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Myron Moskovitz

Golden Gate University School of Law, [mmoskovitz@ggu.edu](mailto:mmoskovitz@ggu.edu)

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## THE GREAT RENT CONTROL WAR

by Myron Moskowitz\*

"The fate of ten million Californians is in your hands, Governor," I said gravely. "And most of them voted for you," I added – appealing to his higher values.

His eyes wandered to the plaques and photos on the walls of his inner office. Then he looked down at his massive mahogany desk – where lay the bill I asked him to veto. AB 3788 would forbid California cities and counties from enacting any limitations on residential rents, destroying rent control before it even happened.

A series of battles had led to this critical point – with many more yet to come. California's Rent Control War was to rage on for another 20 years, before it finally cooled into its present détente.

By chance, I was involved from the first cannon shot.

\* Myron Moskowitz ([mmoskovitz@ggu.edu](mailto:mmoskovitz@ggu.edu)) is Professor of Law at Golden Gate University and author of *Winning An Appeal*, 4th edition (Lexis, 2007). See [myronmoskovitz.com](http://myronmoskovitz.com).

## **Birkenfeld**

In the late 1960's, I was running the Marysville office of California Rural Legal Assistance, when I got a call from Ed Halbach, Dean of Boalt Hall (my alma mater). He said, "The feds have given us a grant to set up a National Housing Law Project, to advise legal services lawyers around the county on housing law issues. Wanna be Chief Attorney?" I took the job.

A while later, I was writing a book on how to defend eviction cases when a couple of Boalt students – veterans of the 1969 Berkeley Rent Strike - came into my office. They had a request. "We drafted a rent control ordinance covering the City of Berkeley. The City Council refused to adopt it, so we put it to the voters. They passed the initiative, but Berkeley landlord Trude Birkenfeld filed suit against the City in Alameda County Superior Court – claiming the initiative is unconstitutional. Can you help us?"

I knew nothing about rent control, so I read up on it.

Back during World War II, the whole country had been under federal rent control (along with price and wage control). With materials and labor going to guns and tanks, none went to new housing for the workers flooding into city factories and shipyards. So landlords could have easily milked tenants with sky-high rent increases – but for federally-imposed rent control. These forces ended when Japan surrendered in 1945. A few places (like New York City) had continued to limit rent increases, but no California city had kept controls for more than a short time after the war.

However, I could see that during the early 1970's, three new forces were converging to begin the resurrection of rent control.

First, the Vietnam War had radicalized and organized thousands of college students – left-leaning tenants who were starting to turn their energies to economic issues that affected their own pocketbooks, especially if it also involved an assault on "capitalist pig landlords." Second, this was at the start of the consumer movement - soon after Ralph Nader had published his critique of the auto industry – and rent was a major consumer cost. And finally, the environmental movement was just beginning too. City dwellers became concerned about smog and congestion, so they pressured their legislators to limit new development of housing. This constrained *supply*, while baby boomer *demand* for housing kept increasing. Basic economic theory says when demand outgrows supply, prices go up. And that's what was happening to housing prices – including rents.

Put these forces together, and they spelled rent control.

I agreed to help defend Berkeley's rent control initiative. But it wouldn't be easy. A law that goes through the legislative process often comes out somewhat reasonable – a compromise, not unduly harsh to either of the contending sides, because each side had input into the sausage machine. But initiatives are drafted by one side only, and usually come out one-sided.

That was certainly true of this one. The Berkeley Initiative froze all residential rents as of a date a few months before the election. That part seemed OK, to discourage landlords from increasing rents to a higher "base" in anticipation of the Initiative becoming law. But the Initiative then said that landlords could increase those rents to recover cost increases by only one mechanism: file an application with a newly-created Rent Board for permission to increase the rent. No annual across-the-board rent increases for all landlords. And only one rent increase application per unit, with no provision for consolidation of applications for all units in a building. And only the full Board – not hearing officers – could decide on each application. Berkeley had

about 17,000 rental units, so if a given landlord were near the back of the line of applications, it might take quite a while to get each of his applications heard and decided. The landlord would be stuck with the old rent until each of his applications was granted. Birkenfeld's lawsuit argued that this aspect of the Initiative violated procedural Due Process.

There were two other problems with the Initiative: substantive due process and preemption.

The last U.S. Supreme Court ruling on the constitutionality of rent control, *Block v. Hirsh* (1921) 256 U.S. 135, seemed to say that rent control passed *substantive* due process only if there were an "emergency" in rental housing. In *Block*, the emergency was World War I, which constricted the construction of rental housing for workers. Things might be tough for Berkeley tenants in the '70's, but I would have trouble showing that this rose to an "emergency" comparable to World War I. But I noticed that the Supreme Court's "emergency" requirement was adopted in 1921, during the "economic Due Process" era when the Court was striking down most economic legislation. That ended in the late 1930's, when the Court switched over to almost complete deference to legislative decisions on economic matters. So I could argue that the "emergency exception" to the Court's rule of toughness died when the rule itself died – and now there was no more "emergency requirement."

Also, the landlords claimed that rent control was "preempted" by state law: Civil Code sections that regulated when and how rent could be increased. I could counter that while the State might have fully covered "when and how", it did not cover "how much."

Rent control was meant to give tenants a sense of security, and so was another aspect of the Initiative: eviction control. The Initiative required a landlord to have "just cause" to evict a tenant. The "just causes" included tenant misbehavior (such as nonpayment of rent) and the

landlord's need to occupy the premises for his own use - but did not include expiration of a lease or the landlord's service of a 30-day notice ending a month-to-month tenancy for any or no reasons. These latter reasons were good enough under *state* statutes, so the landlords' lawsuit argued that the "just cause for eviction" limitations of the Initiative were preempted by state law. I could rebut this by claiming that while the State had covered the *manner* of terminating tenancies, it had not fully covered the *grounds*.

The students asked the City Council to hire me to represent the City in the lawsuit. But a majority of the Council members said no – they were conservative Republicans who opposed a "socialist" measure like rent control, so they weren't wild to defend the law. (Hard to believe today, but that was Berkeley back then.) So I instead represented some community groups – *pro bono* - and intervened in the case. City Attorney Don McCullum was more than happy to let me take over the defense.

The trial court and the Court of Appeal bought all of the plaintiff's arguments: rent control violated due process unless there was an emergency, and there was no emergency here; both rent control and eviction control were preempted by state law. But the California Supreme Court accepted my arguments that California cities and counties could enact both rent and eviction controls without an emergency – so long as the ordinance gave landlords a fair shot at getting a rent increase within a reasonable time. This one didn't, held the high court, because the failure to provide hearing officers or automatic yearly increases meant that some Berkeley landlords would have to eat cost increases for years before getting their hearings before the board. *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129.

A loss for Berkeley, but a victory for rent control. *Birkenfeld* paved the way for rent control for any city or county that wanted it – so long as it followed the Court's guidelines on how to write the law to give landlords a fair shake at a fair increase.

## AB 3788

The landlords had seen this coming. At oral argument, the Court had given pretty clear signs that it was going to uphold rent control. So landlords' organizations told their lobbyists to get to work – immediately, before any other city enacted rent control. They had AB 3788 introduced. The Assembly passed it on June 16, 1976 (coincidentally the same day that the Supreme Court issued *Birkenfeld*). The Senate passed it on August 30. And that's what brought me to the Governor's office on September 30. By law, September 30 was the *last* day the Governor could veto a bill.

The Governor and I went back a ways. We shared a carpool from Berkeley to San Francisco when we both clerked for justices on the California Supreme Court. Later, when he was elected to his dad's former position, he appointed me Chair of the state's Commission of Housing & Community Development, a part-time position I held while working full-time as a law professor at Golden Gate University.

In the afternoon of September 30, I was in my office at Golden Gate when the phone rang. Don Burns, one of the Governor's top aides, said, "Get up here. The Governor wants your input on rent control. Today's the last day he gets to veto AB 3788." After my last class, I scurried up to Sacramento. When I arrived at around 7 p.m., the door to the Governor's inner office was shut. Burns said, "He's busy with the 'right-to-die' bill. It protects physicians from prosecution for assisting suicide. Jerry's a seminary boy. You know how these Jesuits are with big philosophy. This might take a while." It did – quite a while.

I noticed a man in the corridor outside the main entrance to the Governor's Office. He just stood there, holding some papers.

"Who's that guy, Don?"

"Him? That's Cinderella."

"Cinderella?"

"Yeah. He's from the Legislature. He sets his watch by Greenwich Mean Time. If we don't hand him a signed veto before his second hand hits midnight, he turns into a pumpkin and walks away. Once Cinderella walks, the bill becomes law."

The clock ticked away. 8 p.m. 9 p.m. "Is he almost done, Don?" "Can't rush him. He's the Gov." 10 p.m. *11 p.m.!* If Cinderella walks away without a veto, rent control is dead in the womb.

At 11:30, the door to the Governor's inner office opened. Several very tired aides emerged, and the Governor waved me in. On his big desk were two pieces of paper: the bill (with a place for him to sign) and a veto message (also with a signature line). "Let's hear your side, Myron. Why should I veto this bill?" I told him how rising rents were driving low-income, minority, and elderly people out of many cities – which needed the option of rent regulation to maintain the diversity of their residents. Another aide presented the arguments in favor of the bill – how rent control would deter landlords from maintaining buildings, and the like. I countered that these issues should be thrashed out at the local level, because each city has different needs.

The Governor listened and questioned, enjoying the dialogue. The clock on the wall behind him marched on: 11:40, 11:45, *11:50*. Finally, at 11:55, the Governor picked up his pen and signed the veto message. I thanked him. We're almost home. We walked out of the inner sanctum, the Governor carrying the veto in his hand.

But instead of walking to the outer door, he planted his butt on a secretary's desk! There he proceeded to lecture his assembled aides on the art of politics. A clock on the desk headed

towards pumpkin-time. 11:57, 11:58. But this was *the Governor* talking. How do you interrupt *the Governor*?

Someone did. (Not me.) An aide who was familiar with the Gov's penchant for ruminating snapped, "Time's up, Governor." He snatched the veto out of the Governor's hand, ran to the door, and slammed it into Cinderella's hand – just as Cindy was packing up to leave. I wish I could remember the aide's name. Millions of California tenants owe him a medal.

### **Proposition 10**

Thus, by the Fall of 1976, it seemed that the big roadblocks to rent control had been removed. *Birkenfeld* had knocked down the Constitutional obstacles, and the Governor had beaten back the Legislature.

But locally, rent control was pretty much dead in the water. Tenants just didn't have the political muscle to match the landlords, and city council members had little interest in offending the people who contributed to their campaigns. The few efforts to enact rent control had fizzled.

In 1978, all that changed.

I've occasionally been called the Father of California Rent Control (not always as a compliment). But that sobriquet is more deservedly bestowed on two more conservative men: Howard Jarvis and Paul Gann. Jarvis and Gann had no use for rent control, of course. But rent control was the inadvertent offspring of their own darling baby: Proposition 13, which reduced property taxes.

Almost a third of the state's voters were tenants. Jarvis and Gann wanted their votes. Property taxes are paid by property owners, who had a natural incentive to vote for Prop 13. But tenants pay rent, not property taxes. So why should a tenant vote for Prop 13? Jarvis and Gann

came up with an answer: "If Prop 13 passes, your landlord will pass along some of the savings to you, by lowering your rent."

Yeah, right. But many tenants fell for it, and Prop 13 passed by a healthy margin. Tenants waited for their rent reductions. They waited, and waited . . . .

Why should landlords pass on their Prop 13 savings - when the same market forces mentioned above continued to operate? As long as demand kept rising faster than new supply, they could keep *increasing* their rents. And that's what many of them did. San Francisco landlords watched with horror while one of their colleagues who owned lots of buildings imposed stiff rent increases. They could see what was coming. . . .

It came in a hurry. Within a year, furious tenants pushed their local legislators and electorates to enact rent control ordinances. Rent control sprung up in Santa Monica, Berkeley, and even the big boys: Los Angeles City, Los Angeles County, and San Francisco.

Quickly, the landlords tried to nip the movement in the bud. They started gathering signatures to put Proposition 10 on the Fall 1980, statewide ballot.

Prop 10 would not *abolish* rent control. Too late for a measure that bold, as many tenants now had a strong stake in supporting local rent control. So let's go for something short of a total ban, but would put a serious crimp in rent control.

The initiative began by repealing all existing rent control ordinances. Then it would authorize a new rent control ordinance only if enacted by a vote of the electorate, and only if it expired in 4 years – when it would have to be re-adopted by the voters. And the ordinance had to exempt single-family homes, had to provide for "vacancy decontrol", and had to permit rents to increase annually by at least as much as the amount the Consumer Price Index had increased. These limitations did not exist in all current rent control ordinances, which had no expiration

dates, no exemption for single-family homes, and gave annual increases only for increases in costs that had increased (such as maintenance and property taxes, but not interest on fixed-rate mortgages, which were prevalent in 1980). And some of the ordinances did not allow "vacancy decontrol", i.e., they not allow landlords to increase rents to market rates just because a unit became vacant.

While Prop 10 severely limited rent control, you might not know this if you were asked to sign a petition to put Prop 10 on the ballot. In fact, you might well think the initiative *helped* rent control. The drafters began the initiative with, "The People of the State of California find and declare that the enactment of fair rent control regulations is appropriately a matter of local government concern." Sounds pretty good if you're a tenant, right? And the signature-gatherers seduced tenants with their signs: "Sign Here To Protect Rent Control." It worked. Prop 10 was on the ballot.

Then the campaign. The landlords raised several million dollars to push Prop 10, while tenant groups raised less than \$100,000 to oppose it. Some of us volunteered, of course. I spoke on several radio and TV call-in shows, debating a professor of urban planning the landlords flew in from the east coast. The prof. displayed photos of run-down buildings in New York City and somberly intoned: "*This* shows the effect of rent control." After facing this a couple of times, I brought along photos of worse buildings in Detroit and Cleveland - which had *no* rent control: "*This* shows the deceptive tactics of the backers of Prop 10."

We focused on deceptive tactics because we didn't have much else. The state was still pretty conservative. It had elected Reagan governor twice, and rent control sounded socialist to many voters. We met with the editorial boards of the SF Chronicle, the LA Times, and other major newspapers – none of them fans of rent control. But they liked fraud on the voters even

less. They were especially concerned with the way tenants had been deceived into signing the petition to put Prop 10 on the ballot. That got most papers to oppose Prop 10.

Whatever we did, something must have worked. In November, the voters defeated Proposition 10. David had beaten Goliath.

## Fisher

After *Birkenfeld* came down, I got together with a couple of other Berkeley activists (Jim Grow and Marty Schiffenbauer) to draft a new rent control law for Berkeley. We tried to make it bullet-proof: we included *both* an annual general adjustment for all landlords *and* a provision enabling hearing officers to give landlords individual increases to cover any cost increases not covered by the general adjustment. (*Birkenfeld* suggested that either one would have been enough to sustain the old law.) Once again the City Council refused to enact it, and once again the voters enacted it through the initiative process, in 1980.

And once again the landlords sued – led by Berkeley property owner Alexandra Fisher. The suit claimed that the new initiative denied landlords substantive Due Process by depriving them of a "fair return on investment", as well as preemption and procedural Due Process. This time the City Council retained me to represent the City. The Superior Court upheld the law, but the Court of Appeal reversed. Once again, the California Supreme Court agreed to hear the case.

I was pretty confident. We had drafted the law with a copy of the *Birkenfeld* opinion right next to us on the kitchen table, and we had expressly included the procedural protections the prior law had omitted. I had good answers to the landlords' substantive due process and preemption arguments. (The Court of Appeals reversal was baffling – the justices simply seemed hostile to rent control.)

But while I was working on the Supreme Court brief, something new popped up. The California Real Estate Association ("CREA") filed an amicus brief – supporting the landlords, of course. This brief raised a brand new argument: local rent control was price-fixing, and therefore it was preempted by the federal Sherman Antitrust Act. The brief cited a couple of

very recent U.S. Supreme Court cases that held, for the first time, that the Sherman Act covered cities.

My initial reaction was to brush it off. I could write a one-paragraph opposition telling the Court: "The issue was not raised in the Plaintiff's complaint, or at trial, or before the Court of Appeal. There is no evidence in the record on this matter. So it is not appropriate to address it at this late date." I had little doubt that the Supreme Court would agree. On the off chance they didn't, they would order me to brief the issue on the merits.

But wait a minute. If I did that, CREA would simply raise the issue in another lawsuit – probably filed in federal court. They might draw a conservative district court judge who could rule in their favor. Starting with a loss, it might be tough to get a reversal from the 9th Circuit or U.S. Supreme Court.

Why take that chance, when I had a nice, liberal panel right in front of me? Bird, Reynoso, Grodin, and Mosk. Hey, I can live with that. Much better than rolling the dice in federal court.

So I wrote an Opposition to the CREA brief saying, in effect: "Take it – so we can resolve the validity of the Berkeley initiative once and for all. No additional facts needed. You can decide this on the face of the law. The Sherman Act outlaws only *conspiracies* to fix prices. It takes two to tango, but the City of Berkeley didn't dance with anyone. By adopting this ordinance, the City fixed rents by its lonesome."

The Supreme Court agreed. Stanley Mosk wrote the majority opinion: no conspiracy, so no violation of the Sherman Act. And no violation of substantive due process. And no preemption (except for one minor section providing a presumption of retaliation). *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644.

Ah, sweet victory. For the first time in California, a rent control ordinance had been approved by both the voters and the courts – so the way was paved for more of them. The landlords filed a petition for cert in the U.S. Supreme Court, but fat chance that would lead to anything.

But it did. The high Court granted cert. On only one issue, however: the price-fixing argument. The Court declined to hear the Due Process issues. That was a hopeful sign. If the Court was out to get rent control, they would have taken the whole case.

Still, there was cause to worry. Rehnquist was Chief Justice, and a majority of his sidekicks were also conservative.

The City hired Harvard Prof Larry Tribe to argue the case (over my protests – but that's another story). Tribe and I decided to frame our argument around a theme likely to appeal to a conservative Court: state's rights. "The Landlords claim that Congress enacted the Sherman Act to dictate how states and cities regulate their own affairs. Don't buy it. Keep Big Brother Congress off our local backs!"

It worked. The Court affirmed, pretty much following the California Supreme Court's reasoning: no conspiracy, so no violation of the Sherman Act. *Fisher v. City of Berkeley* (1986) 475 U.S. 260.

The big war was over. Rent control was here to stay.

## *The Aftermath*

Here to stay (so far), but not quite peaceably.

Landlords tried again to run bills banning rent control through the Legislature, but now rent control was ensconced and had its constituencies. It had also gained a champion: Senator Dave Roberti, who represented Santa Monica, a rabid rent control venue. Roberti chaired the Senate Judiciary Committee, where he made sure that every bill repealing rent control died a quiet death.

After term limits knocked Roberti out of the Senate, however, some stuff got through. The Costa-Hawkins Act (Civil Code §§1954.50 et. seq.) requires cities to allow vacancy decontrol and to exempt single-family homes. The Ellis Act (Govt. Code §§7060 et.seq.) requires cities to allow landlords to go out of the rental business (usually by converting to condos and tenancies-in-common).

And there were side shows. Mobile home park tenants organized, got state-wide statutory protections (Civil Code §§798 et.seq.) and local rent control, leading to much litigation. I wrote a *commercial* rent control ordinance, protecting retailers in Berkeley's Elmwood District. The voters passed it, and I got the courts to uphold it (*Rue-Ell Enterprises v. City of Berkeley* (1983) 147 Cal.App.3d 81), but then the Legislature preempted all commercial rent control in the state (Civil Code §1954.27). (For a more comprehensive discussion of the present status of rent control, see 1 *California Landlord-Tenant Practice*, Chapter 7 (2d ed., CEB).)

We seem to have settled into an adversarial standoff - where the parties fight, but are past the point of trying to demolish each other. In the early decades of the 20th century, management wanted to destroy unions, and workers of the Marxist persuasion wanted to destroy capitalists.

Today, however, unions and management each grudgingly accept the other's right to exist – but nevertheless join battle every day in arbitration, litigation, and legislation.

Landlords and rent control advocates are in a similar situation. The big war is over, but the skirmishes continue.

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