



Written by [Bob Adelman](#) on December 27, 2011

Supreme Court Just Might Upset Rent Controls in New York City

Harmon filed the original lawsuit against the chair of the Rent Guidelines Board claiming that the rent control laws violated his Fifth Amendment rights under the Constitution's "taking" clause. ("No person shall be ... deprived of life, liberty, or property without due process of law.") When he was denied, he appealed, claiming that he had been denied the right of due process under the 14th Amendment. The Court of Appeals for the Second Circuit dismissed it out of hand, and that's when Pacific Legal jumped in.



Radford explained why his firm was involved: "Jim Harmon and his wife own a building in New York City that has some rent controlled units that are occupied, apparently, by fairly affluent tenants, and he simply can't use the property the way he would like to." Harmon indicated that he would eventually like to pass the building on to his children and grandchildren but the regulations limit his rights as a property owner to do so.

The three units in question are renting for about 40 percent of fair market rents and the renters have long since outstayed the terms of their original rent agreements. Under the NYC law, however, renters may continue to stay as long as they pay their rent on time. In a free market, Harmon would be able to charge market rates either to his present tenants or to new ones, if he so chooses. It's that obvious trespassing of his rights as a property owner that Harmon is complaining about.

The *New York Times* [picked up on the matter](#), noting that "the regulations are meant to support the government's goal of maintaining affordable housing for its citizens. Instead, the laws have forced [Harmon] and his family to shoulder the government's burden and extend what is essentially 'privatized welfare' to rent-stabilized tenants who are paying rent 59 percent below market rates and who [in addition] have rights of succession to their lodgings in his home."

Harmon was quoted saying:

Put yourself in our position. Suppose somebody told you, you've got an extra bedroom — we'd like to put someone in there for as long as they want to stay, and you have to take care of them for the rest of their lives and the rest of your life. That's really what this is like.

A local attorney specializing in tenants and landlords, Jarred Kassenoff, was surprised that the Supreme Court took an interest in the case and demanded that the city respond to Harmon's complaint: "Courts



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usually pay scant attention to these well-settled claims and routinely reject them." And Leonard Koerner, chief of appeals for New York City's Law Department, agreed: "We are confident that once the U.S. Supreme Court receives our brief, the lower court's decision will stand."

Richard Epstein isn't so sure. A Bedford Senior Fellow at the Hoover Institute, Epstein said the Circuit Court's dismissal without argument "gives ample testimony to the moribund state of modern federal constitutional law, particularly in the area of property rights." The Second Circuit "was undeniably correct as a matter of current constitutional law. But ... it was hopelessly defective as a matter of constitutional theory." The way the rent control law is enforced "takes a person who should be the full owner of the property and turns him into a puppet dangling on the end of the tenant's string."

Under common law, at the expiration of a lease the owner may renew the lease at will, or not. But under current law, once a tenant is let into the premises on a short-term lease, he is entitled to remain in possession so long as he pays the rent set under that law. Epstein says that turns the law upside down: "The person who overstays his welcome is no better than a stranger who trespasses on the property."

There are, of course, many unintended consequences of the law, including reducing the amount of housing available to lower-income people since investors have little interest in owning property subject to such regulations. And those caught in the law have little incentive to keep the property up. The landlord and tenant become combatants rather than agreeable parties to an enforceable contract not subject to outside influences by politicians.

Epstein had lunch with Harmon and gave him his best advice: Drop the case and save his time and money - if the Supreme Court even agrees to hear the case — given its willingness in the past to allow individuals to take properties from other individuals (a la [the Kelo case](#)) in violation of constitutional safeguards — it is likely to uphold the lower court's decision. But "As a one-time friend, I would urge him to go for broke. The worst the Supreme Court can do is say 'cert denied.' " On the other hand, "If the Court took the case, it is hard to imagine how it could make a bigger mess of this branch of the law [than it already has]." And it might even begin the process of straightening things out, repenting of its awful *Kelo* decision, and allowing Harmon his constitutionally guaranteed rights — all of them — as a private property owner.



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