

MET COUNCIL ON HOUSING TENANT/INQUILINO

Property v. Democracy
Supreme Court May Hear Challenge to New York Rent Laws

by Timothy L. Collins

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James D. Harmon Jr., a New York landlord and attorney, has plied his way upstream through the federal court system with a series of recycled, one-sided, cranky attacks on the constitutionality of New York's rent regulations. His legal claims are perhaps best described as like Oz's Tin Man-"a clinking clanking collection of caliginous junk."

Harmon's road show has already been summarily halted twice - first, in the Federal District Court for the Southern District of New York, and again by the Second Circuit Court of Appeals. He now stands at the gates of the country's highest court.

Somewhat startlingly, the U.S. Supreme Court has actually requested responses from both the city and state to address Harmon's attempt to get his claims before the court. The fact that both had "waived" their initial right to oppose his petition for a writ of certiorari suggests what little they thought of his challenge.

Apparently, at least one of the Justices was moved by Harmon's legal mush and now wants the city and state to explain why the court shouldn't hear more. That's a bit troubling.

Harmon has peppered his petition with ill-informed arguments against New York's rent laws, parroting a lot of

nonsense about the supposed evils of tenant protections. Joining his attack on rent regulation as amicus curiae are the intellectual vanguards of Organized Money: the Pacific Legal Foundation, the Atlantic Legal Foundation, the Cato Institute, and New York's own Rent Stabilization Association, a landlord lobbyist group.

At the moment, tenants have no voice before the court, unless one can trust the city and state to vigorously represent the case for rent regulation. That's a bit of a stretch. In his petition, Harmon quoted Marvin Markus, the former chair of the city Rent Guidelines Board, as arguing that the rent laws are "antiquated" and "plagued by 'systemic inequities.'" Throughout his tenure, Markus repeatedly demonstrated a fundamental misunderstanding of the system he had a hand in administering. He bought into the notion that rent regulation is a system designed to subsidize needy tenants, rather than one designed to mitigate landlord profiteering during a housing shortage.

All of this would be a bit amusing were it not for the fact that the current Supreme Court seems all too willing to join the 1% in hastening the demise of democracy in America. In recent years we have repeatedly witnessed propertied interests trumping democracy at work - from the evictions at Zuccotti Park to the

Court's elevation of corporations (which are basically creatures of the state) to virtual citizenship.

We've been here before. Until *Bowers v. Hardwick*, *Bush v. Gore*, and *Citizens United v. Federal Election Commission*, there were just three truly infamous decisions by the Supreme Court: *Dred Scott v. Sanford* (a slave in free territory remains a slave); *Plessy v. Ferguson* (segregated facilities can be constitutionally "equal"); and *Lochner v. New York* (states cannot adopt laws protecting the health and safety of workers - in that case hours for bakers - because such laws interfere with "liberty of contract," which is protected by the 14th Amendment's due process clause).

Dred Scott was "overruled" by a bloody civil war. *Plessy* fell in the wake of World War II, after Americans got a cold look at what regimes based upon racial supremacy can come to. (It's no coincidence that *Brown v. Board of Education* was decided less than a decade after the war's end.)

Lochner melted away in the heat of the Great Depression, first with *West Coast Hotel Co. v. Parrish* in 1937, which held minimum-wage laws constitutional. The court wrote that legislatures have properly recognized that employers and workers do not stand in equal relations, because employees "are often induced by the fear of discharge to conform to regulations which in their judgment, fairly exercised, would... be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly

interpose its authority."

What Harmon and his supporters are really attempting to do in this case is resurrect *Lochner*. That 1905 decision provided the precedent for striking down other laws limiting work hours and forbidding child labor. It floated on a legal fiction which assumed that all people, including the poor and the unemployed, the young and the elderly, are "free to contract" for wages and working conditions and that unregulated markets produced a natural and rightful allocation of goods and resources.

As constitutional scholar Cass Sunstein has written, the *Lochner* Court defined both government "neutrality" and "intervention" in terms of "whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct." But once the common-law system came to be seen as a product of legal rules, in *West Coast Hotel*, that system itself "appeared to be a subsidy to employers."

So what does this have to do with Harmon's attack on rent regulation? His petition posits that rent regulation in New York creates discounts-forcing owners to subsidize tenants. He claims that the three regulated tenants in his building pay 59 percent less than the three unregulated tenants, and that this loss is a "taking" of his property, violating the Fifth Amendment's clause against the public taking private property without just compensation. Nowhere does he recognize that rents in New York have been abnormally inflated by a chronic housing shortage, which is the precise basis for the laws he attacks.

As in Sunstein's description of Harmon assumes that the common-law system of allocating rents during a housing shortage is a part of nature rather than a legal construct. But he fails to recognize that if it were not for other legal constructs in New York City—such as zoning, building codes, landmarks, and the preservation of public spaces—which protect and foster the city's quality of life, but also promote housing scarcity, his neighborhood would probably be in shambles, and his building would be worth bupkis. He also neglects that massive infusions of taxpayer dollars for public transportation and infrastructure, such as the subways and water-supply systems, have greatly enhanced the value of existing properties. Indeed, much of the development of rental housing in New York followed the expansion of the city's subway system.

In sum, Harmon has greatly benefited from other laws that limit the supply of new housing and from public programs that greatly enhance the value of his property. If he wants truly neutral treatment, he should probably consider giving refunds to his tenants.

Harmon doesn't stop with his forced "discount" argument. He recycles and spins some of the worst propaganda on the subject of rent regulation. This is the stuff for legislatures to sort out, not courts.

Citing a terribly wrong-headed 2010 report by the Citizens' Budget Commission ("Rent Regulation: Beyond the Rhetoric"), Harmon claims in his petition that "[c]itywide, the annual estimated \$4 billion cost of 'off-budget'

rent stabilization is borne by market-rate tenants, property owners and the City itself."

The CBC report argued that with deregulation, rents in unregulated apartments would actually fall by some \$2 billion. This dubious claim was based upon the assumption that huge numbers of tenants would disappear from the rental market—a conveniently sterile way for economists to ignore the human impact of massive rent increases. It also ignored clear data from other sources.

According to the 2008 Housing and Vacancy Survey, there is a 4.7 percent vacancy rate among unregulated apartments, more than twice the 2.14 percent vacancy rate among rent-stabilized units. Unregulated apartments are already at or close to market rents. Deregulation would force formerly regulated tenants displaced by large rent hikes to look for unregulated apartments and thus inflate rents in that market. There is no good reason to assume, as the CBC did, that rents in the unregulated sector would fall if rents are deregulated elsewhere. Six years after Boston was forced to deregulate rents in 1995, average rents for two bedroom apartments advertised in the Boston Globe had risen from \$740 to \$1,700. Why would the New York experience be so different?

Finally, Harmon's claim that property owners have been ripped off under the rent-regulation system belies a fundamental fact: No one ever held a gun to anyone's head and forced them to purchase a rent-regulated building. While the building had been in Harmon's family since 1949, he purchased his brother's interest in 2005. If it was such

a bad investment, why did he buy his brother's share? In fact, a rent-regulated building was one of the most profitable investments one could have made in 2005. While the rest of the investment community suffered from the meltdown of 2008-2009, owners of rent-stabilized properties realized an average increase in net operating income of 5.8 percent.

Harmon cites a number of economists who have condemned rent regulation as a cause of housing shortages. He fails to point out that most of those economists were addressing strict World War II-era controls, and that none had apparently reviewed the full historical record of housing construction in New York City. New York's two greatest housing booms (during the 1920s and from 1947-1965) occurred when strict rent controls remained in effect for existing units. Nowhere does Harmon disclose that new construction is exempt from rent regulation, and that extraordinary incentives remain in place to fund improvements in regulated buildings.

Harmon's legal arguments are surreal. He claims that the city's housing emergency is over; that based upon a 2005 decision, *Lingle v. Chevron*, New York's rent regulations result in a substantive due process violation; that the state has foisted a permanent physical occupation on his property; and that he was entitled to personal notice by certified mail and a hearing before the city adopted local laws extending rent regulation. He appears to have abandoned his craziest claim, raised before the District Court, that rent stabilization forces landlords into a form of invol-

untary servitude. Ask any New Yorker who is more likely to be treated as an indentured servant: landlords or tenants?

Harmon argues that the state cannot continue to maintain that the city is still faced with a housing emergency. As of last count, the city's overall vacancy rate was less than 3 percent, compared with nationwide vacancy rates of around 9-10 percent for the past several years. New York's housing markets have several artificial constraints on supply (such as strict zoning rules) and extraordinary levels of unmet demand, with over a million new people entering the city in the 1990s and over 400,000 in the last decade. In fact, as a port of entry for new immigrants, New York has had serious housing supply issues for over two centuries. It's up to the state legislature to consider whether this is an ongoing emergency - not Harmon or the courts.

Harmon's claim of a substantive due process violation based upon *Lingle v. Chevron* is truly zany. *Lingle* was a "takings" case which involved restrictions on the amount of rent oil companies could charge to retail dealer/lessees in Hawaii. It essentially held that the courts had no business second-guessing state legislatures on the issue of whether rent regulation was a taking. Several earlier decisions involving land-use restrictions appeared to permit courts to consider whether such restrictions furthered a "legitimate state interest" – a concept that put judges in the role of legislators. *Lingle* dumped the "legitimate state interest" test from the takings analysis and criticized its use to challenge a rent-regulation statute on very practical

grounds.

Justice O'Connor, writing for a unanimous court in *Lingle*, stated her concerns quite clearly. If a government action was interpreted as a taking because it did not "substantially advance" state interests, "it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."

Lingle suggested that the "legitimate state interest" test survived in the context of substantive due process claims, but such claims involving economic regulation have not met with success since the 1930s. In a 1955 decision, *Williamson v. Lee Optical Co.*, the Supreme Court basically declared substantive due process challenges to economic regulations a dead letter: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Harmon's argument that rent regulation forces a physical occupation of his property has been repeatedly discredited by Supreme Court

precedent. Basically, by inviting tenants to rent apartments, he has agreed to an occupation of his property. He is clearly not asking the court to throw his tenants out. Rather, he is asking for the right to charge them any rent he pleases. The whole argument is fundamentally disingenuous.

Finally, his claim that he was entitled to personal notice before the city adopted local laws extending rent regulation is absurd. It was a legislative—not an adjudicative—act. If he has a problem with what happened, his recourse is at the voting booth.

In sum, Harmon's problem is that he just doesn't like the consequences of democracy. If property interests are permitted to trump popular sovereignty at every turn, civilization as we know it would indeed collapse. At the moment, our increasingly fragile republic is still governed by laws beyond the law of supply and demand. If Harmon and others like him had their way, we would live in an economic theocracy, a cult administered by the high priests of Organized Money. Sadly, we're getting damn close to that state of affairs. Now we'll have a chance to see if the U.S. Supreme Court is ready to drink the Kool-Aid.

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