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California's Kafkaesque Rent Control Laws

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Property rights and due process get second-class status in the courts.

In March 2011, my column for Defining Ideas carried the title, The Follies of Rent Control. In it, I took to task the Court of Appeals of the Second Circuit for perpetuating a substantive mess in takings law when, in Harmon v. Markus, it yet again upheld New York City's Rent Stabilization Law. On that occasion, I directed my attention to the injustices that arise whenever the government may allow a tenant on a short term lease to remain on the premises, at rental rates set by the government, after the lease has run out.

The fundamental substantive error of this legal regime is that the government treats the owner as if he operates the property as a public utility. As such the owner is duty-bound to let the tenant stay in possession, so long as the owner received sufficient revenue for its operating and capital expenses, but to nothing more. Accordingly, the right to any and all increases in the value of the underlying property is shifted, without compensation, from the owner to the tenant. In booming markets, that shift can be huge.

New York is not the only economically failing state that treats rent control as the road to salvation for its financially pressed citizens. California matches it stride for stride. In the California setting, the focal point is mobile homes. The 2010 decision in Guggenheim v. City of Goleta upheld a municipal ordinance that allows the tenant to hunker down in perpetuity so long as he or she agrees to cover the landlord's increased costs, narrowly conceived.

That gap between lease value and rental value sets in motion a set of procedural gimmicks, making it virtually impossible to give that landowner a fair shot at challenging these oppressive regulations, given the rigged rules now in place. This entire matter was brought to a head recently in Colony Cove Properties, LLC v. City of Carson, where the Court of Appeals for the Ninth Circuit denied the landowner the right to be heard in court at all. The aggrieved landowner has asked the Supreme Court to take this case for review. I have made common cause with these owners by signing on to an Amicus Brief prepared by Ilya Somin of George Mason Law School and Ilya Shapiro of the Cato Institute.

Let's start from the beginning. It is an axiom of procedural due process that any claim of a deprivation of property rights should be subject to judicial review. It is the timing of the

hearing that is the issue in *Colony Grove*. According to the Ninth Circuit, the proper time is, in a word, never. In one cryptic sentence, it takes the position that the case either comes too soon or too late. “The district court dismissed Colony Cove’s *facial takings* claim as time-barred, its *as applied* takings claim as unripe. . .” (italics added).

Local government officials are master game players.

It is worth unpacking that obscure proposition. A landowner can challenge the application of a municipal ordinance to his property in one of two ways. He can claim that the ordinance is so bad *on its face* that the state will unconstitutionally infringe his property rights no matter how the law is applied. Or he can claim that, *as applied*, the ordinance works an unconstitutional deprivation of rights in a particular case. The sentence quoted above therefore holds that it is too late for a *facial* challenge and too early for an *as applied* challenge. The Court’s position is specious.

The dismissal of the facial challenges rests on the view that the statute of limitations runs from the time the ordinance is promulgated, even for landowners who have no immediate beef with the government. Yet what sane person wants to pick a fight with the government today about the constitutionality of a statute that may never govern to his or her land? The Ninth Circuit’s ruling forces everyone to speak up immediately or abandon his or her facial challenge.

This all or nothing choice is indefensible. The standard rule starts the statute of limitation only when a cause of action has accrued—that is, when all the facts needed to decide the case are in place. That only happens to a landowner once he has a grievance against the government because it has denied a building permit or a rent increase. Accordingly, it is only from the time that the controversy arises that the statute of limitations should run.

There is, moreover, a precise analogy to this case in the common law cases dealing with the “coming to the nuisance” defense. Suppose the defendant runs a piggery on his land, which would cause a real nuisance to his next-door neighbor. At the time the piggery is started, that neighbor keeps her land vacant until it makes sense to build. The standard legal response holds that it is idle to force her to sue before her interest clashes with her neighbor. Accordingly, the statute of limitation is tolled (i.e. suspended) until the plaintiff starts to build on his own land. That approach lets the landowner bring a single action in which the *facial* and *as applied* claims can be heard together. Interposing a time-barred defense to facial claims offers an inexcusable windfall to government officials.

What does the Due Process Clause guarantee if not due process?

The legal position is, if anything, worse when asking whether a claim is “ripe,” i.e., ready for judicial determination. Local government officials are master game players. They know it is in their interest to stall as long as they can, for under current law, so long as they are engaged in a “normal” land use review of potential private action, they cannot be sued for a landowner’s loss of interim use. In one of its worst takings decisions ever, Williamson County Planning Commission v. Hamilton Bank of Johnson, the Supreme

Court refused to allow a private landowner to challenge in court any adverse decision by a local land use board until there was a "final judgment" entered against the landlord, which only had to take place after the landlord "exhausted" its administrative remedies. Put in ordinary English, the land use applicant had to take advantage of all the procedural opportunities that the local authorities threw in his direction.

And throw them they do. For local officials, their primary objective is to stop development by outsiders. So they shower landowners with endless rights to internal review, stacking the deck as they go. In practice, the word "exhaustion" takes on an ominous meaning. The local government gives enough rights to exhaust a landowner, who just gives up in frustration knowing that the local board can run out the clock, not just for years, but for decades. It's no coincidence that the landowner in *Williamson County* was the local bank that foreclosed on a developer who long ago had given up fighting city hall.

None of these lessons have been lost on the local officials in Carson City, long a bastion of restrictive land use practices. In the present dispute, the official hauled out the heavy artillery to make sure that the mobile home owners got their full portion of procedural rights when seeking rent increases. The stakes were huge. The landowners claim that under the local ordinance they were entitled to increases that could have been as much as $1,000 per unit per month. The local government board authorized a $36 increase per month, and then battened down the hatches.

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Under the local municipal law, the landowner could not get to court until it exhausted the internal review procedures applied under the statute. Any claim for back-rent would have to wait until the entire process ran its course. But what sort of review? Under California law, local governments need only offer what is commonly called a *Kavanau review*, after the 1997 state court decision in *Kavanau v. Santa Monica Rent Control Bd.*, which, as the Ninth Circuit reminds us, "involves filing a writ of mandamus [ordering some specific act to be performed] in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board." That is the *same* board that denied the original request for a rent increase.

The whole process is a transparent step to prolong these proceedings. After all, what is the likelihood that the same board, subject to the same biases, will reverse its decision when ordered by a court to review its prior decision? The landowner who seeks to escape this trap will learn to his sorrow that the Ninth Circuit and the California courts have both "rejected futility arguments on theories of undue delay, the futility of returning to the same rent control board if a writ is granted by the state court, and the failure to provide compensation for losses incurred while *Kavanau* proceedings are pending."

Talk about playing with a stacked deck! The Supreme Court should reconsider its requirement that there be a final judgment before a review can take place. Any system of due process requires a prompt and adequate remedy for government misbehavior. When

the issue before the Supreme Court was whether persons who claimed unlawful discrimination by local officials were required to exhaust administrative remedies, the Court did not hesitate in Patsy v. Board of Regents of the State of Floridato allow immediate judicial review of the issue. So the question is why other constitutional rights, including those of due process, should be relegated to second-class status.

To the Ninth Circuit, the issue was clear in *Guggenheim* that any claims that rent control was an unconstitutional taking were left to "[s]tudents in Economics 101," on the ground that the Due Process Clause does not empower courts to impose sound economic principles on political bodies." That statement is itself intellectual nonsense given that rent controls work by forcibly displacing an owner from the possession of his or her own property. But take it at face value. It would be strange beyond all belief for any court to conclude that the right to a prompt judicial review of a Kafkaesque decision under the Due Process clause is an issue that students in Political Philosophy 101 may debate, but which does not bind courts.

Just what does the Due Process Clause guarantee if not due process, i.e. the process appropriate for the occasion? The consequences of this kind of thinking are plain to see in the implosion of the California real estate market. A naïve Supreme Court got us into this mess. A wiser Supreme Court should work overtime to get us out of it—by using the Colony Cove decision to overturn its own ill-advised *Williamson* precedent.

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