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# *Rent Control Is Constitutionally Vulnerable*

New York's 2019 law is so onerous that the Supreme Court may revisit the issue for the first time in years.

By Alexander Talel

Aug. 15, 2023 6:10 pm ET



A tenant protest in New York, April 28, 2022. PHOTO: MICHAEL M. SANTIAGO/GETTY IMAGES

Is rent control constitutional? To look at the case law, the answer would appear to be yes. The Supreme Court “has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular,” as Justice Thurgood Marshall put it in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982).

But the justices have also acknowledged that the rules have to be “appropriate” and that “if regulation goes too far, it will be recognized as a taking for which compensation must be paid,” as Justice Oliver Wendell Holmes wrote in *Pennsylvania Coal Co. v. Mahon* (1922). New York state’s Housing Stability and Tenant Protection Act of 2019 amended New York City’s rent-stabilization regime in a way that makes it ripe for a constitutional challenge.

New York’s Rent Stabilization Law, originally enacted in 1969, compels certain city landlords to accommodate de facto permanent tenancies at well below-market rental rates. Before 2019, however, landlords could exit the rent-stabilization

scheme under certain conditions. The 2019 law eliminated those exceptions.

A group of landlords sued and lost. In February, the Second U.S. Circuit Court of Appeals affirmed the trial court's decision that rent stabilization, even in its 2019 version, isn't a government taking, which would require compensation under the Fifth Amendment. The landlords have petitioned the justices to hear an appeal.

The 1969 law was followed by the Emergency Tenant Protection Act in 1974, which allowed the state to renew rent stabilization on declaration of a housing "emergency." The state has since regularly made that declaration, preventing rent stabilization from expiring, although 1993 amendments allowed landlords to escape rent stabilization when an apartment became vacant or a tenant's income and the monthly rent both rose above a certain threshold. The 2019 law effectively eliminated both deregulation and the "sunset provision"—the date by which rent stabilization expires absent an "emergency" declaration—thereby ensuring

that rent stabilization will apply forever to every covered apartment.

After several unsuccessful legal challenges to previous iterations of the law, *Community Housing Improvement Program v. City of New York* challenged the 2019 version. The Second Circuit applied *Penn Central Transportation v. New York City* (1978), a Supreme Court decision involving a challenge to the city's landmarks-preservation law. *Penn Central* encourages courts reviewing a takings claim to engage in “essentially ad hoc, factual inquiries” by considering several factors, including the statutory scheme's economic impact on a landowner, the extent to which the scheme interferes with a landowner's investment-backed expectations, and the character of the governmental action. The Second Circuit held that rent stabilization doesn't invariably do economic harm to landlords and that the Legislature's judgment was entitled to broad deference.

But that formulaic determination gives short shrift to the economic harm of rent regulation—which other policies

implicitly acknowledge. New York state offers a tax abatement for residential construction developers who have allowed a portion of new units to be rent-stabilized. If government is compensating property owners who voluntarily provide below-market rental apartments, how can it refuse to compensate those it compels to do so? The onerousness of the taking effected by rent stabilization undermines its stated purpose of increasing the availability of affordable housing units. Owners of buildings with rent-stabilized apartments have begun “warehousing” them—keeping them vacant to prevent permanent occupation by commercially damaging tenants.

Instead of *Penn Central*, the appellants had urged the Second Circuit to apply a more context-specific standard set out by Justice Antonin Scalia. Writing in *Pennell v. San Jose* (1988), Scalia argued that where a price regulation designed to cure a social ill encumbers a property whose owner has neither created nor contributed to that ill—in this case the hardship to which a market rent subjects a tenant—the regulation amounts to a

taking. Scalia's opinion in *Pennell* was joined only by Justice Sandra Day O'Connor.

The Second Circuit's opinion cites Scalia's proposed standard in a lengthy footnote, which concludes as follows: "We decline to employ a test that has never been adopted by the Supreme Court." That was the right thing to do; appellate courts are obligated to follow the precedents of the Supreme Court. The petition for appeal is an opportunity for the justices to take another look.

Scalia's standard cuts against the notion that a legislature's "broad authority" to regulate the landlord-tenant relationship insulates such regulation from serious constitutional scrutiny. "The fact that government acts through the landlord-tenant relationship," he wrote, "does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionately burden particular individuals."

Scalia further pointed out that the “traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps).”

New York’s rent-stabilization scheme is at heart a public-welfare program. It may be a worthy one. But it uses private property for a public purpose. The Constitution therefore requires its cost to be borne by the general public, whether through a tax benefit or some equivalent compensation applicable to all affected buildings.

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*Appeared in the August 16, 2023, print edition as ‘Rent Control Is Constitutionally Vulnerable’.*