.

47. 74 PARL. DEB., H.C. (5th ser.) 1285 (1915). Lloyd George, then Minister of Munitions, became Prime Minister of the war cabinet in December 1916.

48. See, e.g., W. Ivor Jennings, *Courts and Administrative Law — The Experience of English Housing Legislation*, 49 HARV. L. REV. 426, 451 (1936) (finding that government seizure of property without compensation is justified when private landlords owning substandard housing cause "social evils"); Dennis Lloyd, *The Rent Bill*, 20 MOD. L. REV. 157, 160 (1957) (concluding that statutory decontrol of premises is unsound when it allows landlords to charge "exorbitant rents" and to "exploit to the full any local scarcity of accommodation which may exist"). Early on, perceptions that a number of landlords violated rent legislation by demanding excess rents, threatening dismissal for nonpayment of such increased rates, or making false claims that they were paying higher local taxes, buttressed these negative evaluations. See ENGLANDER, *supra* note 24, at 253-56.

49. The extant evidence of oppression is anecdotal, rather than empirical. While history offers many examples of rich and powerful interest groups oppressing the poor and weak, the assertion that oppression typifies the residential landlord-tenant relationship is simply an article of faith — a corollary of generalized attacks on capitalism — unless it is empirically supported. Documenting the charge calls for investigation of

over seventy years Britain embarked on a policy of shielding residential tenants from the application of private market forces to determine rent levels and the circumstances for termination of tenancies. The long-term gradual effect of such market intervention was to drive the private landlords away. By 1950, the share of dwelling units provided by private landlords represented less than forty-five percent of available housing.⁵⁰ The figure plummeted to fifteen percent by 1970,⁵¹ and presently hovers below seven percent.⁵² Most remaining landlords who are not employers are individuals.⁵³ Very few companies have entered the business of renting residential property;⁵⁴ of the present individual private landowners, few have directly chosen residential property as an investing vehicle. Many inherited the rental units because they have been in their family for generations,⁵⁵ and they cannot

wealth characteristics of landlords and tenants, political attitudes and affiliations, lobbying efforts, relative bargaining positions, access to legal representation, and the like.

50. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS No. 5, at 161 (Muriel Nissel ed., 1974).

51. *Id.*

52. See GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 139 (Tom Griffin ed., 1991) (reporting that housing stock contains 1,244,000 privately owned rental units out of total housing stock of 18,839,000 dwellings).

53. Many private landlords are employers offering job-related housing. Modern British government statistics fail to show what percentage of private rentals are employment-related or from housing associations. From isolated statistics, it appears that a substantial portion of private rentals presently are employee housing and housing association tenancies. See GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 20, at 129 (Tom Griffin ed., 1990) (charting the 86% increase between 1976 and 1988 in rentals from housing associations, which constituted 3% of all English dwellings in 1988).

54. During the past 15 years, housing associations have assumed a small but significant role in providing housing. While housing associations rent to residential tenants, they are clearly distinguishable from private rentals where the landlord is a for-profit business entity. Some housing associations are fully mutual, which means that the tenants fully comprise the membership. Housing Associations Act, 1985, ch. 69, § 1(2) (Eng.). Fully mutual housing associations are the functional equivalents of American housing cooperative corporations and should be considered a species of owner occupation.

The statute bars housing associations from trading for profit. Ch. 69, § 1(1)(b). Thus, housing associations are essentially quasi-public hybrids, straddling the public and private sectors. Although statutes treat the tenancies granted as private for certain regulatory purposes, they are not private in that they lack the ability to attract private capital and lack profit potential for the landlord. See, e.g., Housing Act, 1988, ch. 50, § 35 (Eng.) (providing that housing association tenancies generally are secure tenancies).

55. See GREVE, *supra* note 9, at 27-30.

sell or convert the property to other use due to government regulation.⁵⁶

2. Legal Controls

The twentieth-century reformers of British residential landlord-tenant law made their mark in three principal areas. Foremost was rent control,⁵⁷ closely followed by security of tenure.⁵⁸ Finally, in the area of tenants' rights concerning the physical condition of the premises, reform lagged far behind rent control and secure tenure, both chronologically and in the eventual scope of reform.⁵⁹

a. Rent Control

Before World War I, government intervention in the housing markets was minimal, confined to public health regulations and modest slum clearance initiatives.⁶⁰ Both Conservative and Liberal governments staunchly reflected deference to the private market, clinging to the economic and political philosophy of *laissez-faire*.⁶¹ There was lit-

56. The current private sector rent control legislation consists of the Rent Act, 1977, ch. 42 (Eng.) as amended by the Housing Act, 1980, ch. 51 (Eng.) and the Housing Act, 1988, ch. 50 (Eng.). These acts prevent landlords from converting their rental premises to another use, even when leases expire, due to the tenants' security of tenure provisions. The Acts do not expressly forbid landlords from selling their properties, but they do impose a practical restraint on alienation because there is no private market of investors who wish to acquire such unprofitable properties.

57. See *infra* text accompanying notes 60-104.

58. See *infra* text accompanying notes 105-23.

59. See *infra* text accompanying notes 125-27. Unlike Britain, America achieved widespread reform of the landlord's obligation to provide satisfactory physical conditions through the development of the warranty of habitability. See *generally supra* note 10 discussing the implied warranty of habitability.

60. In 1868, legislation permitted local authorities to demolish or improve slum housing. See *Artisans and Labourers Dwellings Act, 1868*, 31 & 32 Vict., ch. 130 (Eng.). In 1875, legislation authorized the purchase of slum housing. See *Artisans and Labourers Dwellings Improvement Act, 1875*, 38 & 39 Vict., ch. 36, § 19 (Eng.). Legislation did not permit local authorities to operate redeveloped slum housing instead of selling it to the private sector until 1909. *Housing, Town Planning, &c. Act, 1909*, 9 Edw. 7, ch. 44, § 40 (Eng.).

61. The incipient Labour party, pressing for welfare state reforms, did not gain significant political clout until the first decade of the twentieth century. See ALFRED F. HAVIGHURST, *BRITAIN IN TRANSITION: THE TWENTIETH CENTURY 18-22*, 74-77 (4th ed. 1985). During this period, the Liberals under Lloyd George retreated from their nineteenth century *laissez-faire* heritage in an attempt to stem Labour's growing popularity among British workers. The "People's Budget" of 1909, vetoed by the House of Lords, epitomized the changed Liberal focus. *Id.* at 81-99. In 1911, the new

tle collective agitation for change among residential tenants. Occasional rent strikes, such as the one in 1913 induced by inflated rents in several major cities,⁶² failed to impact significantly government policy or landlord behavior.

The First World War catalyzed rent control. After the initial euphoria attendant to the outbreak of War in August 1914 subsided, Lloyd George's cabinet realized that central economic planning was essential to finance Britain's war effort while maintaining the production of other necessary goods and services. The massive influx of wartime workers and soldiers to urban centers, coupled with virtual cessation of new residential construction,⁶³ dramatically upset the equilibrium of the rental market. With surging demand and a fixed supply, many landlords found irresistible the potential for wartime profiteering.⁶⁴ Workers' demands for government-imposed rent control steadily grew, culminating in a massive rent strike in Glasgow in November 1915.⁶⁵ Parliament immediately acted to appease the working-class tenants, motivated not by sympathy for their cause but by two pragmatic objectives: the necessity of maintaining wartime industrial production, and an appreciation that many of the protesting tenants recently had be-

Liberal agenda bore fruit in the form of legislation establishing national unemployment and health insurance. See National Insurance Act, 1911, 1 & 2 Geo. 5, Ch. 55 (Eng.); HAVIGHURST, *supra*, at 104.

62. See CORNISH & CLARK, *supra* note 38, at 185 (1989) (noting the increase in rent strikes in 1913); ENGLANDER, *supra* note 24, at 143-61 (discussing rent strikes in Wolverhampton, Erdington, Leeds, Bradford, and other sites).

63. Tens of thousands of workers streamed into the major industrial cities to staff wartime industries. See, e.g., ENGLANDER, *supra* note 24, at 198 (reporting that between 8000 and 9000 additional workers relocated to Leeds at the start of the War); *id.* at 199 (finding that over 33,000 additional workers were added at the arsenal at Woolrich in less than twelve weeks). While the Ministry of Munitions eventually pursued a modest program of house building, the housing stock failed to meet the demand. See *id.* at 197-200.

64. Some of the wartime rent hikes may reflect landlords' attempts to recoup higher costs related to prior tax hikes. See *supra* text accompanying notes 41-44. Nonetheless, the timing, in the face of wartime privations, lends credence to the charge that a sizeable number of landlords in industrial centers were profiteering. See *supra* note 35.

65. See generally ENGLANDER, *supra* note 24, at 193-233 (devoting an entire chapter to the 1915 rent strikes). Englander traces the roots of the Glasgow strike to the tensions that steadily built between working class tenants and landlords from the inception of the War and demonstrates the depth and bitterness of the class conflict between the two groups. See *id.* at 201-03. He also notes other antecedents to the strike, noting that the resulting Rent Act was the "culmination of the pre-war struggle between landlord and tenant." *Id.* at 208.

come members of the voting electorate.⁶⁶

One week after the Glasgow general strike began, Walter Long, a Conservative M.P. from the Strand who often sympathized with landed interests, introduced the Increase of Rent and Mortgage Interest (War Restrictions) Act⁶⁷ in the House of Commons. Hurriedly enacted in December 1915 and fully meeting the demands of the militant tenants, the legislation froze the rents on low-cost housing at levels charged sixteen months earlier, before the War.⁶⁸ The Act covered only the cheapest housing with the threshold defined not by the amount of rent but by the market value of the dwelling unit, as measured by rateable value for tax purposes.⁶⁹ The statute froze this market segment under government control without an allowance for rent adjustments to keep up with inflation.⁷⁰ Characterized as an emergency wartime measure, the statute scheduled the rental freeze to expire six months after the end of the War.⁷¹

After the 1918 Armistice, a government commission, consonant with the original purpose of braking wartime profiteering, recommended total decontrol of housing rents within two and one-half

66. Males who owned or rented houses in boroughs and male lodgers whose premises exceeded a minimum rental value received the franchise in 1867. Representation of the People Act, 1867, 30 & 31 Vict., ch. 102, §§ 3, 4 (Eng.). This reform assumed great significance with the swelling population of urban workers. After the First World War, Parliament extended the vote to all men over the age of 21 and all women over the age of 30. Representation of the People Act, 1918, 7 & 8 Geo. 5, ch. 64, §§ 1-4 (Eng.).

67. 5 & 6 Geo. 5, ch. 97 (Eng.).

68. The statute rolled rents back to their August 3, 1914 levels. *Id.* § 2(1)(a). It also allowed a rent increase equal to the amount of any rate increase assessed against the house above the August 1914 rate level. *Id.* § 1(1)(iv). It also authorized a rent increase not to exceed a six percent annual return for capital improvements excluding decoration and repairs. *Id.* § 1(1)(ii).

69. The thresholds were £35 in London, £26 in the rest of England, and £30 in Scotland. *Id.* See also *id.* § 2(2) (regulating housing when "either the annual amount of the standard rent [on August 3, 1914] or the rateable value" of the premises is under set amount); *id.* § 2(6) (excluding housing when standard rent is less than two-thirds of taxable value). The statute controlled all housing types—single family and multi-family, rural and urban—within these thresholds.

70. These thresholds were high enough that most British housing was initially covered, but war-time inflation gradually eroded the scope of this rent control scheme. GLYN DAVIES, *BUILDING SOCIETIES AND THEIR BRANCHES — A REGIONAL ECONOMIC SURVEY* 40 (1981).

71. Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97, § 5(2) (Eng.). The full title of the act highlighted its temporary nature, evincing an intent "to restrict, in connection with the present War, the Increase of the Rent of Small Dwelling-houses." *Id.*

years.⁷² However, political pressures from other directions — principally, workers' groups — were too strong to ignore. Workers were not returning to their pre-war rural or small town accommodations. Instead, they remained in the urban environments. As a compromise, 1919 legislation retained rent control for two more years,⁷³ loosened the freeze by permitting a ten percent rental increase,⁷⁴ and doubled the rateable value threshold.⁷⁵ Originating a regulatory characteristic common to subsequent rent control regimes, Parliament controlled only housing units in existence as of April 2, 1919.⁷⁶ Legislators again portrayed this compromise as a temporary expedient, with rent restrictions to be lifted when the postwar building industry recovered so that supply caught up with demand.⁷⁷

Postwar political changes solidified rent control. The Liberal party, often an ally of the Conservatives on social and economic policies, began its disintegration during the War. During the 1920s, Labour grew in strength, replacing the Liberals as the second major political party.⁷⁸

72. MINISTRY OF RECONSTRUCTION, REPORT OF THE COMMITTEE ON THE INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACTS, 1919, CMD. 9235, at 8, 13, 15-17 (reporting that eight of nine committee members supported a two-and-one-half-year extension of the Rent Acts, with one member arguing for annual extension).

73. Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, 9 & 10 Geo. 5, ch. 7, § 1 (Eng.).

74. *Id.* § 2. The rent increase was one time, not annual, with the controlled "standard rent" of August 1914 as the base. *Id.* § 2. Parliament did not authorize an increase for unfit houses. *Id.* § 2(1) (barring increase if sanitary authority certified house "not reasonably fit for human habitation or . . . not kept in a reasonable state of repair").

75. *Id.* § 4.

76. *Id.* § 8.

77. A government committee noted the impasse: controls could not be dropped because the "great shortage of houses" persisted, but new housing construction could not proceed "on economic lines at all" unless controls were dropped. MINISTRY OF RECONSTRUCTION, REPORT OF THE COMMITTEE ON THE INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACTS, 1919, CMD. 9235, at 4-7 (the Hunter Committee). A second committee found one year later that the "period of emergency" would last at least three more years due to the persistence of the "element of scarcity value." REPORT OF THE COMMITTEE ON THE INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACTS, 1920, CMD. 658, at 3 (the Salisbury Committee). Therefore, the government proposed short-term subsidies for builders to facilitate new residential construction. See Housing, Town Planning, &c. Act, 1919, 9 & 10 Geo. 5, ch. 35, § 2 (Eng.) (describing the duration of the building plans); *id.* § 7 (describing the financial details of the subsidies).

78. As the Liberal party splintered, its right-wingers tended to join the Conservatives and its left-wingers tended to join Labour.

While Conservatives and Liberals might have reached a consensus for decontrolling rents, Conservatives and Labourites were not so inclined. The parties advocated sharply contrasting positions on the scope of government intervention in the economy in general⁷⁹ and in the housing markets in particular.⁸⁰

The Conservative dream for a return to a private unregulated residential housing market never materialized. Politically, the desire of working class and middle class tenants to retain their controlled leaseholds thwarted the Conservative agenda.⁸¹ Rising middle class support for rent control was due partially to reduced opportunities to purchase affordable housing, which in turn was a byproduct of growing limits on the rights of buyers of rental housing to take personal possession by evicting sitting tenants.⁸² Given the social tide, legislative changes were much less politically volatile than a return to market economics.

Since the First World War, rent control has undergone numerous statutory revisions. From 1919 to date, no fewer than thirty-six statutes have amended elements of the original rent control program.⁸³ The long term regulatory pattern, however, assumes far greater significance than the details of seriatim statutory revision.

Conservative governments accomplished partial decontrol by two mechanisms. First, legislation exempted some categories of rental

79. The Conservative Party sought to preserve a large role for private enterprise in all spheres of economic activity and limit government intervention to those instances in which the private sector could not function. Labour, in contrast, influenced by socialist ideals, sought nationalization of basic industries and widespread government control of the private sector in order to ensure that it operated to promote the working classes' interests. See HAVIGHURST, *supra* note 61, at 147-70, 177-86, 201-20.

80. See *infra* notes 81-94 and accompanying text for a detailed discussion of these developments.

81. By 1923 the Conservatives learned that public support for rent control made any overt proposals for rent decontrol political suicide, even in traditionally safe districts. CORNISH & CLARK, *supra* note 38, at 187; ENGLANDER, *supra* note 24, at 293.

82. According to Englander, the widely-held contemporary belief was that "general inflation was driving the disaffected middle classes into the arms of the Labour Party." ENGLANDER, *supra* note 24, at 293.

83. From 1919 to 1933, the rent acts still bore scheduled expiration dates. Amendatory acts granted two-year extensions from 1919 to 1927. *E.g.*, Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. 5, ch. 32, § 1 (Eng.) (granting extension until June 24, 1925). They also granted annual extensions to 1933. *E.g.*, Expiring Laws Continuance Act, 1927, 17 & 18 Geo. 5, ch. 34, § 1(3) (Eng.) (granting extension until December 25, 1928).

housing, usually based upon rateable value, from control.⁸⁴ Second, "creeping decontrol" granted landlords, who lawfully recovered possession of their premises, the freedom to set any rental price for a new tenant.⁸⁵ Moreover, in contrast with the wartime freeze, the Conservatives also often permitted modest rent increases, which generally tracked inflation for dwelling units that remained controlled.⁸⁶

Conversely, Labour leaders moved to extend the rent control regime by regulating previously exempted housing. For example, in 1919 the monetary threshold for rent control doubled,⁸⁷ and the next year trebled, due to Labour initiatives.⁸⁸ In consequence, in 1920 almost all of the nation's eight million rental dwelling units were controlled — one half million more than were controlled under the 1915 wartime emergency measure.⁸⁹ Besides expanding the number of controlled houses, the Labour agenda emphasized holding down rents. Labour was substantially less permissive than the Conservatives with respect to rent increases for controlled dwellings.⁹⁰

84. In 1933, for example, housing with rateable values above £45 in London and Scotland and above £35 elsewhere were decontrolled. Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, ch. 32, § 1(2) (Eng.). In 1938, houses rated above £35 in London and Scotland and £20 elsewhere became unrestricted. Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, 1 & 2 Geo. 6, ch. 26, § 2(1) (Eng.).

85. See Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. 5, ch. 32, § 2(1) (Eng.) (permitting decontrol when a landlord comes into possession, unless possession is pursuant to a court order on grounds of nonpayment of rent). For the least valuable housing, "creeping decontrol" stopped in 1933. Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, ch. 32, § 2 (Eng.) (decontrolling dwellings with values not exceeding £20 in London, £26.5s in Scotland, and £13 elsewhere).

86. See, e.g., Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. 5, ch. 32, § 7 (Eng.) (permitting rent increases of up to 10% of the net rent for certain subtenancies). In 1931, a government study found that controlled rents had risen an average of 50% over 1914 levels. MINISTRY OF HEALTH, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON THE RENT RESTRICTIONS ACTS 1931, CMD. 3911, at 17.

87. See Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, 9 & 10 Geo. 5, ch. 7, § 4 (Eng.).

88. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. 5, ch. 17, § 12(2) (Eng.) (raising threshold to £105 in London, £90 in Scotland, and £78 elsewhere).

89. MINISTRY OF HEALTH, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON THE RENT RESTRICTIONS ACTS 1931, CMD. 3911, at 15 (reporting that about 98% of all houses were controlled after the 1920 Act).

90. During the period between the wars, two Labour governments were in power from 1923 to 1924 and from 1929 to 1931, both headed by Ramsay MacDonald. The

The interlude between the World Wars illustrates the ebb and flow of rent control under successive governments. Conservative legislation in 1923, which Labour condemned, decontrolled premises whenever the landlord obtained vacant possession.⁹¹ Ten years later, in the teeth of worldwide economic depression, the least expensive housing was made "undecontrollable."⁹² Legislation increased the size of this class of permanently controlled housing in 1938.⁹³ The next year, on the eve of World War II, the regulatory scheme for the British rental housing stock was roughly divisible into thirds. Approximately four million rental houses and flats were controlled, four and one-half million more expensive houses and flats were decontrolled, and four and one-half million dwelling units, constructed since 1919, were exempt.⁹⁴

The outbreak of hostilities ushered in much tighter wartime controls. In 1939, legislation sponsored by a Conservative-dominated coalition government restricted rents on all but the most expensive residences, including those built since World War I.⁹⁵ Within this

rent control legislation enacted during both periods, although not repealing previously authorized rent increases, did not provide for any further increases. *See, e.g.*, Prevention of Eviction Act, 1924, 14 & 15 Geo. 5, ch. 18, § 1 (Eng.) (continuing rent control under first MacDonald government); Expiring Laws Continuance Act, 1928, 19 Geo. 5, ch. 3, § 1(4) (Eng.) (continuing rent control under second MacDonald government); Housing Act, 1930, 20 & 21 Geo. 5, ch. 39, § 8(4) (Eng.) (same); Expiring Laws Act, 1930, 21 Geo. 5, ch. 4, § 1(2) (Eng.) (same); Expiring Laws Act, 1931, 22 Geo. 5, ch. 2, § 2(2) (Eng.) (same).

91. Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. 5, ch. 32, § 2(1) (Eng.). There was one exception to the vacant possession rule: decontrol did not apply if the landlord obtained possession by court order for nonpayment of rent. *Id.* The next year, a newly elected Labour government sponsored legislation that made it more difficult for the landlord to obtain possession for occupation as a residence. Prevention of Eviction Act, 1924, 14 & 15 Geo. 5, ch. 18, § 1 (Eng.). The Act directed courts to consider whether the tenant had alternative accommodations when deciding whether the landlord should receive possession, and it barred landlords from gaining possession altogether if they purchased the house after May 1924. *Id.*

92. Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, ch. 32, § 2(1) (Eng.).

93. Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, 1 & 2 Geo. 6, ch. 26, § 2(1) (Eng.).

94. *See* MINISTRY OF HEALTH, REPORT OF INTER-DEPARTMENTAL COMMITTEE ON RENT CONTROL 1945, CMD. 6621, at 8. Of the houses constructed between the World Wars, approximately 1.5 million were built by local authorities and 3 million by the private sector. *Id.*

95. Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 Geo. 6, ch. 71, § 3(1) (Eng.) (applying rent control to houses with rateable values up to £100 in London, £90 in Scotland, and £75 elsewhere).

scope, wartime control embraced more than ninety-one percent of the private rental market.⁹⁶ Nor did the end of the War in 1945 augur any easing in rent control policy. In the first postwar elections, the British electorate gave Labour its first majority in the House of Commons, turning out Churchill's Conservative government. Not surprisingly, the strict wartime rent controls remained resilient under the postwar Labour governments. In 1954, for example, over eighty-four percent of rental housing — all units but the most expensive — still remained controlled.⁹⁷

For the next four decades, from the 1950s through the 1980s, the ebb and flow of control continued. Governments loosened the screws a bit, then tightened them, and then loosened them again. The 1950s saw loosening,⁹⁸ the 1960s and 1970s tightening,⁹⁹ and the 1980s loosening again under the Thatcher government.¹⁰⁰

What remains immutable in the statutory scheme is the concept of continual rent control. It has never unwound completely, even though housing scarcity, the traditional economic prop for controls, has declined since 1960.¹⁰¹ Conservative challenges to rent control have failed. Moreover, despite the ebb and flow of successive governments, evolution and growth in statutory purpose is discernible. The original purpose of rent protection for only the poorest tenants disappeared

96. See BUTLER & SLOMAN, *supra* note 4, at 8.

97. See RENT CONTROL STATISTICAL INFORMATION 1956, CMD. 17, at 2 (reporting that only 100,000 privately-owned homes had values exceeding rent limits; virtually all uncontrolled leases were exempted because they covered furnished houses, dwellings on farm or business premises, or were tied to employment).

98. See, e.g., Rent Act, 1957, 5 & 6 Eliz. 2, ch. 25, § 11(1) (Eng.) (decontrolling properties with rateable values over £40 in London, £30 elsewhere in England and in Wales, and £40 in Scotland).

99. See, e.g., Rent Act, 1965, ch. 75, § 1 (Eng.) (controlling all dwelling houses with rateable values under £400 in greater London and £200 elsewhere in Great Britain); Rent Act, 1974, ch. 51, § 6 (Eng.) (increasing rateable value limits for furnished lettings).

100. See Housing Act, 1980, ch. 51, pt. II (Eng.) (modifying rules regarding protected shorthold tenancies, assured tenancies, registered rents, rates of rent, increase phasing, regulated tenancies, and security of tenure).

101. See GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 18, at 133 (1988) (charting excess supply of dwellings relative to the number of households for each region of the United Kingdom since 1960). The lack of generalized scarcity on the national scale, of course, does not demonstrate that there is a close fit between supply and demand in all instances. In some submarkets, demand exceeds supply; in submarkets with excess housing stock, many vacant units are dilapidated.

long ago, with receding tides under the Conservatives never reaching back to such a limited scope. Over the following eight decades, rent control haphazardly and gradually extended so that today, tenants' wealth classification matters little. Presently, very few tenancies are excluded from control by reason of high value. Instead, today's decontrolled residential tenancies stem from exemptions keyed to the duration of the tenancy, the newness of the premises, or the facts concerning the parties' relationship. For example, the Housing Act of 1980 created protected shorthold tenancies and assured tenancies, the former exempting certain leases with fixed terms between one and five years,¹⁰² the latter exempting certain leases in buildings constructed after 1980.¹⁰³

With the passage of time, the loosening and tightening of rent control policy has become increasingly irrelevant. Changes in the rent control scheme, even incremental changes, assume real significance only if they apply to a significant proportion of the housing stock. It is probably for this reason that the 1980s housing policies of the Conservative party generally ignored rent control, instead directing an emphasis toward dismantling Council housing and encouraging home ownership. With no more than one million dwellings remaining in the private rental market,¹⁰⁴ it hardly seems worthwhile to expend much energy to draft and propose legislation revising or even abolishing rent control.

b. Security of Tenure

Traditional landlord-tenant law deferred to freedom of contract principles with respect to the landlord's right to recover possession. Expiration of a lease term entitled the landlord to immediate possession, as did the landlord's giving of notice a specified period in advance for a periodic tenancy. In addition, the tenant's breach of lease conditions or covenants generally justified the landlord's termination of the

102. Housing Act, 1980, ch. 51, §§ 51-55 (Eng.).

103. *Id.* at §§ 56-58.

104. In 1986 the private rental housing stock numbered 1,244,000 dwellings, but this included employer-provided housing and rentals from housing associations, which are quasi-public entities. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 139 (Tom Griffin ed., 1991). Precise figures of the breakdown within these three categories are not available. This rental stock is shrinking and shelters only a small proportion of British households; in 1991, Britain is projected to have 22 million households. *Id.* at 37.

lease under a forfeiture or re-entry clause.¹⁰⁵

During the early period of rent control, the landlord's common-law right to recover possession survived without substantial modification. After the War's outbreak, magistrates had authority to refuse to evict a tenant upon the demonstration of a war-related hardship.¹⁰⁶ However, magistrates seldom utilized this safety valve.¹⁰⁷ Under the 1915 rent statute, a buyer of a rent-controlled house who wanted to occupy the house personally could evict the tenant without providing other housing for the tenant.¹⁰⁸ Encouraged by a broad judicial interpretation of the scope of the landlord's statutory right to take possession,¹⁰⁹ evictions on change of ownership became fairly common. This practice contributed to tenant agitation for a wartime moratorium on evictions.¹¹⁰ Tenants obtained partial relief: in 1917 a regulation under the Defence of the Realm Act,¹¹¹ supported by Winston Churchill, Minister of Munitions, barred the eviction of munitions workers who complied with the conditions of their tenancy in specially designated industrial areas.¹¹²

The goal of security of tenure on a broad basis remained unrealized. The first post-war rent legislation, in 1918, denied purchasers of working-class controlled housing the right to possession for their own occu-

105. See generally 1 HILL & REDMAN, *supra* note 9, at A901-A903, A930-A952, A1007-A1046.

106. See Courts (Emergency Powers) Act, 1914, 4 & 5 Geo. 5, ch. 78, § 1(2) (Eng.).

107. See ENGLANDER, *supra* note 24, at 196-204 (finding that public knowledge of the Courts (Emergency Powers) Act was scant and that magistrates' heavy caseloads combined with the Act's procedural rules actually aided landlords in obtaining quick evictions and recoveries of rent arrearage).

108. Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97, § 1(3) (Eng.) (permitting recovery of possession when "premises are reasonably required by the landlord for the occupation of himself or some other person in his employ").

109. See *Harcourt v. Lowe*, 35 T.L.R. 255 (K.B. Div'1 Ct. 1919) (establishing a broad interpretation of the landlord's right to possession when "reasonably required" as set out in ch. 97, § 1(3)).

110. Outrage was heightened because a substantial fraction of the evicted tenants were servicemen's families. ENGLANDER, *supra* note 24, at 242 & n.48 (noting that one-third of the formal complaints filed with government agencies were from servicemen's dependents).

111. Defence of the Realm Consolidation Act, 1914, 5 & 6 Geo. 5, ch. 8 (Eng.).

112. See *Defence of the Realm*, 143 LAW TIMES 364 (1917) (reporting the September 29, 1917 promulgation of the Defence of the Realm Regulations that prohibit evictions which "impede, delay, or restrict" war operations).

pation or for their employees' occupation.¹¹³ The next year, however, rent legislation loosened this security, resulting in higher eviction rates.¹¹⁴ In 1925, the Law of Property Act extended to tenants the right to receive notice of breach and a reasonable time to cure for breaches capable of remedy, prior to forfeiture or re-entry.¹¹⁵

For middle-class tenants, who also wanted security of tenure, the old rules governing the normal expiration of term leases and periodic tenancies remained intact. Generally, there were relatively few instances where landlords desired to terminate the rent-controlled tenancies of nondefaulting tenants.¹¹⁶ When a landlord obtained vacant possession and relet the premises, the new tenant had to pay only the same controlled rent as the old tenant. Only if the owner cared to occupy the dwelling personally or had a personal noneconomic stake in the identity of the tenant, such as a lease to a relative or friend, would termination of an existing tenancy be sensible.¹¹⁷

Despite the relatively slight real-world need for security of tenure,

113. Increase of Rent, &c. (Amendment) Act, 1918, 8 & 9 Geo. 5, ch. 7, § 1 (Eng.) (amending definition of "landlord" in Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97, § 1(3) (Eng.), to exclude persons who acquire a dwelling after September 30, 1917, unless such acquisition was by testamentary transfer). *See also* Stovin v. Farebrass, 35 T.L.R. 659, 662, 664, 666 (C.A. 1919) (interpreting 1919 amendment to strip county court of discretion to give possession to new buyer).

114. *See* Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, 9 & 10 Geo. 5, ch. 7, § 5(2) (Eng.) (amending 1918 Act to permit court order for recovery of possession by new landlord "if, after considering all the circumstances of the case, including especially the alternative accommodations available for the tenant, the court considers it reasonable to make such an order."). *See also* ENGLANDER, *supra* note 24, at 291-92 (discussing the events and judicial concern which led to the amendment).

115. Law of Property Act, 1925, 15 Geo. 5, ch. 20, § 146 (Eng.). Mandatory notice and opportunity to cure provisions, such as § 146, do not confer any right of occupancy after expiration of the stated term on the tenant, but they do augment security of tenure by making the landlord's termination for cause more difficult.

116. Rental housing with higher values had lower eviction rates. *Cf.* ENGLANDER, *supra* note 24, at 307 (finding that the post-war problem faced by middle class tenants under "creeping decontrol" was repossession for occupation by landlord or landlord's relative).

117. Vacancy decontrol largely disappeared during the 1930s. *See supra* text accompanying notes 91-93. Security of tenure fulfills a real need only when the landlord can withdraw a house from the rental market by personal occupation. Therefore, security of tenure is a proxy for a direct prohibition on conversion from rental use to owner occupation. Security of tenure prevents the landlord from appropriating the benefit of the difference between the fair rental value and the controlled rent for the house. Economically, the landlord who occupies a previously controlled unit is in the same position as a replacement tenant who pays the controlled rent.

substantial tenant rights eventually materialized. The Rent Act of 1977¹¹⁸ ushered in the modern rules for security of tenure, which the legislature amended during the 1980s.¹¹⁹ Subject to a number of exceptions, the statutes entitle tenants residing in rental housing to continued occupancy, regardless of the nominal duration of their lease.¹²⁰ A number of the exceptions relate to material default by the tenant.¹²¹ Also, under limited circumstances, an owner may recover possession under a short-term rental arrangement if the landlord notified the tenant at the commencement of the tenancy that she reserved such a right.¹²² For example, with owner occupied housing, an owner who vacates her home and rents it may thereafter recover possession for herself or a close relative to use as a residence.¹²³ This exception encourages temporarily absent homeowners to let their property.

c. Habitability

No dramatic change occurred with respect to the parties' rights as to the physical condition of leased housing during the decades when rent control and security of tenure radically realigned common law landlord-tenant relationships. Common law deferred to the express covenants of the lease in allocating the parties' responsibilities for the

118. Rent Act, 1977, ch. 42 (Eng.). See also Protection from Eviction Act, 1977, ch. 43 (Eng.) (barring landlord repossession of premises except by judicial process, harassment of residential tenants, and other conduct, such as reduction of services, designed to cause tenants to abandon premises).

119. See Housing Act, 1988, ch. 50, §§ 5-12 (Eng.) (dealing with security of tenure in general); Housing Act, 1980, ch. 51, §§ 28-50 (same), 51-55 (dealing with private sector tenants only).

120. See Housing Act, 1988, ch. 50, §§ 5-12 (Eng.); Rent Act, 1977, ch. 42, §§ 98-107 (Eng.). The 1988 Housing Act provides security of tenure for "assured tenancies" created after January 15, 1989. See Housing Act, 1988, ch. 50, §§ 5-12 (Eng.) (providing security of tenure) and § 141(2), sched. 1, § 1 (defining assured tenancies by exclusion). For a comprehensive discussion of security of tenure rules under the Rent Act and the Housing Act, see Martin Davey, *The Housing Act 1988*, 52 MOD. L. REV. 661 (1989) (discussing in full the Housing Act, 1988); MARTIN, *supra* note 9, at 91-115, 191-92, 201-02.

121. See Housing Act, 1988, ch. 50, sched. 2, grounds 8, 10-15 (Eng.); Rent Act 1977, ch. 42, sched. 15, cases 1-7, 10 (Eng.).

122. Housing Act, 1988, ch. 50, sched. 2, grounds 1, 3-5 (Eng.); Rent Act, 1977, ch. 42, sched. 15, cases 11-16 (Eng.).

123. Housing Act, 1988, ch. 50, sched. 2, ground 1 (Eng.); Rent Act, 1977, ch. 42, sched. 15, cases 11-18 (Eng.). In contrast to the explicit language of the 1977 Act, the 1988 Act does not make it clear whether the landlord seeking possession must intend to occupy the premises personally.

condition of leased premises.¹²⁴ Courts did not imply any landlord duties to repair or improve; in the absence of express agreement, the doctrine of waste served as the baseline for ascertaining parties' rights and obligations.¹²⁵ The failure to impose habitability duties on landlords during the early decades of this century simply reflected practical realities. Many small landlords could not afford needed repairs; others, when squeezed by rent control, voluntarily allowed their properties to deteriorate.

The courts and the legislature made modest changes to the common law, pro-landlord rules governing habitability. For leases of furnished dwellings, early courts implied an obligation that the premises be habitable at the commencement of the term.¹²⁶ This precedent, however, remained cabined; the implied obligation did not extend to repairs which became necessary after commencement of the term or to leases of unfurnished dwellings.¹²⁷ Consequently, much private rental housing suffered from severe dilapidation.

In 1961, Parliament enacted a statutory habitability scheme, which required that the landlord keep the structure and utility installations in repair.¹²⁸ However, this repair duty did not extend to fixtures and appliances,¹²⁹ or to needed repairs occasioned by casualty damage.¹³⁰ Moreover, the scheme did not cover all rental housing. Statutory hab-

124. See *Wilchick v. Marks*, [1934] 2 K.B. 56, 63 (refusing to imply a duty to repair where contract did not allocate such a duty); *Morgan v. Liverpool Corp.*, [1927] 2 K.B. 131, 141 (Eng. C.A.) (denying finding of landlord's liability for failure to repair on grounds that tenant failed to notify landlord of latent defect which caused injury).

125. See generally 1 HILL & REDMAN, *supra* note 9, at A442-A462.

126. See, e.g., *Smith v. Marrable*, 11 M.&W. 5, 8-9 (Ex. Ch. 1843) (holding that there is an implied warranty that a furnished house will be reasonably fit for habitation and where premises are not fit for occupation the tenant may quit without notice); *Collins v. Hopkins*, [1923] 2 K.B. 617, 628 (observing that there normally is not a warranty for fitness for occupation for an unfurnished house but finding furnished premises unfit for habitation where defendant's husband, who suffered from tuberculosis, had recently inhabited the premises).

127. See, e.g., *Hart v. Windsor*, 12 M.&W. 68, 87 (Ex. Ch. 1844) (refusing to extend *Smith* to lease of unfurnished house). More recently, courts have implied a covenant that the landlord repair common areas of the premises. See *Liverpool City Council v. Irwin*, 1977 App. Cas. 239, 254, 269, 270 (H.L.) (implying obligation to maintain elevators and staircases in high-rise residential building).

128. Housing Act, 1961, 9 & 10 Eliz. 2, ch. 65, § 32(1) (Eng.).

129. *Id.* § 32(1)(b)(i).

130. *Id.* § 32(2)(b). For criticism of the narrow judicial interpretations of the statutory covenant, see generally J.I. Reynolds, *Statutory Covenants of Fitness and Repair: Social Legislation and the Judges*, 37 MOD. L. REV. 377 (1974).

itability applied only to leases of dwelling houses with a term of less than seven years,¹³¹ thereby excluding both long-term leases and occupational licenses from the scope of protection.¹³² The fact that, even today, the quality of rental housing lags far behind the council housing and owner occupied sectors demonstrates the meagerness of these statutory reforms.¹³³

It is difficult to say why solid tenant habitability rights did not evolve, especially in light of the growing acceptance of big government and the welfare state that marked so much of the era after World War I. The inaction in this area stands in stark contrast to developments in the United States, where most states embraced a vigorous warranty of habitability during the 1970s.¹³⁴ One English scholar posits that the winds of reform could only go so far, and that they expended virtually all their energy on rent control and security of tenure.¹³⁵ One distinguishing feature between habitability on the one hand, and rent control and secure tenure on the other, is that the former requires the landlord to make a cash outlay. Perhaps the underlying common law bias that a person should not be required to pay money without her consent, except in cases of tort, remained vibrant here.¹³⁶ This common law pre-

131. Housing Act, 1961, 9 & 10 Eliz. 2, ch. 65, § 33 (Eng.).

132. The leading modern case distinguishing leases from licenses is *Street v. Mountford*, 1985 App. Cas. 809, 818, 826, 827 (appeal taken from Eng. C.A.), which found that a "license agreement" generally creates a lease, not a license, if the occupier has exclusive possession. For a review of recent cases applying the *Street* test, see Jonathan Hill, *Shared Accommodation and Exclusive Possession*, 52 MOD. L. REV. 408 (1989).

133. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 138-39 (Tom Griffin ed., 1991) (reporting that, in 1986, 42% of Britain's "unfit" dwellings were private rental dwellings while owner occupied dwellings constituted only 12.8% and housing association dwellings only 6.6% of "unfit" dwellings, and defining "unfit" as needing major repair or lacking amenities such as adequate ventilation or sanitation).

134. See *supra* note 13 for sources discussing the warranty of habitability. Forty-four American jurisdictions have adopted either a common law or statutory warranty of habitability. See Smith, *supra* note 13, at 510-11 n.19 (listing jurisdictions that have a warranty of habitability).

135. KEVIN GRAY, ELEMENTS OF LAND LAW 905-07 (1987).

136. See S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 353-56 (2d ed. 1981) (discussing the expansion of the common law action of assumpsit to include fictionalized or implied promises); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 647-48 (5th ed. 1956) (discussing the seventeenth century beginnings of implied contracts). In many modern areas, such as employment insurance programs and, more generally, income taxation, however, the old aversion to mandatory payment without an individual's consent has been readily overcome.

cept, while wholly lacking in economic substance, serves to camouflage the government's pursuit of redistributive ends. Coercing payment for improvements and repairs from landlords constitutes highly visible intervention; barring rental increases seems less intrusive because it poses as preserving the status quo.¹³⁷

3. Present Status

The end result of the regime of controls may have been unintended. With private landlords going the way of the passenger pigeon, more and more legal rules governed fewer and fewer leasing transactions. The law of residential leases became increasingly complex, with a number of treatises attempting doctrinal exposition.¹³⁸ At the same time, the law became largely irrelevant because of the dearth of private landlords and tenants.

Initiatives under Prime Minister Thatcher included some loosening of the legal regime governing private landlords and tenants.¹³⁹ The Housing Act of 1988, for example, attempts to stimulate the production of private rental housing,¹⁴⁰ but it is too soon to tell whether the Act will attract a substantial amount of capital for the construction of new dwelling units.

For several reasons, it seems unlikely that the legislation of the 1980s represents anything more than the normal ebb and flow witnessed during earlier decades. First, the statutes retain the basic rationale of gov-

137. Another possibility is a fear that habitability rules, coupled with rent control, would force substantial numbers of British landlords to abandon their properties. Legislation could have allayed these fears of landlord abandonment by allowing increases to controlled rents for major repairs needed to comply with habitability standards.

138. *E.g.*, HILL & REDMAN, *supra* note 9; MARTIN, *supra* note 9; PARTINGTON, *supra* note 9.

139. *See* Housing Act, 1988, ch. 50, §§ 10-22 (Eng.) (creating assured shorthold tenancies); *id.* §§ 35, 46-59 (expanding powers of housing associations); *id.* §§ 60-92 (establishing provisions for housing association trusts); Housing Associations Act, 1985, ch. 69, §§ 8, 13, 15-18 (Eng.) (enhancing powers of housing associations). Note that, because housing associations are quasi-public, increasing their role in rental housing is virtually irrelevant to the restoration of a private rental market.

140. *See, e.g.*, Housing Act, 1988, ch. 50, § 63 (Eng.) (permitting housing action trusts to take action to improve housing stock by various means, including instigating new building projects). For a detailed review of this legislation, see MARTIN, *supra* note 9, at 177-227. The 1988 legislation also seeks to further privatization of council housing by a "Tenant's Choice" scheme, which sets forth procedures for the transfer of council housing to a housing association landlord or private landlord. Housing Act, 1988, ch. 50, §§ 93-114 (Eng.). *See* Chris Rodgers, *The Demise of Social Housing?* (pts. 1 & 2), 139 *New. L.J.* 1565, 1603 (1989) (analyzing the Tenant's Choice scheme).

ernment regulation — the government, not the parties, should set price and other market terms. The statutory reforms do not mount a frontal assault on the underlying rationale. Rather these reforms seek only to expand the class of exceptions which afford the parties contractual latitude.¹⁴¹ As a consequence, treating freedom of contract in the private landlord-tenant context as an exception rather than a basic principle restricts its scope. Further, there is a conservative tendency to treat exceptions narrowly rather than expansively, in order to preserve the values which presumably lie at the core of basic rules. The approaches of many legislatures and judges to various bodies of law reflect this conservative tendency.

Second, in order for revised landlord-tenant laws to impact substantially the real world, private sources of capital must invest in the construction of rental housing. Long ago, banks and other financial institutions deserted residential, rental real estate because these transactions appeared fraught with risk.¹⁴² These transactions seemed risky because of the unprofitable nature of rental real estate ownership. Ultimately, the law backed the market-driven decision to withdraw from the rental real estate market. Banking regulations prohibited building societies¹⁴³ and commercial banks¹⁴⁴ from financing the construction of private rental housing. Thus, legislation denied institutional lenders

141. This commitment to the underlying structure of regulation is evident in the assured shorthold tenancy, which is an exceptional type of residential tenancy meeting certain durational and notice requirements. Housing Act, 1988, ch. 50, § 20 (Eng.). From the landlord's perspective, however, the statute exacts a trade-off: an assured shorthold tenancy makes it easier for the landlord to recover possession after expiration of a fixed rental term; however, it also grants tenants additional rights to seek redetermination of rent by a rent assessment committee. *Id.* § 22.

142. See Christine Whitehead & Mark Kleinman, *The Viability of the Privately Rented Housing Market*, in HOUSING AND THE NATIONAL ECONOMY 113, 126, 133-34 (John Ermisch ed., 1990) (declaring that financial institutions' present involvement in residential rental property is negligible; those institutions are unwilling to lend because of their perception of risk and low rents). These same perceptions of risk and profit led the capital markets to abstain from new investment in British residential rental properties during the period between the World Wars. See BOWLEY, *supra* note 38, at 83-93.

143. See Building Societies Act, 1986, ch. 53, §§ 5(1), 11(2), 16(8) (Eng.) (limiting building societies' ability to loan funds to individuals); Building Societies (Limits on Lending) Order 1988, S.I. 1988, No. 1197 (imposing £10,000 limit on any building society loan which is not for an individual borrower's personal, residential use).

The present rules precluding building societies from financing rental housing are stricter than prior law. Under the Building Societies Act, 1962, 10 & 11 Eliz. 2, ch. 37, § 23 (Eng.) (repealed by Building Societies Act, 1986, ch. 53, § 120, sched. 19, pt. 1 (Eng.)), a building society could make special advances of up to 10% of its loan portfolio on proposed or recently constructed rental dwelling houses or flats. Apparently,

the choice to become mavericks and risk their financial health by occasionally committing funds to the rental housing sector.

Lenders, at least on some points, are very conservative. From their viewpoint, regulatory risks have a temporal dimension. Of course the current regulatory scheme governing a business is a prime concern, but lenders also care about probable regulatory changes occurring during the life of their loans. Lenders wonder whether a particular rental property, not currently subject to rent control, might become regulated in the future. If this risk seems more than remote, given foreseeable political and social changes, they will discount their evaluation of the value of the collateral. The 1980s statutory exceptions to rent control have thus far failed to spur private commercial financing of rental housing, nor is it likely that they will do so as long as Parliament retains a commitment to controlling the rents of some residential tenancies.

B. Council Housing

1. Demographic Trends

As Britain's private landlords approached extinction, public housing programs were in their ascendancy. Wartime necessity provided the impetus not only for rent control of private tenancies,¹⁴⁵ but also for public ownership of housing. The outbreak of World War I brought private house building to a halt. The Ministry of Munitions built dwelling units for almost twenty thousand people at a cost in excess of four and a quarter million pounds to accommodate the huge influx of workers to cities.¹⁴⁶ This wartime construction formed the initial stock of British public housing. The bulk of the munitions housing estates were built quickly as temporary structures, with estimated useful lives as short as ten years.¹⁴⁷ Although the postwar central government pre-

building societies rarely utilized this provision. See M.J. Russell, *Special Advances*, 48 MOD. L. REV. 389, 404-05 (1985).

144. Widely shared institutional norms, having to do with prudent risk management, rather than explicit rulemaking, cause the banks to shun commercial mortgage loans for rental housing. Cf. *Stockbridge Turns Sour*, THE ECONOMIST, Dec. 14, 1985, at 23 (reporting that, after government official persuaded Barclays Bank to extend modest mortgage loan for housing development with mix of rental houses and owner occupied houses, bank accelerated loan when development encountered slow sales).

145. See *supra* text accompanying notes 63-71 for a discussion of the move toward rent control.

146. ENGLANDER, *supra* note 24, at 199, 263.

147. See *id.* at 264-67 (discussing the poor quality of much of the housing built by

ferred to demolish or sell these estates, divestment was not politically feasible: existing tenants had nowhere to relocate. The absence of either local authorities or private investors to purchase these properties compelled the central government to retain long-term ownership.¹⁴⁸

The housing shortage persisted after the end of the War. In response, the British government in 1919 began to construct new housing.¹⁴⁹ Both Conservatives and Labour conceived such state intervention as a temporary measure, intended to terminate as soon as housing supply approached the demand and overcame the imbalance stemming from wartime market dislocations.¹⁵⁰ Government viewed this early postwar program "as a finite emergency measure," with no thought of "an open-ended commitment to provide [housing] according to need, let alone to supersede private enterprise."¹⁵¹ The widely shared expectation of a short-term correction through housing subsidies gradually withered away during the next decade as Britain fell deep into the throes of economic depression. In 1924, the central government finally expressed a long-term, broad commitment to public construction and ownership of housing.¹⁵²

By the 1930s, for social as well as economic reasons, it became clear that a return to a rental housing system based predominantly on pri-

the Ministry of Munitions); *id.* at 283 (reporting that some structures had "an estimated life of from only ten to fifteen years").

148. In 1920, the Ministry of Munitions transferred its housing estates to the Office of Works. *Id.* at 282. *See also generally id.* at 263-86 (discussing the early course of state-subsidized housing in Britain).

149. Both the Housing, Town Planning, &c. Act, 1919, 9 & 10 Geo. 5, ch. 35, §§ 1, 7-8 (Eng.), and the Housing (Additional Powers) Act, 1919, 9 & 10 Geo. 5, ch. 99, § 1 (Eng.) authorized subsidized housing construction.

150. The Liberal plan (set forth in Housing, Town Planning, &c. Act, 1919) called for 170,000 local authority houses and 40,000 privately subsidized houses, with completion and decontrol of rents by 1927. *See CORNISH & CLARK, supra* note 38, at 188. The narrower Conservative plan, adopted four years later, preferred private subsidies and called for the completion of subsidized housing within two years. *See* Housing, &c. Act, 1923, 13 & 14 Geo. 5, ch. 24, §§ 1, 3 (Eng.).

151. ENGLANDER, *supra* note 24, at 287.

152. *See* Housing (Financial Provisions) Act, 1924, 14 & 15 Geo. 5, ch. 35 (Eng.). This legislation, sponsored by Britain's first minority Labour government, directed local authorities to conduct a 15-year program of subsidized housing construction. *Id.* The central government offered generous subsidies, payable in a lump sum or over 40 years. *Id.* § 2. While subsidies could go to private builders who built private sector rental or owner occupied housing to specifications, the Act favored government-owned housing by easing controls on local councils and by discriminating in subsidy rates. *See CORNISH & CLARK, supra* note 38, at 188-89.

vate ownership was very unlikely. Housing scarcity and the prevalence of substandard, slum housing never truly abated.¹⁵³ Citizen support for state housing controls no longer was confined to the working-classes; among the middle-classes many citizens supported controls out of idealism, self-interest, or both. Local councils undertook massive housing construction projects.¹⁵⁴ A strong public consensus in support of public housing evolved, just as it had for rent control when middle-class tenants came to see the advantages gained by the working class.¹⁵⁵ The development of council housing fit in well with the social and political ethic of the times. Its remarkable growth represented one manifestation of the increasing size, functions, and cost of twentieth century government.¹⁵⁶

Eventually, local councils became the prime suppliers of urban housing, not only in large cities but also in smaller towns. Although initially conceived as housing for occupancy only by the working class poor,¹⁵⁷ eligibility restrictions for tenants in council housing loosened

153. Scarcity continued through the Second World War, until, in the early 1960s, the existing stock of dwellings finally caught up with the number of households. See *supra* note 101 (noting that, since 1960, British housing supply has, on the whole, exceeded demand).

154. See, e.g., BURNETT, *supra* note 18, at 234-35 (citing the Beacontree development in London, which housed over 90,000 residents and the 60,000 houses built in County Durham which accommodated almost 300,000 people, as outstanding examples of the building done by local councils).

155. See *supra* notes 81-82 and accompanying text for a discussion the middle class' desire for rent control.

156. There were cross-currents in housing policy during the 1930s. Labour, for example, advocated slum clearance, and local authorities were slated to provide most working class housing. See Housing Act, 1930, 20 & 21 Geo. 5, ch. 39 (Eng.) (calling in its title for "the clearance or improvement of unhealthy areas, the repair or demolition of insanitary houses"). Conservatives, on the other hand, favored the construction of owner occupied housing on freeholds, coupled with rent decontrol. See Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, ch. 32, § 1(2) (Eng.) (decontrolling more expensive rental housing); Housing (Financial Provisions) Act, 1933, 23 & 24 Geo. 5, ch. 15, §§ 1, 2(1) (Eng.) (cutting off subsidies to local authorities for house building but permitting government guarantees of private loans made to private home builders); BOWLEY, *supra* note 38, at 74-93. Although Cornish and Clark observed that the "shifts of housing policy between the two world wars are too complex to admit of one-directional explanation," CORNISH & CLARK, *supra* note 38, at 189, the dominant trend during the entire period between the wars nevertheless was growing state intervention in housing. Successive changes in policy were only differences in emphasis, focused on which subsidies in what amount should be available to the private sector.

157. Until 1949, legislation restricted council housing to "the working classes." Cf. Housing, Town Planning, &c. Act, 1919, 9 & 10 Geo. 5, ch. 35, § 1(1) (Eng.) (requiring

after the Second World War, and this form of housing became available for middle class employed persons.¹⁵⁸ Presently, council tenancies are available for all residents, regardless of income level or occupation, but in many localities there are substantial waiting periods until vacancies occur.

Council housing projects, as communities, acquired a social and economic mix. For example, during the mid-1970s almost ten percent of the socioeconomic group identified as "professional, managerial, and employers" lived in local authority housing.¹⁵⁹ This mix is a prime reason for the impressive successes of British council housing, as compared to its American counterparts.¹⁶⁰ Widespread usage of council housing avoided the stigma, often perceived in the United States, of a family living in public housing.¹⁶¹ Economically, the mix of tenants meant that only a small fraction of council tenants needed rent subsidies. In 1980, only nineteen percent of council tenants qualified, based on a low family income, for rent rebates from the central government.¹⁶² This reduced the aggregate tax burden attributable to the council housing programs. With so many middle class tenants, tax spending for council housing was not perceived as a redistribution of

local authorities to prepare and carry out scheme for "the provision of houses for the working classes") with Housing Act, 1949, 12 & 13 Geo. 6, ch. 60, § 1 (Eng.) (removing references to working classes from extant housing legislation).

158. The increased discretion in selecting council tenants from different socioeconomic classes is illustrated by the Housing Act, 1957, 5 & 6 Eliz. 2, ch. 56, § 113(2) (Eng.) which required local authorities to give "reasonable preference . . . to persons who are occupying insanitary or overcrowded houses, have large families or are living under unsatisfactory housing conditions." *Id.*

159. Holmans, *supra* note 1, at 15 (charting the tenure and socio-economic groups of households in 1974, 1975, and 1976).

160. While council estates at their height housed approximately one-third of the British population, today American public housing constitutes only 1.5% of the national housing stock. Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 897 (1990).

161. This is not to say that all council estates meet the same physical standards or are equally well maintained. There is a broad range of quality, with stigma often attaching to the least desirable estates, which middle class families then shun.

162. Christopher Warman, *£7.71 Council House Average Rent*, THE TIMES (London), Feb. 2, 1981, at 4 (reporting that approximately one million council homes received rent rebates, averaging £4.40 per week; average council rent was £7.71 per week). In contrast, all public tenants in the United States qualify for subsidized rentals due to income eligibility requirements for public housing. See 42 U.S.C. § 1437a(a)-(b) (1988 & Supp. III 1991) (restricting occupancy to "low-income families," defined as those with income of less than eighty percent of the median family income for the area in question).

wealth from the middle class to the poor.¹⁶³ Finally, the economic success of council housing has had political consequences at the local level. In a number of cities, council tenants achieved a critical mass, enabling them to influence the local tax system to their benefit.¹⁶⁴

2. Legal Controls

The legal regime applied to public rental housing contrasted sharply with the emerging regime applied to the private sector. During the first decades of council housing, legal controls on the landlord-tenant relationships created by council authorities were close to nonexistent. Tenants were afforded only minimal protection from local authorities by

163. Holmans provides income averages that demonstrate council tenants' position in the economic mainstream. See Holmans, *supra* note 1, at 15-16. In 1976, economically active council tenants' median household income exceeded that of private sector tenants (£4180 to £3590) and approached that of owner occupiers (£4180 to £4880). *Id.* at 15, table A.8. Holmans found major overlaps in income, socio-economic group, occupation, and other characteristics between households in the three major categories of tenure, *i.e.*, owner occupiers, local authority tenants, and private rental tenants. *Id.* at 15.

In the early 1970s, Professor Mandelker found a similar economic overlap between families living in council housing and those living in privately owned housing. DANIEL R. MANDELKER, HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND 119-21 (1973). Mandelker's book carefully analyzes English and American housing subsidies, focusing on public housing. He concludes that the English plan confers a modest subsidy on a large proportion of the populace — all council tenants — because council rents are lower than the market rental value of the council properties. *Id.* at 7, 136. In contrast, the American public housing plan extends generous housing subsidies to a small segment of low-income residents. *Id.* at 6.

164. In Scotland until the late 1980s, rates were payable separately by both the occupant of a house and its owner, with the proportion between each set at the council's discretion. Council tenants paid only occupier's rates, but owner occupiers and businesses paid both. As a consequence, in some cities, like Edinburgh, council tenants successfully supported representatives who voted for low occupiers' rates and high owners' rates. In 1987, Thatcher's Conservative government chose to replace the traditional rate system with a "community charge," commonly called the "poll tax." The government first implemented the poll tax in Scotland, and planned to extend it to England and Wales in subsequent years. One primary reason for initiating the poll tax in Scotland was to shift part of local tax burden away from owners to council tenants, who were paying comparatively little under the rate system. See James Buxton, *Angry Scots Chorus Greets Poll Tax*, FINANCIAL TIMES, Apr. 1, 1989, at 5. However, the poll tax proved to be extremely unpopular, not only in Scotland but also throughout Britain. After several years of unsuccessful experimentation, the Government replaced the poll tax with another new system. See John MacCalman, *Ayrshire Tax "Pushed Up By Cash Deficit"*, GLASGOW HERALD, Feb. 27, 1993 (describing amount of "council tax" levied on households).

common law leasing doctrines.¹⁶⁵ As a practical matter, this gave the regulators complete discretion in setting rents and other terms of housing tenancies.¹⁶⁶ Public housing tenants, therefore, possessed remarkably few substantive or procedural legal rights.¹⁶⁷

The orthodox justification for common law landlord-tenant rules in a market economy is that tenants can bargain for housing rights that they desire, with variations in rent reflecting such bargaining on a case-by-case basis.¹⁶⁸ Whatever the merits of this argument in the context of market transactions, it fails completely when applied to public housing. Due to the market position of council housing, regulatory discretion was even less circumscribed than that enjoyed by private-sector landlords who previously operated under common-law principles. Local authorities offered publicly financed subsidized rents to tenants, thereby attaining a market advantage over other, private providers of housing. Moreover, council housing operated as local monopolies; there were no competing local authorities operating within the same borough or parish. As a consequence, a tenant who wanted to pay a low subsidized rent had no ability to bargain whatsoever with a local authority as to the terms of the tenancy.¹⁶⁹

What accounts for the national government's *laissez-faire* attitude toward local authorities' treatment of their tenants? Part of the expla-

165. For a discussion of the broad discretion afforded local authorities to set rent levels, structure rent rebate programs, select tenants, and evict tenants, see MANDELKER, *supra* note 163, at 133-36.

166. Early on, the national government gave up on a requirement that the houses it subsidized would have to produce rents reflecting a two-thirds rate of return on capital investment, substituting a request that local councils obtain the best rent "reasonably obtainable." Local Authorities (Assisted Housing Schemes) Regs. 1919, Schedule B. Tenants successfully protested local authority attempts to charge economically viable rents on grounds that pre-war controlled rents were lower and the local authority housing was poor quality. See ENGLANDER, *supra* note 24, at 263-67, 295-97.

167. See, e.g., MANDELKER, *supra* note 163, at 134-36 (discussing the limited nature of the rights of British public housing tenants).

168. See, e.g., Meyers, *supra* note 40, at 879, 902-03 (arguing against implied warranty of habitability as reflected in RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT, §§ 5.1-5.6 (Tentative Draft No. 2, 1974)).

169. In a typical private rental market with numerous landlords, it is often thought that tenants lack bargaining power because of insufficient information and housing scarcity. *But see, e.g.,* Ackerman, *supra* note 40, at 1147-48 (implying that lower class tenants are "both aware of the housing opportunities open to them and are conscious of the price differentials between units"). However, the monopolistic character of public housing greatly accentuates the imbalance in bargaining power between public housing landlords and tenants.

nation was the rising ethic of the professional bureaucrat, which postulated that government experts, trained in economics, finance, health, engineering, and related fields, merit broad discretion in the administration of statutory objectives. The prime architects of council housing therefore assumed the benevolence of public landlords. Having no direct profit motive, it was believed that management would naturally work only to serve the best interests of council tenants. It was unnecessary to protect tenants by fashioning coercive legal controls, based upon antiquated common-law notions like due process or good faith; indeed, such interference would insult socially responsible public servants. English courts, which occasionally placed modest procedural limits on bureaucratic omnipotence,¹⁷⁰ met with outrage from supporters of expanding government.¹⁷¹

Such naivete, identified by housing activist Peter Marcuse as the "myth of the benevolent state,"¹⁷² lasted decades, while council housing progressed from infancy to maturity. Legal rights for council tenants and fetters on local authority discretion have evolved during the past two decades, under Conservative governments.¹⁷³ Legislation restricted local authority discretion to select tenants. The first of these restrictions imposed legal duties to house the homeless¹⁷⁴ and those persons displaced by law, such as by the exercise of condemnation.¹⁷⁵ Second, the 1980 Housing Act required local authorities to publish their allocation schemes used to select tenants from waiting lists, which

170. *E.g.*, *The King v. Minister of Health ex parte Davis*, [1929] 1 K.B. 619, 638, 643 (Eng. C.A.) (requiring notice to landowner of government's proposed use for land taken under slum clearance powers).

171. For a prototype, see Jennings, *supra* note 48, at 436, 451 (railing against English courts, which imposed procedural requirements on compulsory acquisition schemes and other housing programs because such courts fail to understand that "the fundamental assumption of modern statute law is that the landowner holds his land for the public good" and the "whole purpose of the Housing Acts is to remedy social evils by interfering with the rights of landowners").

172. Peter Marcuse, *Housing Policy and the Myth of the Benevolent State*, 8 SOCIAL POLICY 21 (1978), reprinted in CRITICAL PERSPECTIVES ON HOUSING 248, 248 (Rachel G. Bratt et al., eds., 1986) [hereinafter CRITICAL PERSPECTIVES].

173. In an ironic twist on political ideology, the Labour party opposed the Conservative push for legal rights for council tenants, while at the same time pressing for more construction of council housing and cessation of council unit sales.

174. Housing Act, 1985, ch. 68, §§ 58-78 (Eng.) (replacing Housing (Homeless Persons) Act, 1977, ch. 48 (Eng.)).

175. Land Compensation Act, 1973, ch. 26, § 39 (Eng.) (replacing similar duty set out in Housing Act, 1957, ch. 56, § 91 (Eng.)).

many authorities previously kept confidential.¹⁷⁶ Finally, during the 1980s, the Conservative government broadly assailed local authority discretion to set council rents, in an effort to cause them to rise to the market level of the private sector.¹⁷⁷

In 1980, council tenants received the right to secure tenancy, defined in terms closely analogous to private sector tenancies which the Rent Act protects.¹⁷⁸ With respect to the physical condition of council housing, much of it aging, the legislation placed a legal duty on authorities to inspect properties and consult with tenants with respect to needed repairs.¹⁷⁹ Although few central government limits were placed on rental increases by local authorities,¹⁸⁰ many council tenants received new and valuable economic rights. After 1980, the Thatcher government granted many council tenants the right to buy their council residences at preferential prices.¹⁸¹

176. Housing Act, 1980, ch. 51, § 44 (Eng.). Broad local council discretion remains in the selection of tenants and their assignment to particular dwellings or council estates. For example, a prospective tenant who refuses the first three houses offered by the council is typically struck from the waiting list. Social abuses sometimes occur; a family with an "undesirable" member may be shunted to the least attractive dwellings. See, e.g., MANDELKER, *supra* note 163, at 135 (discussing the scope of authority discretion).

177. Specifically, the reduction of central government subsidies for council housing encouraged hikes in council rents. The most recent statutory initiative aimed at increasing council rents is the Local Government and Housing Act, 1989, ch. 42 (Eng.), which mandates stringent accounting rules and borrowing controls applicable to local housing authorities. See *id.* §§ 41-47 (borrowing controls); *id.* §§ 74-88 (accounting rules). For a thorough discussion of the provisions of the 1989 Act, see James Driscoll, *Public Housing after the Local Government and Housing Act 1989*, 54 MOD. L. REV. 244 (1991).

178. Housing Act 1980, ch. 51, § 28 (Eng.). One difference is that the survivorship provision for council tenants is less generous, allowing only one succession upon the death of a secure tenant. *Id.* § 28(5).

179. *Id.* §§ 43-44.

180. E.g., *id.* § 39 (forbidding rent increase due to improvements made by tenant). Since the beginning of the 1980s, the Conservative central government's usual problem with council rents, especially those set by Labour-oriented local governments, is that they are too low. See *supra* note 177 (noting Conservative government's preference for increasing council rents).

181. The Housing Act 1980, ch. 51, §§ 1, 6-7 (Eng.), gave tenants with a minimum of three years occupancy the right to buy their homes at discounts ranging from 33% to 50% of market value. Legislation enacted in 1984 dropped the occupancy threshold to two years, with the top discount increased to 60%. Housing and Building Control Act, 1984, ch. 29, § 3 (1-2) (Eng.). Three years later, the discount for tenant purchases of flats in some areas increased to 70%. Housing (Scotland) Act, 1987, ch. 26, § 62(3)(b) (Eng.).

Ironically, council housing as an institution declined precipitously just as council tenants gained legal rights. Since the high reached in the late 1970s,¹⁸² council housing has fallen in terms of quantity and quality of dwelling units provided to the British population.¹⁸³ The erosion of council housing stemmed not so much from tenant purchase options, as from reduced public spending on council housing programs. The Conservative central government cut housing subsidies to local councils, leaving many councils unable to cover budget shortfalls.¹⁸⁴

C. Homeowners

1. Demographic Trends

At the outset of the First World War, home ownership in Britain was an enclave for the wealthy: only ten percent of the population resided in homes they owned.¹⁸⁵ As the private rental market atrophied during the ensuing decades, home ownership expanded, becoming the form of housing tenure preferred by both the middle and working classes.¹⁸⁶ The interwar generation became "the most family-

182. The peak year, in terms of percentage of housing stock, was 1978, when local authorities and new town corporations comprised 32.2% of the British housing stock. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 10, at 194 (Eric J. Thompson ed., 1979). The peak year, in terms of gross number of publicly-owned dwelling units, was 1979, with 6,840,000 units. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 11, at 144 (Deo Ramprakash ed., 1980).

183. See RAY FORREST & ALAN MURIE, *SELLING THE WELFARE STATE: THE PRIVATIZATION OF PUBLIC HOUSING* 36-38 (1988) (summarizing history of different standards of building applied to council housing). See also *supra* text accompanying notes 146-48 (stating that wartime housing, built to be temporary, proved difficult to demolish for social and political reasons).

184. Consequently, there is virtually no new construction of council housing; some older dwellings may be closed because of insufficient funds for substantial rehabilitation. See Driscoll, *supra* note 177, at 258 (concluding that the Local Government and Housing Act, 1989, ch. 42 (Eng.), shifts housing policy and local authorities away from building and maintaining rental housing stock).

185. See Holmans, *supra* note 1, at 10.

186. For purposes of this discussion, owner occupied housing includes ownership of long-term leaseholds, a popular form of tenure in Britain. Economically, in terms of the potential for the tenant to accumulate equity, occupancy under a long-term leasehold more closely resembles ownership of a dwelling unit in fee simple than it does occupancy under a short-term leasehold. *Lake End Corp. v. Township of Rockaway*, 448 A.2d 475, 480 (N.J. Super. Ct. App. Div. 1982) ("As a matter of law and fact, 99-year leaseholds are the equivalent of fee ownership for the purposes of real property taxation, valuation and assessment.").

mind and home-centered one" in British history,¹⁸⁷ with rising economic prosperity boosting the rate of owner occupation in England and Wales to twenty-six percent, where it lingered throughout the Second World War.¹⁸⁸ By 1961, the proportion of homeowners had risen to forty-three percent.¹⁸⁹ During the 1970s and 1980s, the shift in housing tenure from rentals to owner occupation continued, climbing to sixty-eight percent in 1990,¹⁹⁰ fueled both by the sale of council houses to tenants¹⁹¹ and by the expansion of mortgage loans offered by the building society industry.¹⁹²

Since the late 1970s, the Conservatives have employed two primary tools to advance owner occupancy. First, homeowners receive an income taxation subsidy: each household may deduct the interest paid on its home mortgage loan, up to a maximum of £30,000 of principal per year.¹⁹³ The economic value of this tax benefit to homeowners as a group has grown exponentially under the current Conservative leadership, with an increase of over tenfold from 1962 to 1990.¹⁹⁴ A timing

187. BURNETT, *supra* note 18, at 265.

188. *See infra* note 190 (detailing the owner occupation rates from 1914 to 1990).

189. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 136 (Tom Griffin ed., 1991).

190. The British rates of owner occupation, as revealed by census records are:

<i>Year</i>	<i>Rate</i>
1914	10%
1938	25%
1945	26%
1951	29%
1960	42%
1970	50%
1980	55%
1990	68%

191. *See supra* note 181 and accompanying text (detailing the programs permitting purchase of council housing).

192. *See infra* notes 216-20 and accompanying text.

193. *See* Income and Corporations Taxes Act, 1988, ch. 1, § 369(1) (Eng.) (providing for income tax deduction). Each year Parliament determines the maximum loan amount eligible for tax relief. *Id.* § 367(5). *See also* Finance Act, 1990, ch. 29, § 71 (Eng.) (specifying qualifying maximum of £30,000 for 1990-91); LORD HAILSHAM, 23 HALSBURY'S LAWS OF ENGLAND ¶¶ 1038-1040 (4th ed. reissue 1991) (outlining provisions of mortgage income tax deduction). In 1983, Parliament increased the maximum from £25,000 to £30,000, where it has remained ever since. Finance (No. 2) Act, 1983, ch. 49, § 3 (Eng.). The building society industry recently proposed increasing the mortgage limit to £45,000. Kay Marles, *Gaining a First in Mortar*, THE TIMES (London), Feb. 15, 1992, at 13.

194. The great rise in value is due both to the higher threshold and to the larger

rule that eases the household's cash flow enhances the attractiveness of this subsidy. Rather than claim the deduction after the close of the taxable year, the mortgagor may reduce the monthly installment due to the lender by the amount of the subsidy, with the lender processing the tax claim on behalf of the mortgagor.¹⁹⁵

The second tool promoting home ownership is an ingredient of privatization. The Conservative dismantling of the social welfare state extends to housing. During the past forty years, a sizeable portion of the British population lived in council housing, owned by local government authorities and rented to tenants.¹⁹⁶ Unlike American public housing, the British equivalent garnered widespread community acceptance, accommodating roughly one-third of all households during the 1970s.¹⁹⁷ Starting in 1981, the central government directed the local authorities to sell housing units to their tenants at a discounted price.¹⁹⁸ Thus, privatization of housing has taken place, alongside the more widely publicized privatization of key industries such as oil, natural gas, water, telecommunications, and the airlines.¹⁹⁹ In addition,

number of owner occupants. Three and one-third million new households purchased residences during the past decade. *Rates Will Fall When Safe, Says Patten*, THE TIMES (London), June 6, 1990, at 29. Presently, the average annual tax benefit is £740 per household. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 21, at 144 (Tom Griffin ed., 1991). For 1989-1990, 9.3 million households received mortgage tax relief totalling £6.9 billion. *Id.*

195. Income and Corporation Taxes Act, 1988, ch. 1, § 369(2) (Eng.). This system is called "mortgage interest relief at source" (MIRAS). See HAILSHAM, *supra* note 193, at ¶ 1052. In addition, homeowners receive other valuable tax subsidies. The imputed rental value of their houses is not taken into income, and upon sale they are exempt from capital gains tax. See PETER SAUNDERS, A NATION OF HOME OWNERS 354-60 (1990).

196. See *supra* note 160 (remarking on the extent of use of council housing); *infra* note 197 and accompanying text (same).

197. The high-water mark was 1978. The General Household Survey conducted by the government revealed that 34% of households rented from local authorities. GOVERNMENT STATISTICAL SERVICE, CENTRAL STATISTICAL OFFICE, SOCIAL TRENDS 10, at 199 (1980). At the end of 1978, local authorities and new town corporations held 32.2% of all dwelling units, including vacant units for rental. *Id.* at 194 (calculating proportion as 6,790,000 out of 21,110,000 units). In Scotland, the proportion of local authority tenants was substantially higher — 54%. *Id.* at 195.

198. Housing Act, 1980, ch. 51, §§ 1-27 (Eng.), amended by Housing Act, 1985, ch. 68, §§ 118-188, scheds. 4-9 (Eng.). Earlier, prohibitions existed against the sales of council houses. Between 1951 and 1981, sales by local authorities had discretion, with flip-flops in policy as Conservatives worked to encourage sales and Labour worked to retard sales. See FORREST & MURIE, *supra* note 183, at 44-55.

199. See generally PRIVATIZATION AND REGULATION: THE U.K. EXPERIENCE (John A. Kay et al. eds., 1986) (compiling readings that summarize the arguments for

the under-funding and under-maintenance of council estates²⁰⁰ facilitates council sales by providing an additional incentive for households to purchase.

With home ownership becoming both aspiration and reality for a majority of modern British families, the physical attributes of the typical owner occupied dwelling unit necessarily evolved. While twentieth-century Britain realized a gradual improvement in the overall standard of living,²⁰¹ owner occupied housing, to become affordable for the many, needed to be physically smaller. Instead of the country estate evoked by the law teacher's image of Blackacre, the average home became a modern terrace of modest size, with party walls and a small garden.²⁰² While small relative to American standards for room sizes and lot sizes, British homes remain consistent with the technological revolution. As is common for the western democracies, the average house comes equipped with an impressive array of modern amenities and furnishings, ranging from central heat to the full set of kitchen appliances.²⁰³

and against privatization); Peter Young, *Privatization in Great Britain*, 7 GOV'T UNION REV. 1 (1986) (describing methods of British privatization and concluding that its overall results were increased government revenues, reduced taxes, and rising popularity of the Conservative party). For an argument that American proposals to sell public housing units to tenants at discounted prices are unfair, unwise, and unconstitutional, see generally Schill, *supra* note 160. Cf. M.H. Hoeflich & John E. Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629 (advocating that state and local governments take on major role in providing subsidized housing for low-income families).

200. See *supra* notes 81-83 and accompanying text (discussing decline in quality of much council housing).

201. Real per capita income almost tripled from 1860 to 1960. BURNETT, *supra* note 18, at 281.

202. This is not to say that the average British household lives in a smaller dwelling unit than in the past. The long-term trend is that smaller rental accommodations are replaced by owner occupied units that, while bigger than most rental units, are not as large as the houses owned by wealthy Victorian families, who typically employed live-in servants. Burnett describes the dichotomy of houses growing in size, while the size of households occupying them shrinks. *Id.* at 278-81. From 1891 to 1961, the share of the housing stock consisting of one and two room dwellings fell from 16% to 4.6%, with the three bedroom house becoming the norm. *Id.* at 280.

203. *Id.* at 283-85. For a detailed description of the British evolution of standards for new housing from World War II to the mid-1980s, for both council housing and privately-owned housing, see *id.* at 296-330.

Nevertheless, modern British housing lags behind American standards for amenities, as well as size. Central heating only recently became standard. Appliances that are staples to the American middle-class, such as washers, dryers, dishwashers, garbage disposals, and microwaves, are today considered luxuries in Britain.

From the social as well as the economic standpoint, the tremendous rise in the rate of home ownership markedly blurred class distinctions. Before 1948, housing for workers and for the middle class differed sharply, both in terms of housing tenure and physical characteristics. The vast majority of workers were tenants, while many middle class families owned their homes.²⁰⁴ Physically, worker housing was often small, overcrowded, poorly maintained, and lacking in basic facilities such as plumbing.²⁰⁵ Especially after World War II, working and middle class housing converged. Both the council housing program, which attracted a substantial number of middle class tenants,²⁰⁶ and the construction of new subdivisions for owner occupied housing, which placed downsized units (mainly small three-bedrooms) on small plots²⁰⁷ for mass consumption at affordable prices, reflected this convergence.²⁰⁸ John Burnett describes the growing affluence of working class families as a “levelling-up,” with the narrowed gap between the working and middle classes perceived by the latter as a “levelling-down.”²⁰⁹

2. Building Societies

a. Rise of Financial Institutions

This century’s rise in home ownership could not have occurred without reforming British legal and financial institutions. The institution of building societies provided the means to expand home ownership. Building societies originated in the eighteenth century as temporary associations formed to enable a close-knit group of workers to con-

204. Before 1914, middle class families, like workers, preferred to rent housing. *Id.* at 100-01, 199-201. A strong middle class preference for home ownership gradually developed, as rent control made quality rental housing increasingly scarce and as building societies expanded the credit available for home purchases. *Id.* at 282-83.

205. *See id.* at 140-87 for a thorough discussion of worker housing through the First World War.

206. *See supra* notes 59-63 and accompanying text which explains the equalizing effect of council housing.

207. The typical housing estate is high density, by American standards, at about 12 dwelling units per acre. BURNETT, *supra* note 18, at 299-300.

208. For a description of the suburbanization process, spurred by the development of affordable rail transportation and the marketing efforts of speculative home builders, see *id.* at 188-209.

209. *Id.* at 285.

struct their own homes.²¹⁰ Small and local in orientation, the societies were mutual in organization, with each member paying subscriptions and each member, and only members, being entitled to a mortgage loan.²¹¹

In the middle of the nineteenth century, permanent building societies came into existence, doing business as corporations and pooling investment capital to make home loans to members.²¹² These permanent associations soon eclipsed their temporary forebearers. British banks by and large shunned the building industry, partly because the industry had a notoriously high bankruptcy rate and partly because too much new construction might depress the value of the banks' existing real estate loans.²¹³ In 1896, Pollock observed that "the artisans of the north country are already in great part, through the operation of building societies, full owners of the homes they dwell in."²¹⁴

During the twentieth century, the building society institution burgeoned, taking on major roles in the housing and financial markets. The period of expansion dates to the economic recovery of the 1930s. After the First World War, the private housing industry stagnated under the grip of the economic depression and high interest rates induced by massive wartime debt.²¹⁵ Britain's abandonment of the gold standard in 1931 led to dramatic reductions in market interest rates, thereby spurring a housing boom, financed by building society mortgages.²¹⁶ A substantial government subsidy in the form of favorable income tax treatment also promoted building society growth.²¹⁷ As building societies multiplied in size, they also expanded their geo-

210. *Id.* at 94-95. See also MARK BOLÉAT, *THE BUILDING SOCIETY INDUSTRY* 3 (1982) (reporting that first building society was established in Birmingham in 1775).

211. For a brief historical account of the societies' working class, mutual-aid origins, see DAVIES, *supra* note 70, at 13-23. The societies typically used a lottery or ballot to determine which lucky families would first acquire a jointly financed home. See BOLÉAT, *supra* note 210, at 3; DAVIES, *supra* note 70, at 30-32.

212. See generally CORNISH & CLARK, *supra* note 38, at 147-48; DAVIES, *supra* note 70, at 17-25.

213. See BURNETT, *supra* note 18, at 24-25.

214. FREDERICK POLLOCK, *THE LAND LAWS* 195 (3d ed. 1896).

215. See BOWLEY, *supra* note 38, at 23-35, 74-83; DAVIES, *supra* note 70, at 43-45.

216. See DAVIES, *supra* note 70, at 45-47.

217. Depositors effectively paid a lower rate of tax on interest paid by building societies than the rate assessed on interest paid by other financial institutions. See COMMITTEE TO REVIEW THE FUNCTIONING OF FINANCIAL INSTITUTIONS, REPORT, 1980, CMND 7937, at 107-112 (recommending that interest payments made by all financial institutions receive same tax treatment). Favorable tax treatment afforded homeowners,

graphic scope of operations throughout Britain, becoming national rather than local lending institutions.²¹⁸

In the course of their evolution, the societies retained the mutual membership organizational form, but in substance they became financial intermediaries.²¹⁹ Departing from the nineteenth century conception of a homeowners' cooperative, they assumed the purely economic function of channelling capital from investors to home mortgagors, with these two groups, lenders and borrowers, distinct, rather than common.²²⁰

With growth came dramatic market concentration; by the 1980s a cartel of five major building societies controlled over fifty-five percent of the funding for the British home mortgage market.²²¹ The market achieved these increasing levels of concentration through both mergers, which larger societies actively sought and the government encouraged, and the opening of new branches.²²² Representatives of the building

currently subsidizes the demand for building society mortgages. See *supra* text accompanying notes 193-95 for an illustration of homeowner benefits.

218. See, e.g., BOLÈAT, *supra* note 210, at 11-13 (describing the expansion and consolidation of building societies since 1895 and remarking on the fact that the five largest societies control 55% of the market, with over 2,000 branches between them).

219. The building societies' historic cooperative roots are reflected by the fact that the government agency charged with their oversight is known as the Registrar of *Friendly Societies*. See *id.* at 3.

220. One might suppose that the distributional effects of channeling investors' capital to home mortgagors would be egalitarian — the wealthy investing in middle class housing. According to one scholar, however, the British societies function to increase wealth disparities. There is a strong ethic among the working middle classes of depositing in the societies; the well-to-do obtain a disproportionately high percentage of the dollar volume of mortgage loans. See PAUL BARNES, *BUILDING SOCIETIES: THE MYTH OF MUTUALITY* 24-26, 38-40 (1984). Accord, T.J. GOUGH, *THE ECONOMICS OF BUILDING SOCIETIES* 49-54 (1982) (describing the characteristics and patterns of society members and investors).

221. DAVIES, *supra* note 70, at 54. For statistics and graphs showing the historical increase in market concentration, see GOUGH, *supra* note 220, at 104-13. Today there are approximately 200 active building societies, with the 16 largest controlling over 82% of the mortgage funds. BARNES, *supra* note 220, at 17. The number of active building societies peaked at 2,795 during the early 1890s. DAVIES, *supra* note 70, at 26.

Besides building societies, there are other suppliers of mortgage money including insurance companies, local authorities, commercial banks, and overseas banks. These firms, however, have never provided a substantial part of the British demand for home mortgages, and their market share steadily declined during the 1970s and 1980s. See BARNES, *supra* note 220, at 22-23; GOUGH, *supra* note 220, at 102-04. At the beginning of the 1980s, the building societies' share of the market for new mortgage loans rose to 95%. See DAVIES, *supra* note 70, at 196.

222. For a description of modern merger practices and a critique of the justifica-

society industry justify mergers and the resulting heightened market concentration primarily on the basis of efficiency through economies of scale. In contrast, critics of the building society posit that cartelization has had the negative effects that economic theory traditionally associates with oligopoly: instability in supply, with drastic swings between too much and too little mortgage money to lend;²²³ price fixing under the auspices of trade associations;²²⁴ and inefficiency as neither competition nor shareholder-members constrain society managers' discretionary expenditures.²²⁵

Criticism of the building societies' economic performance appears merited. Apologists for the societies have failed to supply empirical evidence of economies of scale, while wide fluctuations in the supply of loan funds are well documented.²²⁶ It is also noteworthy that British home mortgage rates have remained consistently higher than American rates during the past decade — usually by a gap of over two percent.²²⁷ The cause of this persistent differential is hard to identify, and

tions therefore, see BARNES, *supra* note 220, at 53-71; GOUGH, *supra* note 220, at 102-17. Building society acquisition of branch locations comprises the prime method of expansion. The definitive study of building society branching is DAVIES, *supra* note 70.

223. See BARNES, *supra* note 220, at 30-31; GOUGH, *supra* note 220, at 76-78.

224. The building society industry functions as a collusive oligopoly, with rate agreements made within the auspices of a dominant trade association, the Building Societies Association (BSA). Over 99% of the building societies, by assets, are members of the BSA. BOLÉAT, *supra* note 210, at 9. For an economic model analyzing building society interest rates, see GOUGH, *supra* note 220, at 65-80.

225. See BARNES, *supra* note 220, at 42-52. For careful consideration of whether efficiency justifies the long-term trend toward bigger and fewer building societies, see GOUGH, *supra* note 220, at 81-96. Gough concludes that for very small societies, increases in size tend to produce economies of scale. *Id.* at 95. He finds, however, conflicting empirical evidence as to economies of scale or diseconomies of scale for large societies' increases in size. *Id.* at 95-96.

226. See *infra* note 250 and accompanying text.

227. In March 1993, the base mortgage rate of interest in Britain was 7.99 percent, with lower rates sometimes offered to new borrowers. See Lindsay Cook & Graham Searjeant, *Mortgage Demand Rises More than 40%*, THE TIMES (London), Mar. 19, 1993. See also Lindsay Cook, *Building Societies Cut Mortgage Rates*, THE TIMES (London) Nov. 14, 1992 (describing mortgage rates; first time borrowers pay approximately 2% to 2.5% less interest than existing borrowers for first six months or year of loan); Lindsay Cook, *Lenders to Offer Cheapest Mortgages For 25 Years*, THE TIMES (London), Jan. 27, 1993 (discussing reduction in base mortgage rate). In the United States, the comparable rate was 4.43% on an adjustable rate loan. ATLANTA CONSTITUTION, March 26, 1993 at H2. For comparisons with the recent past, see MARK BOLÉAT, NATIONAL HOUSING FINANCE SYSTEMS: A COMPARATIVE STUDY 53 (1985) (table covering 1973 to 1984); UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, SAVINGS INSTITUTIONS SOURCEBOOK 31 (1988) (table covering 1965 to 1987).

undoubtedly may be multifaceted. Nonetheless, its significance calls into question the comparative efficiency of building societies as financial intermediaries, channelling capital from investors to mortgagors.²²⁸

b. Legal Controls

The primary functions of building societies are borrowing money from members and lending it to mortgagors.²²⁹ Consequently, the most important elements of building society law are those governing these two prime relationships. Building societies' roots lie in British private law; the legal relationships relevant to building societies rest firmly in contract.

Government abstinence from regulation is the key to the lingering predominance of private contract law in defining the rights and obligations of building societies. The central government consistently has followed a *laissez-faire* approach, viewing its regulatory role as limited to protecting shareholders and depositors from fraud and imprudent management.²³⁰ Building societies' immunity from government controls is remarkable, given the strong twentieth century trend toward expanding government control over key segments of the economy.²³¹

For example, in 1974 the British rate was 11% while the average United States rate was 8.92%; in 1980 the British rate was 15% until November and then 14%, while the average United States rate was 12.66%. *Id.* The data published by the United States League of Savings Institutions does not distinguish between fixed-rate and adjustable rate loans. The more appropriate comparison is between the British rate and the United States interest rate on variable rate loans.

228. Two factors which differentiate British and American mortgage loans suggest that British mortgage rates should be lower than the American rates. First, building societies attempt to hold their mortgage rates below a market clearing rate by mortgage queuing, rather than letting the borrower demand drive up rates. Second, because building societies, unlike United States lenders, are contractually free to raise the interest rate at any time during the mortgage term, *see infra* text accompanying notes 241-46, they do not undertake the risk of interest rate fluctuation. Accordingly, their interest rates should be lower because there is no need to hedge this risk by charging a slightly higher interest rate than the current cost of funds.

229. In this respect, they are closely analogous to American savings and loan associations, which historically provided home mortgage financing.

230. This contrasts with the history of American regulation of savings and loans, despite the recent pendulum swing of deregulation and reregulation as noted *supra* note 11. Since the New Deal, the scope of regulation in the United States has extended much further than in Britain, chiefly in the areas of deposit insurance and borrower protections. *See infra* Part IIIB (discussing the protections extended to American mortgagors).

231. While arguably justifying more regulation, the substantial indirect tax subsi-

This favored position is traceable directly to, and sometimes even justified by, the societies' historical roots as local clubs designed for the mutual support of members, notwithstanding their evolution into huge financial institutions.²³²

(i) *Members' rights*

In theory, the mutuality principle underlying building societies makes the depositing members the owners of the society and grants them control over its activities under a democratic model. Management owes a duty to the membership to be responsive and act as its agent. Members, as depositors, have certain legal rights, such as the right to withdraw their shares upon demand or in accordance with the terms of any time deposit, and the right to receive contractually set interest.²³³ Members are entitled to vote on certain major society decisions, such as merger with another society.²³⁴ Legally, societies must disclose financial information to the government,²³⁵ as well as to their members and depositors.²³⁶

These rights, however, represent only a modicum of government control. In practice, members' rights are a paper tiger. Control is divorced from ownership: members' needs or desires virtually never constrain the decisions of building society directors and managers.²³⁷

dies accorded the building societies failed to have that impact. *See supra* note 217 (discussing these subsidies).

Professor Glyn Davies, a housing economist, finds it "surprising that building societies have managed to retain their freedom for so long into the post-war period, given the inordinate appetite of most governments in this period to interfere more and more in pursuance of their attempts, often futile and sometimes perverse, to control the economy." DAVIES, *supra* note 70, at 223-24.

232. *See* GOUGH, *supra* note 220, at 147 (noting the dichotomy between the societies' image of mutuality and cooperative enterprise and the reality of societies as powerful and autocratic commercial entities).

233. The individual building society's rules determine the members' rights to compensation in connection with their shares. *See* Building Societies Act, 1986, ch. 53, § 5 & sched. 2, § 3 (Eng.). The contract of deposit governs depositors' rights, regardless of whether they are members. *See id.* §§ 7(1), 8-9.

234. *Id.* §§ 93-95 & sched. 16.

235. *Id.* §§ 52-54 (enumerating information obtainable by Building Societies Commission). *See also id.* §§ 55-57 (enumerating information obtainable by government inspectors on behalf of the Commission).

236. *Id.* §§ 72-76 (requiring distribution of annual summary financial account to members and depositors, prescribing contents of annual report and mandating free access to accounts, business statement, and directors' report at society's offices).

237. Two prime examples of managerial decisionmaking that apparently run

Under the contract model of governance, the society's rules and procedures prescribe managers' authority and members' oversight rights. With management's proxy solicitations, however, members' meetings and votes are almost always rubber stamps for management proposals. This phenomenon is no different from, and indeed is an offshoot from, the managerial evolution of large corporations, for whom shareholder control is now largely fictionalized.²³⁸

In fact, there is even less owner control over management in a building society compared to many large corporations. First, consistent with the mutuality concept, building societies are nonprofit, with members entitled to only accumulated deposits and accrued interest.²³⁹ Hence, there is no managerial incentive to maintain profits at a level sufficient to pay dividends. Essentially, it suffices for the society to remain solvent.²⁴⁰ Second, large corporations typically have one or more large institutional shareholders, such as pension funds, which may exert appreciable influence upon management. In contrast, large investors traditionally shun building societies. Instead, members are individuals, typically with small deposits at stake and little incentive or ability to intervene in management.²⁴¹

counter to the interests of membership are high growth rates in organizational size, accomplished in part by the proliferation of branch locations, and high expenditures on office space, its furnishings, and other executive perquisites. See GOUGH, *supra* note 220, at 7-11.

238. The classic study on the separation of ownership and control in large public corporations is ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1991). See also generally JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 75-90 (4th ed. 1985) (discussing the structure of modern corporations); JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 218-20 (4th ed. 1984) (analyzing the efficiency of modern corporations). The recent American growth of large institutional investors such as pension funds and mutual funds may enable shareholders to monitor corporate managers effectively. See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990) (rejecting traditional view that shareholder passivity is inevitable; instead contending shareholder voice is possible with widespread reform of legal rules).

239. In this respect members, although nominal owners of the society, are in the same economic position as savings depositors in United States banks.

240. See GOUGH, *supra* note 220, at 3-5 (marking that building societies strive to attain not "profits" but only a "minimum surplus" each year to avoid a "shortfall" in which expenditures exceed income).

241. See *id.* at 11-12 (reporting that when funds were tight in 1979, the Building Societies Association considered turning to financial institutions for funds but decided to stay with their historic pattern of "tapping savings almost entirely from the personal sector — i.e. individuals"). See also BARNES, *supra* note 220, at 35-41 (finding that

(ii) *Mortgagors' rights*

The prototypical British mortgage loan, sometimes called the simple repayment mortgage, is a fixed-term facility, usually twenty-five or thirty years, with monthly payments amortizing the principal over the term.²⁴² However, the simple repayment mortgage, unlike its American fixed rate counterpart, bears a variable interest rate.²⁴³ A variable interest rate insulates building societies against the risk of rising interest rates.²⁴⁴ When interest rates rise, building societies generally follow suit by offering higher returns to their members to retain current accounts and to attract new customers. The market thus compels building societies to offer market rates to remain competitive with commercial banks and other financial institutions.

The variable interest rate scheme places the entire risk of interest rate fluctuations on the borrower.²⁴⁵ In this respect, British mortgage loans differ sharply from American adjustable-rate mortgages, which allocate the risk between borrower and lender.²⁴⁶ Thus, a British homeowner lacks the ability to predict future mortgage payments. When the building society announces a new interest rate, the monthly payments change accordingly. Substantial increases impose hardship on mortgagors whose income fails to rise equivalently. To cushion the shock, building societies sometimes ameliorate the increase by ex-

individual savers in the societies subsidize both mortgage holders and the few larger investors who make term deposits).

242. GOUGH, *supra* note 220, at 30.

243. *Id.*

244. In the United States, savings and loan institutions lacked such rate change protection. Fixed-rate, long-term mortgage loans are mismatched with variable-rate deposits, leading to gigantic losses when, as in the late 1970s and early 1980s, interest rates rise much higher than anticipated while mortgage yields are fixed. For a general discussion of these and other incongruities in the savings and loan system, see C. Thomas Long et al., *Enhancing the Value of the Thrift Franchise: A Possible Solution for the Dilemma of the FSLIC?*, 37 CATH. U. L. REV. 385, 388-98 (1988).

245. As the Law Commission explained, "the rate of interest charged is entirely at the mortgagee's discretion and is variable unilaterally by the mortgagee at any time." LAW COMMISSION, WORKING PAPER NO. 99, LAND MORTGAGES 80 (1986) [hereinafter LAND MORTGAGES].

246. American adjustable-rate loans contractually limit interest rate changes, typically by specifying an objectively-based rate index and by setting both a maximum annual rate change and a maximum total interest rate. Recently, a few building societies announced plans to offer some types of fixed and variable rate loans with contractual limits on changes. See, e.g., *Lenders to Reward the Faithful*, THE TIMES, (London), Feb. 15, 1992, at 21 (reporting on the Abbey National Society's offer to fix rates for existing borrowers at 11.7 percent for the next seven years).

tending the repayment term.²⁴⁷

Mortgagors lack legal rights to pay a contracted-for interest rate. Moreover, antiusury laws do not apply to British mortgage loans. The only protection borrowers have against overbearing rate increases resides in a set of informal and extra-legal norms. First, building societies, perhaps true to their historical roots,²⁴⁸ prefer the face of benevolence. In order to maintain goodwill and public approval, the industry attempts to minimize the frequency and amount of rate increases.²⁴⁹ Public approbation, if severe enough, conceivably could foment government inquiry and the enactment of statutory controls on interest rate setting. The traditional restraint exhibited by the building societies, however, is not universally embraced by all observers. For example, one British scholar criticized the building society industry for attempting to stabilize interest rates, maintaining that neither public policy nor economic theory makes a "case for stable interest rates in preference to fluctuating interest rates."²⁵⁰

Second, the nature of oligopoly pricing substantially curbs the incidence of inequities among mortgagors. Under the variable-rate mortgage instruments employed by building societies, there is no reason why mortgagors from one building society should pay the same interest rate as mortgagors from another society, or indeed why mortgagors of one society should, as a general matter, pay the same rate. In theory, when a building society raises interest rates, it could select a discrete group of mortgagors to bear the increase, using whatever criteria it chose, e.g., the borrower's history of prompt payment, the value of the

247. See GOUGH, *supra* note 220, at 38-39 (finding that many loan extensions occurred in 1979 when mortgage rates reached 15%).

248. See *supra* note 211 and accompanying text for a description of the building societies' mutual aid origins.

249. See LAND MORTGAGES, *supra* note 245, at 80, reporting that

[I]n the present state of the mortgage market competition is so fierce that there is little likelihood of any mortgagee moving its interest rates much out of line with its competitors. If it did so, not only would it fail to attract new borrowers, but existing borrowers would seek to borrow money elsewhere at a lower rate of interest in order to redeem their existing mortgages. However, there is no guarantee that this situation will continue indefinitely.

Id.

250. BARNES, *supra* note 220, at 30. See also *id.* at 154 (stating that policy of stabilization causes "feast and famine in the mortgage markets, which in turn led to boom and depression in the house building industry"); GOUGH, *supra* note 220, at 137-46 (finding that the British housebuilding industry is unable to achieve a steady, high output due to cycles of surfeit and famine in mortgage funds).

mortgage security, the age of the mortgage loan, or the borrower's evident ability to pay. A mortgagor who raises an equity argument — that she pays more than her neighbors — has no legal right to insist on the same treatment as any other class of borrowers.²⁵¹

Oligopoly pricing, however, has produced the benign effect of substantial equalization of interest rates. For decades, the building society cartel, through its trade association, has set mortgage rates through the rubric of “recommended” or “advised” interest rates for member deposits and for mortgages.²⁵² Almost all large building societies religiously follow the suggested rates.²⁵³ The small, maverick societies that sometimes set their own rates abstain from vigorous competition for borrowers with the other financial institutions. Rather, the small societies that ignore the market rates typically pay savers more interest and charge higher mortgage rates.²⁵⁴ Despite building societies' experimentation with differential mortgage rate structures²⁵⁵ these rate structures are not yet a general feature of the mortgage market.²⁵⁶

251. Such an equity argument, which hearkens back to the benevolent, fraternal roots of the building society movement, confers no legal right. Early on, courts ruled that contract law and mortgage law determined a borrowing member's rights and liabilities, rather than the member's status as a member. *See, e.g.,* *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc'y v. Martin*, 17 Q.B.D. 609, 614, 616, 618 (1886) (denying member right to arbitration on ground that member's alleged breach of mortgage covenant did not relate to member's relationship with building society). *See also Correspondence*, 140 *LAW TIMES* 276-77 (1916) (decrying treatment of borrowers as mortgagors under “ordinary private mortgage,” with contract provisions allowing building society to call in money or raise interest rate, even though borrower fully performed his obligations to the society).

252. *See* BARNES, *supra* note 220, at 3-4, 15-16. Mortgage rates are not changed as frequently as commercial prime lending rates, i.e., the Minimum Lending Rate, or as frequently as societies change the interest they pay on shares. Gough thoroughly describes the societies' decisionmaking process for mortgage rate changes. GOUGH, *supra* note 220, at 132-37.

253. GOUGH, *supra* note 220, at 78.

254. BARNES, *supra* note 220, at 15-16 (finding that small societies, which often pay more to savers and charge more to borrowers, are common targets for merger takeovers by large societies).

255. *See* BARNES, *supra* note 220, at 154 (remarking that building societies have introduced differential mortgage rates when they “felt it necessary”); DAVIES, *supra* note 70, at 216-17 (commenting that some societies charge higher interest rates for exceptionally large loans). Insiders sometimes obtain rate preferences. *See* BARNES, *supra* note 220, at 150 (reciting instance where building society director had a 5% mortgage loan when going trade association rate was 10%).

256. GOUGH, *supra* note 220, at 66-67 (reporting that most mortgage loans are at the basic lending rate).

A recent example of public opinion constraining the societies' contractual freedom to alter interest rates occurred in 1987. The leading building societies announced a plan to offer lower interest rates to new mortgagors. Because of the small rate differential, existing mortgagors paying the higher rate lacked incentive to refinance, given the transaction costs of doing so. After a barrage of criticism reported by the media, led of course by existing borrowers, the building societies forsook the proposal.²⁵⁷ Such extralegal concerns with equity — not reflected by the substantive content of British mortgage law — probably relegated other proposals for widespread differential pricing of mortgage money to failure.²⁵⁸

The setting of interest rates is not the only area of mortgage law displaying a great imbalance between the rights of borrowers and lenders. In a homeowner's ranking of the importance of loan features, the substantive rules governing a borrower's default are second in importance perhaps only to the interest rate on the loan.²⁵⁹ Under an adhesion contract regime, where lenders unilaterally draft loan documents, there is no legal impediment to a lender accelerating and exercising its power of sale whenever the borrower defaults on the loan.²⁶⁰ Lenders may tolerate and accept late payments, but as a matter of grace, not of right.²⁶¹ In the United States, the law abandoned this one-sided ap-

257. See Richard Thomson, *Natwest Signals Lower Mortgages*, THE TIMES (London), July 22, 1987, at 1, col. 5 (reporting on bank and building society actions to end gap between existing borrowers who paid higher rates than new borrowers); Richard Woods, *Home Loan Chaos*, THE SUNDAY TIMES (London), July 26, 1987, at 63, col. 8 (remarking on rate differences between various lenders).

258. See GOUGH, *supra* note 220, at 61 (claiming that building societies are unlikely to switch to mortgage loans with principal amount adjusted for inflation for new borrowers because of equity concerns vis-a-vis existing borrowers).

259. LAND MORTGAGES, *supra* note 245, at 94-100 (finding that mortgagors are "artificially put technically in default"; mortgagees can pursue remedies even though there is no real threat to security or when mortgagor has already remedied breach).

260. Exercise of a power of sale set forth in the mortgage instrument is the primary method for the lender to realize upon the value of its security. Foreclosure, in Britain, in contrast to American usage, refers only to the mortgagee's acquisition of clear title without a sale by terminating the mortgagor's equity of redemption. Foreclosure is used so little that it is said to have reached "the point of obsolescence." LAND MORTGAGES, *supra* note 245, at 91.

261. While § 103 of the Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20 (Eng.), provides for notice of default to the mortgagor, followed by a three-month grace period before the exercise of a power of sale, this protection is not mandatory. Mortgage lenders invariably amend or exclude this protection. LAND MORTGAGES, *supra* note 245, at 97. Although British courts have discretion to delay or withhold a mortgagee's request for a possession order, a mortgagee apparently can bypass even this amorphous road-

proach decades ago, with the formalization of notice of default provisions, grace periods for cure of default, and bankruptcy provisions authorizing the unwinding of loan accelerations.²⁶² In Britain, however, freedom of contract still serves as the legal baseline for resolving the parties' conflicting interests upon default. Although many defaulting British mortgagors receive some leniency, extended by their lenders as a matter of custom and goodwill, there is no legal protection for borrowers who lack such good fortune.²⁶³

Parliament may reform this imbalance in the near future. In November 1991, the Law Commission recommended sweeping reform of British mortgage law, including the creation of a "protected mortgage" for residential property, under which freedom of contract is substantially curtailed.²⁶⁴

D. *British Housing Market: Concluding Observations*

One broad theme emerges from the legal and social evolution of British twentieth century housing: legal rules, as the realists taught decades ago, have real world impacts. Legal rules do more than resolve claims to entitlements between parties to a judicial proceeding. Nor are they mere reflections of society's evolution. Although in a broad sense, every society makes its own legal rules, and changes in society often translate into legal change, the converse is also true. Legal rules may assume a life of their own, changing society in unforeseen ways.

In Britain, legal reform of the landlord-tenant regime wrought a drastic change in how the nation housed itself. Yet tenants' rights advocates who championed the legal reforms did not foresee the coming transformation.²⁶⁵ Indeed, this transformation became visible only

block simply by selling, while a stubborn mortgagor remains in possession. *See id.* at 103.

262. For a concise summary of the protective devices extended to American residential mortgagors, see GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 479-85, 491-99, 650-58 (2d ed. 1985 & Supp. 1989) (covering redemption rights, limitations on acceleration, and bankruptcy protections).

263. The lender's discretion to change the interest rate or to call in the loan after a purely technical default has troubled the Law Commission. As new lenders compete with the building societies, regulators fear that they might not obey the extralegal, reputational norms that constrain the building societies. *See LAND MORTGAGES, supra* note 245, at 80-82, 116-19.

264. LAW COMMISSION, REP. NO. 204, *TRANSFER OF LAND — LAND MORTGAGES* 25-27, 51-52 (1991).

265. This assertion is based upon my review of Parliamentary debates, government reports, and statements in contemporaneous legal periodicals and newspaper accounts.

several generations after the birth of rent control. In the instance of landlords and tenants, new law affected society because of the scope of freedom of choice afforded to individuals by that society. On a larger scale, the rules adopted to govern a particular legal relationship always affect individuals' propensity to enter into that relationship. When the relationship is one founded on volition — such as landlord and tenant — rather than happenstance — such as tort — a would-be participant may elect abstinence.

Such abstinence, in the form of long-term and apparently permanent market withdrawal, is the prime story of twentieth century British landlord-tenant law. While treatises advancing the doctrines governing the rights of private landlords and their tenants may still line the walls of British law libraries,²⁶⁶ their significance pales year by year, because increasing numbers of British families are buying homes and fewer renting privately. The common law rules signify much ado about nothing: they are laws of more and more complexity affecting fewer and fewer people. The most heavily regulated sector, that of private landlord-tenant law, has atrophied, while the virtually unregulated sector, that of mortgagor-building society, has thrived. Building

See, e.g., 33 PARL. DEB., H.L. (5th ser.) 726-53, 921-37, 1058-92 (1919) (considering legislation codified on April 2, 1919 as the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, 9 Geo. 5, ch. 7 (Eng.)); 20 PARL. DEB., H.L. (5th ser.) 769-76, 789-804 (1915) (giving second reading of and commenting in committee on legislation codified on December 23, 1915 as the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97 (Eng.)); 113 PARL. DEB., H.B. (5th ser.) 799-857, 1133-1248, 1621-58 (1919) (giving second reading of and discussing in committee early version of 1919 Increase of Rent and Mortgage Interest (Restrictions) Act); 112 PARL. DEB., H.C. (5th ser.) 696-709 (1919) (debating on problems associated with evictions and notices to quit); 76 PARL. DEB., H.C. (5th ser.) 420-73, 1425-1542 (1915) (discussing merits of proposed Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915); MINISTRY OF RECONSTRUCTION, REPORT OF THE COMMITTEE ON THE INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACTS, 1919, CMD 9235 at 4-7 (Hunter Committee) (enumerating the effects of decontrol and rejecting permanent rent control); A. Clifford Fountaine, *The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: Some Suggested Amendments*, 37 LAW Q. REV. 95-103 (1921) (proposing primarily technical amendments to the 1920 version of the Increase of Rent and Mortgage (War Restrictions) Act); *Parliament*, THE TIMES (London), Dec. 2, 1915, at 12, col. 4-7 (reporting on the second reading debate in the House of Lords on the 1915 Increase of Rent and Mortgage Interest (War Restrictions) Bill); *Parliament*, THE TIMES (London), Dec. 9, 1915, at 12, cols. 5-6 (summarizing committee debate in House of Lords on same); *Rent Raising Provisions of the New Bill*, THE TIMES (London), Nov. 26, 1915, at 10, cols. 3-4 (discussing the debate following M.P. Long's proposal to control rent during the war).

266. For some of these tomes' titles, see *supra* note 9.

societies replaced landlords as the financial providers of housing. To escape legal controls that limited profit, capital moved to an alternative regime where freedom of contract reigns supreme.

While the supplanting of landlords by building societies may or may not be serendipitous,²⁶⁷ its genesis clearly is accidental. In the critical period between the two World Wars, neither the British government nor its citizens made a public policy decision to phase out rental housing. Neither housing reformers nor building societies consciously expressed a desire to replace private leases with other forms of housing tenure. Instead, the promulgation of other forms of housing occurred as a byproduct of an effort to achieve distributive justice between two large groups — landlords of dwellings and their renters — with the underlying presupposition that both groups would continue indefinitely to play a major role in housing.

It is questionable whether private landlords' demise has furthered the public interest. In general, the policy arguments parallel those raised for and against government subsidization of home ownership. Neighborhood stability may be enhanced by the presence of homeowners, who are less transient than renters and more likely to involve themselves in local government, the public schools, and other community affairs.²⁶⁸ From the standpoint of the individual family, home ownership epitomizes the virtues of Thatcher's "property-owning democracy."²⁶⁹ Buying a house represents an investment that is likely to appreciate or at least hold its value, thereby assuring the family of long-term financial security, which may prove especially propitious as the owners near retirement age.²⁷⁰ For many middle class families,

267. See *infra* notes 268-70 and accompanying text (examining whether the decline of the British landlord has been beneficial).

268. See, e.g., Carla A. Hills, Secretary of Housing and Urban Development, Speech to the American Bar Association (Aug. 13, 1975), excerpted in CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 78 (1977):

The family who owns its own home, not only has an investment in a house, it has an incentive to take an active role in the decisions which shape its neighborhood, its community, its schools, and churches. . . . Homeownership provides a sense of identity, of roots and of security, which is the stuff from which neighborhoods are made

Id.

269. See *supra* note 4 and accompanying text.

270. See DAVID SCHWARTZ ET AL., A NEW HOUSING POLICY FOR AMERICA: RECAPTURING THE AMERICAN DREAM 284-87 (1988) (detailing the importance of homeowners' equity in enabling families to afford costs of children's college education, major health care, and retirement).

their house is their single most valuable asset. These points tend to justify legal rules that destroy the private rental market.

On the other side, critics of generous homeowner subsidies point not only to equity concerns but also to the fact that homeowners often undertake very substantial mortgage debt.²⁷¹ Some residents are ill-equipped, both financially and otherwise, to assume the burdens and responsibilities of owning and maintaining a house. Thus many households are better off with the rental option.

Another important criticism of the transformed British housing market is that it limits substantially freedom of choice. Because virtually no decent private rental housing exists, and good council housing is not immediately available due to substantial waiting lists, many British families must purchase housing. Most homeowner subsidy policies, as in the United States for example, do not foreclose renting — they raise equity concerns by increasing the cost of renting relative to owning. However, in Britain, families who want decent housing must buy, even though they would prefer to rent for reasons of financial planning or geographic mobility. This bind is especially acute for young British families, who are likely to have limited savings and whose career plans may dictate moving due to employment considerations. Even when a family expects to live in a community for a relatively short time period, the absence of rental housing makes purchasing imperative and compels the family to bear the substantial transaction costs of buying and selling a house.²⁷²

271. See generally THE PROPERTY OWING DEMOCRACY (John Doling et al., eds., 1988)[hereinafter PROPERTY OWING DEMOCRACY].

272. Detailed critique of the merits of government acting to boost the rate of homeownership is beyond the scope of this Article. However, a wealth of literature on this subject from many different perspectives has emerged. See generally, e.g., CRITICAL PERSPECTIVES, *supra* note 172 (collection of essays, many by socialist scholars, who are sharply critical of government augmentation of middle-class home ownership); PERIN, *supra* note 268 (examining social meanings of American home ownership from cultural anthropologist's perspective); PROPERTY OWING DEMOCRACY, *supra* note 271 (discussing generally the debt burdens assumed by British homebuyers); PETER SAUNDERS, A NATION OF HOME OWNERS (1990) (supporting generally the rise in homeownership in course of sociological study by British author); SCHWARTZ, *supra* note 1270 (calling for new United States policies to restore dream of home ownership to younger, non-traditional, and low-income families).

III. IMPLICATIONS FOR UNITED STATES HOUSING POLICY

A. Demographic Trends

The recent history of housing tenure in the United States, in contrast with Britain, presents a much less clear picture. At the turn of the century, most American families rented homes, but renters did not comprise an overwhelming majority, as in Britain. Close to half of all American families owned their own homes;²⁷³ virtually all others were private market tenants, as this was before the advent of public housing.²⁷⁴ Private market rentals consisted of a mix of multi-family units and single family residences: by today's standards, the physical quality and size of rental accommodations was quite low. When this century began, rural dwellings generally lacked amenities such as indoor plumbing and electricity; urban units often were dilapidated, cramped tenements.²⁷⁵

Throughout this century the United States' private rental market has remained vibrant. In terms of total units, it has kept pace with population growth. From 1900 to 1990, the total number of rental units increased from eight million to thirty-one million.²⁷⁶ This growth is dramatic, even though it accompanied a relative decline in market share from fifty-three percent to thirty-four percent, as compared to owner occupation.²⁷⁷ While maintaining its market share, American rental housing has advanced dramatically in quality. The average rental home today is both larger and better equipped, in terms of utilities and amenities, than ever before. While it is true that there are still

273. UNITED STATES BUREAU OF CENSUS, CENSUS REPORTS, POPULATION, TWELFTH CENSUS OF THE UNITED STATES, vol. II, pt. II, table CIII, at cxviii (1902) (47 percent).

274. See *infra* text accompanying notes 293-94 (discussing the genesis of America's public housing program).

275. See generally GEORGE STERNLIEB, PATTERNS OF DEVELOPMENT 29-30 (1986) (describing slum conditions up to the turn of the century). For a literary exposition of rural poverty and dwellings in the South, see JAMES AGEE & WALKER EVANS, LET US NOW PRAISE FAMOUS MEN (Houghton Mifflin 1988) (1941). For a turn of the century account of American slum conditions, see generally JACOB RIIS, THE BATTLE WITH THE SLUMS (1895).

276. BUREAU OF CENSUS, UNITED STATES DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING STATISTICS, Summary Tape File 1C [hereinafter 1990 CENSUS]; 2 BUREAU OF CENSUS, UNITED STATES DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 646 (1975) [hereinafter HISTORICAL STATISTICS].

277. 1990 CENSUS, *supra* note 276, at Summary Tape File 1C; 2 HISTORICAL STATISTICS, *supra* note 276, at 646.

slum properties — indeed, far too many — which have proven stubbornly resistant to eradication, they comprise only a small piece of the rental sector.²⁷⁸

The resilience of this century's residential rental market is due in part to the historical abstinence from long-term rent control. Rent control in the United States, in contrast to Britain, remained by and large a wartime phenomenon. Both World Wars saw rent control laws as part of the overall centralized economic planning that included other measures such as price controls and rationing of goods.²⁷⁹ In both instances, however, peacetime led to prompt nationwide repeals, with the notable exception of New York City in the 1940s.²⁸⁰

This century's long-term trend is a gradual, but not dramatic, rise in the proportion of families who own their own homes. In 1900, almost forty-seven percent of American families owned their homes; today sixty-four percent of American families own their own homes.²⁸¹ There are two primary reasons for the increase, both stemming from federal policies. First, the federal income tax system, which dates to 1913, subsidizes homeowners. Interest on mortgage loans and real

278. See BUREAU OF CENSUS, UNITED STATES DEP'T OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES IN 1989, at 156 (1991) [hereinafter AMERICAN HOUSING SURVEY] (reporting that only 1,588,000 of 33,767,000 rental occupied units in the United States in 1989 were classified as having severe physical problems).

279. See Kenneth Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 727 & nn. 6-7 (1983); Lawrence Berger, *The New Residential Tenancy Law — Are Landlords Public Utilities?*, 60 NEB. L. REV. 707, 717 (1981).

280. For a general discussion of rent control in New York City, see Michael A. Stegman, *The Model: Rent Control in New York City*, in THE RENT CONTROL DEBATE 29, 29-55 (Paul L. Niebanck ed., 1985).

281. The national rates of owner occupation, as revealed by census records, are:

Year	Rate
1900	46.7%
1910	45.9%
1920	45.6%
1930	47.8%
1940	43.6%
1950	55.0%
1960	61.9%
1970	62.9%
1980	64.4%
1990	64.2%

See 2 HISTORICAL STATISTICS, *supra* note 276, at 646; 1990 CENSUS, *supra* note 276, Summary Tape File 1C.

property taxes are deductible,²⁸² while a tenant's rental payments are not. The dollar value of this tax benefit is often highly significant. Thus, families who can afford to buy a house receive financial incentives to desert the rental sector, even if they are pleased with the physical characteristics of their present accommodations.

Second, since the New Deal, the federal government has sponsored long-term mortgage financing with small down payments.²⁸³ Before creation of the Federal Housing Association, lending practices effectively precluded middle-class families who lacked substantial savings and a high income from buying homes. To limit their risk, lenders typically demanded high down payments and quick repayment of loan principal.²⁸⁴ After the reforms, the dream of home ownership became available to any family with a regular source of earned income and no negative credit history.²⁸⁵ Mortgage loans for ninety to ninety-five percent of the purchase price, with repayment over twenty-five or thirty years at a low fixed interest rate, became the staple.²⁸⁶ Veterans qualified for one hundred percent financing under the plan administered by the Veterans Administration.²⁸⁷

The rate of increase in the proportion of homeowners, though gradual when viewed over the ninety year time span, appears uneven. Rather, this century has seen a number of brief cycles with movement towards more residential tenants, the most recent countertrend being

282. See ALLAN J. SAMANSKY & JAMES C. SMITH, *FEDERAL TAXATION OF REAL ESTATE* § 4.02[2][a] (1992).

283. New Deal legislation encouraging home ownership consisted of deposit insurance for the savings and loan associations and mortgage insurance for loans processed by the Federal Housing Administration (FHA) and Veterans Administration (VA).

284. Previously, families needed substantial cash to buy a house because institutional lenders typically required a down payment of one-third or more of the purchase price. Moreover, those lenders usually loaned money only on a short-term basis, with the loan maturing in five years. See STERNLIEB, *supra* note 275, at 6, 15.

285. See *id.* at 8-10 (discussing the institution of the long-term, fixed rate, self-amortizing mortgage).

286. *Id.*

287. Current Developments, 20 Hous. & Dev. Rep. (BNA) 87, Mar. 15, 1993, at 898 (finding that nearly 83% of loans guaranteed by VA have no down payment; reporting that no-down-payment loans can be up to \$184,000 in principal amount; and discussing house bill that would increase maximum to \$203,000); UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 29-30, 79-80* (1974) [hereinafter *HOUSING IN THE SEVENTIES*] (describing the VA guarantee program and its advantages for veterans).

the small drop reflected by the 1990 census.²⁸⁸ In general, the cycles correspond to national periods of economic expansion, recession, and depression. Economic slumps compel more families to rent, as some families lose their homes by foreclosure, and others, who hoped to purchase, postpone that decision. The lowest rate of owner occupation reflected by the decennial censuses was forty-four percent in 1940, after the country had spent a decade struggling with the Great Depression.²⁸⁹ From then until 1980, home ownership rates rose steadily, despite a small decline in 1990 as a result of the recession that began in the late 1980s.²⁹⁰

In addition to national cycles in the rates of ownership, there are also significant regional differences in these trends. Some states experience falling rates of home ownership, usually accompanied by a high rate of in-migration,²⁹¹ while during the same time periods, other states hold steady or report increases in home ownership rates.²⁹²

Public housing constitutes the smallest part of the housing sector, with the proportion of American families so housed never exceeding two percent.²⁹³ Like home mortgage subsidies, public housing at the federal level originates in the New Deal. At its inception in 1937, the

288. The rate fell slightly during the century's first two decades, significantly during the Great Depression of the 1930s, and marginally during the past decade. *See supra* note 281 for a chart detailing these rents.

289. *See supra* note 281 (reporting this statistic).

290. *See supra* note 281 for a chart numerically showing these trends.

291. For example, the rates of owner occupancy for California and Texas peaked in the 1960 census records, and the Florida rate peaked in 1970, with subsequent declines in these three fast-growing states.

<i>Census Year</i>	<i>California</i>	<i>Texas</i>	<i>Florida</i>
1950	54.3%	56.7%	57.6%
1960	58.4%	64.8%	67.5%
1970	54.9%	64.7%	68.6%
1980	55.9%	64.3%	68.3%
1990	55.6%	60.9%	67.2%

292. The only region to increase its home ownership rate over the past decade was the Northeast, where the percentage rose from 59.0% to 61.3%.

<i>Census Year</i>	<i>Northeast</i>	<i>Midwest</i>	<i>South</i>	<i>West</i>
1950	48.4%	60.7%	53.7%	57.8%
1960	56.1%	67.0%	62.0%	61.3%
1970	57.6%	68.0%	64.7%	59.0%
1980	59.0%	68.8%	67.0%	62.4%
1990	61.3%	68.1%	66.2%	59.0%

293. *See AMERICAN HOUSING SURVEY, supra* note 278, at 73-76 (reporting that

public housing program attempted to provide short-term accommodation for the most needy Americans, rather than to replace any part of the private housing market.²⁹⁴ While over the decades the program facilitated the construction of public housing in many American cities, no political consensus arose in support of expanding the role of public housing. At its height, public housing has served only a small segment of families: primarily, but by no means most of, the urban poor.²⁹⁵

In the 1990s, public housing policy has focused not on expansion, but privatization. Jack Kemp, Secretary of Housing and Urban Development until 1993, led efforts to sell public housing units to tenants²⁹⁶ and to give tenants associations the right to participate in the management of their properties.²⁹⁷

B. *Sketch of Legal Rules Protecting Tenants and Mortgagors*

On a national basis, the legal rules governing the competing markets of rental and owner occupied housing reflect significant modernization and reform. Yet, unlike Britain, it seems both regimes are balanced reasonably well. Whether modern American landlord-tenant law or modern American home mortgage law is more "pro-consumer" is debatable. While residential landlord-tenant law has undergone dramatic change during the past two decades — enough to be called "revolutionary" by a number of commentators²⁹⁸ — the relationship cannot presently be said to be heavily regulated by the state or lacking scope for contractual freedom. The thrust of the reforms embraced by a major-

only 2,466,000 out of a total of 93,683,000 occupied housing units, or approximately 2.6% of the total, are owned by a public housing authority).

294. See Public Housing Act of 1937, Pub. L. No. 75-412, §§ 2(11) & 9-11, 50 Stat. 888, 889, 891-94 (1937) (codified as amended at 42 U.S.C. §§ 1437a(b)(6) & 1437g-1437i (1988 & Supp. V 1992) (authorizing formation of local public housing authorities, which would receive federal grants or loans)).

295. See RACHEL G. BRATT, *REBUILDING A LOW-INCOME HOUSING POLICY* 53-64 (1989); Schill, *supra* note 160, at 897-99.

296. See Michael A. Schelble, Comment, *A Comparative Analysis of the Privatization of Public Housing in Britain and the United States*, 9 WIS. INT'L L.J. 463, 463-65 (1991).

297. See *id.* at 465, 489.

298. For discussion of these significant changes, see, e.g., Deborah H. Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 484-504 (1985) (security of tenure); Rabin, *supra* note 13, at 521 (warranty of habitability); Joseph W. Singer, *The Reliance Interest in Property*, 40 STANFORD L. REV. 614, 746 (1988) (worker property rights).

ity of states set minimum standards of housing quality²⁹⁹ and restrict landlords' freedom to discriminate among prospective tenants,³⁰⁰ while deferring to the private market to establish rent levels. Only in those few, but notable, American communities with rent control has the nature and extent of state legal control over rentals approached that of Britain.

On the other side of the ledger, freedom of contract no longer confers *carte blanche* on residential lenders in dictating and enforcing the terms of mortgage instruments. Despite the recent savings and loan debacles,³⁰¹ federal and state governments control the financial operations of institutional mortgage lenders to a much greater extent than the British government controls building societies.³⁰² More important for our purposes are the mandatory terms that protect individual debtors in their dealings with institutional mortgage holders.

These protections far exceed those imposed on British building societies. The major controls fall into two categories: those governing the substance of the bargain the parties may reach; and, once the loan is made, those governing lender remedies. The American secondary mortgage market has dramatically affected both pre-bargain and post-bargain controls.

Pre-bargain controls are a function of product standardization. While many terms are standardized, the interest rate represents the

299. Forty-four states have statutory or implied warranties of habitability covering rental housing. See Smith, *supra* note 13, at 510 & n.19. While such warranties are often portrayed as creatures of contract law, public policy grounds usually prohibit their waiver by tenants.

Tort law also provides tenants with rights pertaining to housing quality. Presently, in most states, landlords owe their residential tenants a duty to provide premises that are reasonably safe. See, e.g., Browder, *supra* note 13, at 144, 151.

300. See Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988 & Supp. II 1990). While some states and cities have antidiscrimination standards for rental housing, the federal legislation is of paramount significance. Modern landlord-tenant law has also moved to restrict landlords' freedom to discriminate against existing tenants by eviction. See, e.g., RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT §§ 14.8, 14.9 (1977) (setting out the conditions which meet the retaliatory eviction doctrine).

301. For descriptions of the troubles which led to the federal "bail out" of insolvent savings and loan associations, see H.R. REP. NO. 54, pt. 1, 101st Cong., 1st Sess. 291-307 (1990); Richard Breeden, *Thumbs on the Scale: The Role that Accounting Practices Played in the Savings and Loan Crisis*, 59 FORDHAM L. REV. 571 (1991); Carl Felsenfeld, *The Savings and Loan Crisis*, 59 FORDHAM L. REV. 87 (1991); Lawrence White, *The S&L Debacle*, 59 FORDHAM L. REV. 857 (1991).

302. See *supra* note 14 (listing legislation regulating thrifts and commenting on that legislation).

greatest practical concern for most homeowners. The federal government protects borrowers against drastic and unpredictable rate swings by fostering a system of housing finance which features stable interest rates.³⁰³ The system's basic orientation allows the market to set loan rates, with rate stability granted to existing borrowers. For a mortgage loan to be assignable on one of the secondary mortgage markets, its terms concerning interest rate and maturity must fit within one of the few recognized patterns.³⁰⁴ Pooled residential mortgages all feature relatively stable interest rates, thereby protecting borrowers against drastic and unpredictable rate hikes.³⁰⁵ Fixed rate mortgages with level amortization, once the only type of home purchase loan commonly offered, still dominate many lending markets into the 1990s.³⁰⁶ With a fixed-rate mortgage, the risk and benefit of rate fluctuation is allocated to the lender. The borrower knows at the outset exactly what the loan will cost from inception through maturity.

Adjustable-rate mortgages are more popular today but, unlike British mortgage loans, they represent a sharing by both parties of risks relative to future interest rate fluctuations.³⁰⁷ First, the lender may not

303. The federal government first undertook this role in the 1930s as a response to the Great Depression. See HOUSING IN THE SEVENTIES, *supra* note 287, at 5-21 (comprehensively reviewing the history of government programs); Robin Malloy, *The Secondary Mortgage Market — A Catalyst for Change in Real Estate Transactions*, 39 Sw. L. J. 991, 992-95 (1986) (providing an overview of government programs that augment interest rate stability).

304. See 12 U.S.C. § 1709(b) (1988 & Supp. III 1991) (granting HUD authority to prescribe terms and provisions for the mortgages it insures); 38 U.S.C. § 1802(e) (1988) (giving the Veterans' Administration authority to approve housing loans to be guaranteed by the government); D. BARLOW BURKE, JR., LAW OF FEDERAL MORTGAGE DOCUMENTS 10-19, 76-85 (1989) (describing evolution of uniform mortgage loan documents and the functioning of principal and interest provisions thereof).

305. Fixed-rate mortgages, by definition, accomplish this borrower protection. Adjustable-rate mortgagors protect borrowers with contractual limits on interest rate increases. See 12 C.F.R. § 34.8 (1992) (Comptroller of Currency regulation requiring adjustable-rate mortgage loans made by national banks and their subsidiaries to consumers to include limit on maximum interest rate that may apply during loan term); 12 C.F.R. § 563.99(e) (1992) (Office of Thrift Supervision regulation requiring same limit for savings associations); ATLANTA J./ATLANTA CONST., Mar. 21, 1993, at 20 (charting home mortgage rates of 30 metropolitan lenders, with all of their quotes for one-year adjustable rates having annual caps of 2 percent and life-of-loan caps of 6 percent). See also generally *infra* text accompanying notes 306-09.

306. See Arm Commitment Rates Show Decline in Early September, O.T.S. 89-27 (Oct. 11, 1989) (announcing that adjustable-rate mortgage loans constituted 25% of all home mortgages in secondary mortgage market as of September 1989).

307. The incentive for the borrower to select a variable rate loan is that the initial rate is lower than the fixed rate alternative. Typically, the gap is about two percent. See

unilaterally set a new interest rate, but a change in rate is tied to an index published by a third party; for example, an index tied to the U.S. Treasury Bill rate is widely used.³⁰⁸ Second, contract provisions that limit both the frequency and extent rate adjustments protect the borrower. Typically, the interest rate is adjusted annually, with limits on how much the rate may rise in any one year and on how much the rate may rise over the life of the loan.³⁰⁹

After contract formation, several types of rules protect the borrower if and when the borrower defaults in paying the debt or performing other secured obligations. First, the rules condition the lender's remedies on the borrower's default, even when proven, meeting a threshold of materiality.³¹⁰ A grace period after default shields the borrower before late charges may be assessed.³¹¹ A longer grace period, during

Money Market Mutual Fund Assets Drop, Most Yields Lower, UPI, Apr. 1, 1991, available in LEXIS, NEXIS Library, UPI File (reporting that the average current rate for adjustable rate mortgages is 7.35% and that the average current rate for year, fixed rate mortgages is 9.32%). Adjustable rate loans are cheaper initially due to the borrower's assumption of the risk of rate increases. For fixed rate loans, the lender charges a premium based upon its perception of the probability that future market rates will exceed the fixed rate during the loan term.

308. See Burke, *supra* note 304, at 82 (discussing how T-bill index calculations are made).

309. For example, a common variable rate loan may specify an initial rate of 8%, with subsequent adjustments to an amount equal to the United States Treasury bill index plus 2.5%. For any year, the maximum rate increase is limited to 2% over the preceding year's rate, and at no time may the loan interest rate exceed 6% over the beginning rate, *i.e.*, 14%.

310. See, *e.g.*, Vonk v. Dunn, 775 P.2d 1088, 1090 (Ariz. 1989) (en banc) (holding that mortgagee must show not only violation of terms of note or mortgage, but also that its security is jeopardized or that mortgagors have frustrated the legitimate purpose of acceleration clause in order to foreclose).

311. At the state level, see, *e.g.*, CAL. CIV. CODE § 2954.4 (West Supp. 1993) (10-day minimum grace period); MASS. GEN. L. ANN. ch. 183, § 59 (West 1991) (15-day grace period); N.Y. REAL PROP. LAW § 254-b (McKinney 1989) (15-day grace period); Uniform Consumer Credit Code §§ 1.301(15)(b)(ii), 2.502 (10-day grace period for delinquency charge; Code applies to mortgage loans only in times of high interest rates, *i.e.*, when interest rate exceeds 12% per annum).

At the federal level, see 12 C.F.R. § 545.34(b) (1993) (Office of Thrift Supervision regulation providing for 15-day grace period and for other borrower protection for mortgage loans made by federal savings associations). The uniform federally-sponsored loan documents contain a blank to insert the number of days for the grace period. See FNMA/FHLMMA Multistate Fixed Rate Note — Single Family ¶ 6(A). See *infra* note 314.

For a discussion of both state and federal rules on late charges, see BURKE, *supra* note 304, at 66-72; NELSON & WHITMAN, *supra* note 262, at 448-50.

which the borrower may cure nonpayment, applies before the lender may accelerate the loan payment.³¹² Notice provisions also safeguard the borrower by requiring that the lender send a written notice of default before loan acceleration and generally before the lender may declare nonmonetary defaults.³¹³ Even after a valid acceleration, bankruptcy furnishes borrowers a last chance to unwind acceleration and keep their home.³¹⁴ Finally, when it comes to the lender realizing on the value of its collateral, there is an array of mortgagor protection laws covering pre-foreclosure procedures, conduct of foreclosure sales, and post-foreclosure redemption.³¹⁵

C. *British Lessons*

1. General Comparisons

What are the lessons of the history of modern British housing? The

312. *E.g.*, ILL. ANN. STAT. ch. 735, para. 5/15-1602 (Smith-Hurd 1992) (providing that borrower has right to reinstate mortgage loan within 90 days after summons in foreclosure action, but only once in five-year period); 41 PA. STAT. ANN. tit. §§ 403, 404 (Purdon West 1992) (notice to borrower 30 days before acceleration; right to unwind acceleration by paying past-due installments plus lender's reasonable expenses at any time up to one hour before foreclosure sale). *See* First Fed. Sav. & Loan Ass'n v. Walker, 437 N.E.2d 644 (Ill. 1982) (sustaining constitutionality of Illinois reinstatement statute). For discussion of state and federal limits on a lender's acceleration of a home mortgage loan, see BURKE, *supra* note 304, at 150-68.

313. *See* FNMA/FHLMA, Multistate Fixed Rate Note — Single Family ¶ 6, in GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT: CASES AND MATERIALS 1307-10 (4th ed. 1992) (permitting grace period and late charge for overdue payments). FNMA/FHLMA Uniform Instrument Deed of Trust Covenants — Single Family ¶ 19, in NELSON & WHITMAN, *supra*, at 1310-17 (requiring 30 day grace period after borrower's receipt of written notice before acceleration). Nominally, these provisions are contractually agreed to by borrowers and lenders, rather than publicly mandated. However, the lender's imperative to generate a loan that will be tradeable on the secondary mortgage market dictates inclusion of the standardized provisions on late payments, notices, and cure of default. *See supra* note 93.

314. 11 U.S.C. § 1322(b) (1988). The leading case, which deciphers convoluted statutory text to permit deceleration, is *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 27-28 (2d Cir. 1982).

315. The content of these foreclosure safeguards varies considerably from state to state. *See generally* Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1991) (describing current protections and contending that, contrary to orthodox view, they do not substantially raise credit costs and may in fact promote efficiency); Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261 (1991) (arguing for existing diversity in state mortgage law and against uniformity achieved through federal preemption).

legal regimes of residential landlord-tenant law and residential mortgage law, though doctrinally separate, are interrelated in the real world. The relationship between the bodies of doctrine affects the allocation of capital and, thus, people's choices of where to live. The interdependency is highlighted in a case, like Britain, when the rule sets are not in harmony. In other words, the lack of a "level playing field" causes sources of housing finance to prefer one type of tenure and to shun the alternative. Because housing is a durable commodity with a long useful life, the shift is not immediate: but although it may take generations, its impact is both concrete and traceable to the relationships between legal doctrinal sets.

Translating the British experience to the United States is problematic. The American private rental sector and owner occupied sector are both massive in size and apparently viable. The difficulty in this comparison stems from an inability to correlate shifts in housing tenure and changes in legal rules over the short run. Moreover, in America the gap between the relative degree of regulation in the rental market and the owner occupied market is much smaller than the gap between the British regulatory schemes. In contrast to Britain, the legal rules governing residential tenancies and those governing residential mortgages in the United States may be characterized as "reasonably level." There are instances where tenants' rights seem greater; for example, the tenant's warranty of habitability is considerably more expansive than the homebuyer's,³¹⁶ and the tenant's covenant of quiet enjoyment has no parallel for home purchasers.³¹⁷ Hence, such tenant rights may tend to encourage providers of housing capital to invest in owner occupied housing rather than the rental sector.

Nonetheless, there are other rules that favor homeowners over tenants. In default situations, homeowners' possessory rights receive substantial protection through foreclosure proceedings, while tenants may quickly find themselves out on the street through summary eviction

316. This is so for two reasons. First, the homeowner's warranty covers defects present at the time of purchase, but the tenant's warranty also extends to defects arising during the lease term, including repairs and replacements occasioned by ordinary wear and tear. Second, in most jurisdictions the tenant's warranty cannot be waived, while the homeowner's implied warranty can be waived and typically is excluded by written warranties with clear expiration dates for various types of claims.

317. While a purchaser's warranty deed customarily has an express warranty of quiet enjoyment, this deed covenant speaks only to title as of delivery of the deed, with no analogue to the tenant's constructive eviction rights.

actions.³¹⁸ This one disparity — providing a fast, low-cost mechanism for a provider of housing to eliminate a defaulting occupant — tends to favor investment in rental housing.³¹⁹

Because tenants' rights and mortgagors' rights in the United States are in substantial equipoise, other factors are primarily responsible for determining how many families own or rent their homes. Some of these factors encourage families to own, while others encourage them to rent. Government subsidizes home ownership, through income tax benefits³²⁰ and federally-subsidized mortgage insurance,³²¹ thus enhancing the rate of home ownership. These considerations reduce the net amount of income homeowners must spend on their housing. In addition, home ownership represents a financially appealing investment for many families. Homes generally appreciate in value, and there is a built-in savings mechanism because principal on the mortgage loan is repaid monthly. Effectively, the mortgage operates as a forced savings account.

For families who can afford to either buy or rent, ownership may be appealing for reasons beyond the economics of the decision. Socially, home ownership is a powerful status symbol; psychologically, it serves as a security blanket. While as a matter of logic, the wolf at the door

318. See, e.g., David Lundy, *Evictions: Tough Job, But . . . For a Price Private Companies Find Niche Doing Landlords' Dirty Work*, ATLANTA CONST., Nov. 30, 1991, at B1 (reporting that private eviction companies hired by landlords do "set-outs" of tenants in metropolitan Atlanta area, charging minimal fees for removing tenant's possessions from premises; average "set-out" takes one half hour).

319. This difference in eviction rules is reflected by the fact that it is easier for a person to rent a dwelling with a weak credit history than it is to buy an equivalent dwelling on credit. The time and effort required to get rid of an unaccommodating defaulter is also one reason why a tenant's security deposit is virtually always minuscule compared to the down payment required to purchase.

320. The preferential tax treatment afforded homeowners consists of deductions for property taxes and qualified resident interest payable on mortgage loans, coupled with the failure to tax imputed rental value. See SAMANSKY & SMITH, *supra* note 282, at §§ 15.01-03; Snoe, *My Home, My Debt: Remodeling the Home Mortgage Interest Deduction*, 80 KY. L. J. 431, 457-60 (1991-92) (examining whether the failure to tax imputed rental income justifies denial of interest deduction).

321. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 78-81 (1974) [hereinafter HOUSING IN THE SEVENTIES]; BURKE, *supra* note 304, at 210-12; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 204-06 (1985); Diana G. Browne, *The Private Mortgage Insurance Industry, the Thrift Industry and the Secondary Mortgage Market: Their Interrelationships*, 12 AKRON L. REV. 631 (1979).

could be either a landlord or a mortgage lender, most people perceive the former as a more ominous and immediate threat.

On the other hand, different considerations drive many American families to rent their homes. First, the rental choice usually is more affordable, especially in the short run. It takes savings or other liquid assets to finance the typical down payment of ten percent of the purchase price for a new home.³²² In contrast, a security deposit for a lease — generally no more than one month's rent — is drastically smaller. Moreover, the monthly payments on a mortgage loan, plus taxes and insurance, often are greater than the rent charged on a dwelling of equivalent size and quality. This is primarily due to the fact that each month the mortgagor repays part of the loan principal plus interest, thereby acquiring equity and eventually full ownership of the dwelling. In contrast, the tenant's rent only pays for the current right to enjoy the property.

Second, the chores and burdens of home maintenance and repair counsel against buying for many families. Tenants today rely on their landlords for repairs, both major and minor, while homeowners are responsible for everything that can go wrong with respect to the building and the land.

Third, Americans are very mobile and terminating a lease is far easier and cheaper than selling a house. The land transfer system, as it presently operates, imposes substantial transaction costs upon home sellers.³²³ Usually, brokers' services are necessary to find a buyer, the title search system is expensive and often cumbersome, and the buyer's need to conduct inspections and arrange new financing results in both delay and expense. For these reasons, a family that expects to move regularly, or believes that it might, is generally better off renting than buying a home.

322. See Interagency Guidelines for Real Estate Lending Policies, 12 C.F.R. pt. 563, subpart D, App. A, at 251 (1993) (no rigid supervisory limit established for owner-occupied home mortgage loan, but "for any such loan with a loan-to-value ratio that exceeds 90% at origination, an institution should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral"); BURKE, *supra* note 304, at 4 (federal programs caused down payments to shrink from 20% to 10%); HOUSING IN THE SEVENTIES, *supra* note 321, at 80 (loan-to-value ratio of 90% to 95% is common for conventional loans backed by private mortgage insurance).

323. See Dale Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311 (1974).

2. United States Rent Control

The British experience teaches that, in a capitalist economic system, when there is extreme disparity between tenants' and mortgagors' rights, government policy cannot prevent a shift in housing tenure. When rent control mandates rental rates below the competitive market, private decisionmakers, who are free to make different investment choices will naturally redirect their capital to more remunerative investment. Britain attempted to impose, with varying degrees of success, prohibitions on market withdrawal by restricting the conversion of rent-controlled housing to owner occupancy. Although government may inhibit market withdrawal, over the long run, private investors will elect not to finance the construction of new rental housing and the existing rental stock will eventually deteriorate. Thus, government cannot stop, but can only delay, shrinkage of the rental market.

In the United States, rent control, though hardy in some locales, covers but a small percentage of the overall national rental market.³²⁴ Its prospects for extension in the near future seem limited because of waning support.³²⁵ Nonetheless, in those rental markets where it exists — principally, parts of California, Massachusetts, New Jersey, New York, and the District of Columbia — it is firmly entrenched politically.³²⁶ Over the long term, based on the British experience, rent-controlled communities can expect to experience a shift toward owner occupied housing.

Indeed, the 1990 United States Census reflects a small shift toward

324. ANTHONY DOWNS, *RESIDENTIAL RENT CONTROLS: AN EVALUATION* 12 (1988) (rent control confined to approximately 200 communities in five states (California, Connecticut, Massachusetts, New York, and New Jersey) plus the District of Columbia).

325. Since the 1970s no less than 16 state legislatures have preempted or substantially fettered local rent control ordinances. *See, e.g.*, GA. CODE ANN. § 44-7-19 (Michie 1991) (barring cities and counties from regulating residential rents on privately-owned property; enacted 1984); TEX. LOCAL GOV'T CODE ANN. § 214.902 (West 1988) (allowing city rent control only if "disaster" causes "housing emergency" and governor approves ordinance; rent control expires when "state of disaster" ends; enacted 1987). Florida began the anti-rent control trend in 1977. *See* FLA. STAT. ANN. §§ 125.0103, 166.043 (West 1991 & Supp. 1993) (prohibiting rent control except for "housing emergency which is so grave as to constitute a serious menace to the general public;" even then, duration is limited to one year and rent control ordinance is subject to referendum of local voters).

326. *See* Neal R. Peirce, *Campaign to Quash Rent Control Gathers Steam*, 22 NAT'L L.J. 230 (1990) (noting that, due to political difficulties, apartment industry lobbyists who push for legislative bans on local rent control have concentrated on states lacking rent control tradition).

owner occupied housing, as compared to prior censuses.³²⁷ To date, this movement is quite small and potentially attributable to other causes. Empirical verification must await further developments. However, given the physical nature of rent-controlled communities in the United States, it makes sense that the shift would occur at a very slow rate. Rent-controlled jurisdictions are established cities with fairly high population and limited land available for new residential development. Consequently, there is a low rate of new housing construction in such communities. When it does occur, it is piecemeal, as tracts become available for redevelopment, and it is often built on expensive land requiring a medium or high density structure, such as a condominium project, to offset some of the high land costs.³²⁸

There is one regulatory possibility for a landlord-tenant regime with rent control to retain its proportionate share of the housing market. A landlord's right to set a rental amount and a lender's right to set an interest rate are economic equivalents. If rent is controlled, then in principle, mortgage interest rates should be subject to similar controls. Usury laws played such a role in the United States prior to the 1980s, but only sporadically.³²⁹ It would not be unduly burdensome to gener-

327. This trend is prominent in Washington, D.C., whose current rent control regime dates from 1974. Since the 1970 census, the rate of home ownership in the District has risen by almost 11%, whereas the national increase over the past twenty years has risen only 1.3%. Other cities with rent control reflect similar increases in the rate of owner occupancy.

Census Year	Cambridge, MA	New York, NY	Santa Monica, CA	Washington, DC
1940	19.1%	15.8%	34.7%	29.9%
1950	21.9%	19.1%	40.3%	32.3%
1960	22.5%	21.7%	31.1%	30.0%
1970	19.2%	23.6%	22.5%	28.2%
1980	22.9%	23.4%	22.1%	35.5%
1990	30.3%	28.6%	27.5%	38.9%

New York City has had rent control from 1921 to 1929 and since 1942. Rent control dates from 1970 in Cambridge and from 1980 in Santa Monica.

328. To date, the published empirical research on United States rent control is scant. It indicates that American cities with stringent rent control ordinances have seen declining rates of construction for new multifamily housing, but it fails to indicate how much of that new housing is intended for owner occupancy and how much for rental. See, e.g., DANIEL O'CONNOR, RENT CONTROL IN THE UNITED STATES (1987) (studying eleven cities). For a good summary of the empirical literature, see generally DOWNS, *supra* note 324.

329. Usury laws were never intended to fulfill the function of price regulation for mortgage loans, and they never really had that impact in fact. To serve such a purpose, usury laws would need a mechanism to induce lenders to continue to lend even when

ate the calculations necessary to fashion interest controls that place rental housing and owner occupied housing in equilibrium, without significant incentives for financial investors to prefer one market over the other. Such interest controls, however, would raise a problem of market withdrawal initially much more severe than for rental housing. Would savings and loan associations and other financial institutions continue to make home mortgage loans if the yield was capped below a market clearing rate? It is not likely they would continue to finance homes voluntarily if alternative investments earned unregulated market rates of return. In the absence of comprehensive price controls throughout the economy, controlling mortgage rates simply shrinks the amount of available mortgage funds. To the extent lenders continue to make any home mortgage loans, they will engage in credit rationing, preferring only their best clients.³³⁰

Rent control regimes generally seek to preserve the stock of existing rental housing by prohibiting owner occupation or demolition. Also, these regimes require that the landlord continue to hold the dwelling for rental even after a tenant vacates.³³¹ Landlords facing such rules are captives; they own a physical asset that has some value, even when earning a controlled rate of return, but they are unable to devote the

the usury limit was, from their viewpoint, unattractively low. In the late 1970s, rising mortgage rates pushed up against state usury limits, which in many states were 10% per annum. Mortgage money began to dry up as lenders diverted their capital to other investments, such as commercial real estate, which were not subject to the same low interest rates. Congress intervened by preempting state usury limits and substituting a floating maximum rate for first mortgage loans sufficiently high that no reputable institution could conceivably charge too much interest. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 501-528, 94 Stat. 132, 161-68, *codified at* 12 U.S.C. § 1735f-7, 1735f-7(a) (1988).

330. In a rudimentary fashion, early British rent control laws recognized the interdependence between rents and mortgage interest rates. From 1915 until after the Second World War, statutes capped interest rates on mortgages on controlled dwelling units. *See, e.g.*, Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97, § 1-2 (Eng.). This statute was not designed to put the rental and owner markets into equilibrium, but rather to avoid the hardship of a landlord bearing an increase in interest payments, with no legal right to raise rents. The mortgage interest restrictions did not apply to owner occupied houses, even if they had the same rateable value as controlled rental houses. *Id.*

331. *See, e.g.*, *Flynn v. City of Cambridge*, 418 N.E.2d 335, 339 (Mass. 1981) (upholding rent control ban on condominium conversions); *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059, 1062 (N.Y. 1989) (invalidating, under taking clause, ordinance requiring owners of single room occupancy hotels to refurbish and rent rooms, distinguishing rent control regimes in which landlord voluntarily rented at some point in time).

asset to other purposes. In the short run, market withdrawal controls for rental housing have achieved some measure of success, but only for a small fraction of the renting population.

Can a similar market withdrawal strategy be translated to residential finance? Unlike rental housing, where the asset is physical, long-term in useful life, and immovable, a mortgage lender's asset is *money*. Subjecting both residential rents and mortgage interest to economically equivalent price controls necessitates the imposition of an equivalent market withdrawal control beyond interest rate protection for existing borrowers. A rule mandating the making of new loans is necessary to ensure that a financial institution does not disinvest in housing finance by failing to make new mortgage loans. Just as landlords are compelled to rent to new rent-controlled tenants, financial institutions would be compelled to loan to new mortgagors. Although such a requirement is hypothetically possible, the political likelihood of such a banking regulation in an economy underpinned by private decision-making is remote.

IV. CONCLUSION

The transformation of Britain from a nation of renters to a nation of homeowners is surprising for several reasons. Compared to a number of nations, post-industrial Britain has not prospered economically, yet most families have acquired the wealth necessary to own their own homes, while their parents or grandparents did not. One would expect, therefore, that such a transformation would only be accomplished by careful planning coupled with dedication and frugality. Instead, the shift represents an unintended outgrowth of rent control; the subsequent replacement of private landlords by building societies seems largely fortuitous. Only the sales of council housing during recent decades, as a mechanism to encourage home ownership, have engaged the widespread attention of British political leaders and housing experts.

The change from rental to owner occupied housing illustrates a broad and simple theme having to do with choice and alternatives. When there is more than one alternative mechanism by which a product, such as housing, may be supplied to a user, the frequency with which users choose each mechanism is influenced heavily by the relationship between the sets of legal rules that apply to such mechanisms. In voluntary market transactions, both the supplier and the consumer in principle have freedom of choice in selecting the mechanism that best fits their needs. In the abstract, markedly different sets of rules —

sets that are diametrically opposed — may not lead to the demise of either regime. Perhaps a substantial number of bargains of both types will still be struck. This contractual model, however, assumes that the participants have relatively equal bargaining power and that they can bargain freely, *i.e.*, that there are no legal impediments to the bargain they may freely choose. Hence, the housing financier offers to be a mortgagee and the would-be occupant of a house offers to be a tenant; the parties then negotiate, either striking a deal through compromising or both walking away to seek more pliable partners.

These assumptions are false when the product is housing and rigid price controls are imposed on one mechanism but not the other. Housing is a necessity from a consumer's standpoint, so if a family cannot rent, it must be prepared to buy. Housing is not a necessity from a capitalist's standpoint; if money invested in one form of housing is not profitable compared to other potential returns, it shall be invested elsewhere. A landlord's ability to set the asking rent is economically fungible with a lender's ability to set the asking rate for a mortgage loan. When law prohibits the parties from negotiating the rent but permits them to negotiate an interest rate, housing finance inevitably is cast in the mold of mortgages rather than leases. Rent control without mortgage interest rate control, while it may serve short-term expediency, is foolhardy if the goal is tenant protection. Instead, the result of bargaining is to phase out rental housing, thereby boosting the rate of home ownership. A capitalist sleeps as well at night, whether he wears the hat of a landlord or a mortgage holder.

