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“Don’t Try This at Home”: Posner as Political Economist

Lior Jacob Strahilevitz†

On September 8, 1986, the Chicago City Council enacted a comprehensive ordinance regulating the relationship between landlords and tenants, following seven years of heated deliberation.¹ The Chicago Board of Realtors, along with property owners and managers, challenged the ordinance’s constitutionality in federal court the following month.²

The plaintiffs in *Chicago Board of Realtors v City of Chicago*³ objected to more than a dozen provisions in the ordinance, the most pertinent of which: (1) enabled tenants to withhold rent or make repairs themselves if their landlord ignored demands to make necessary repairs; (2) authorized tenants to secure substitute housing without penalty if the landlord failed to maintain “habitable” premises; (3) capped penalties for late rent payments; and (4) required that tenant security deposits be held in separate, instate, interest-bearing accounts.⁴ The plaintiffs argued that these provisions violated their rights under the federal Constitution’s Due Process, Contracts, dormant Commerce, and Takings Clauses.⁵ The district court rejected all these claims, noting that while some of the ordinance’s provisions seemed in tension with the text of the Constitution, prior precedents foreclosed the pos-

† Professor of Law, The University of Chicago. The author thanks Jake Gersen, Doug Lichtman, and Stephanie Stern for comments and Emily McKinney for fine research assistance.

¹ *Chicago Board of Realtors v City of Chicago*, 673 F Supp 224, 226 (ND Ill 1986).

² *Chicago Board of Realtors, Inc v City of Chicago*, 819 F2d 732, 734 (7th Cir 1987).

³ 673 F Supp 224 (ND Ill 1986), affirmed 819 F2d 732 (7th Cir 1987).

⁴ Id at 230, 233, 236. The plaintiffs also challenged provisions: (1) providing that landlords give tenants two days’ notice before accessing the apartment for nonemergencies; (2) requiring that tenants be given detailed receipts upon making payments to landlords; (3) imposing joint and several liability on successor landlords for interest and security deposits; (4) requiring landlords to provide to prospective tenants an itemization of any code violation citations issued by the city in the previous twelve months, pending code enforcement litigation, and any notice of intent by a utility to terminate service to the building; (5) prohibiting landlords from withholding consent to reasonable subleases; (6) requiring landlords to attach a summary of the ordinance to all new or renewed residential leases; (7) creating a rebuttable presumption of retaliatory eviction in instances where a landlord cancelled or failed to renew a lease with a tenant who had exercised his rights under the ordinance; (8) requiring that landlords disclose to tenants the identity of the actual owners of properties held or managed in trust; and (9) rendering unenforceable lease provisions that would conflict with the ordinance’s framework. Id at 229–30.

⁵ Id at 229–36.

sibility of its unconstitutionality.⁶ The law withstood rational basis scrutiny, though the district court went on the record with doubts as to whether the law represented enlightened public policy.⁷ As it came to the Seventh Circuit, therefore, this comprehensive ordinance had been judged unwise, but not unconstitutional.

The Seventh Circuit granted an expedited appeal schedule but refused to enjoin the ordinance pending appeal.⁸ Judge Cudahy wrote a dry majority opinion affirming the trial court. Cudahy's opinion largely parroted the district court's handiwork, relying heavily on Supreme Court opinions that foreclosed the plaintiffs' Contracts Clause and substantive due process claims.⁹

Had the matter ended there, *Chicago Board of Realtors* would have been an unremarkable and uninteresting case, one of a string of judicial opinions rejecting constitutional attacks on landlord-tenant regulations.¹⁰ But the matter did not end there. Judge Posner, writing for himself and Judge Easterbrook, noted his agreement with Cudahy's opinion "as far as it goes," but bemoaned its failure to "go far enough."¹¹ In Posner's view, Cudahy's straightforward application of Supreme Court precedents to the plaintiffs' claims "makes the rejection of the appeal seem easier than it is, by refusing to acknowledge the strong case that can be made for the unreasonableness of the ordinance."¹² Hence, Posner was "led to write separately, and since this separate opinion commands the support of two members of this panel, it is also a majority opinion."¹³

In the paragraphs that followed, Posner chastised the city council (for enacting such a misguided and disingenuous law), the Supreme Court (for foreclosing what should have been meritorious claims under the Due Process and Contracts Clauses), and the appellants' lawyers (for inexplicably waiving on appeal their purportedly most promising arguments, having to do with the Takings and dormant Commerce Clauses¹⁴). Judge Cudahy was plainly annoyed, dismissively re-

⁶ Id at 238.

⁷ Id at 237 (confiding that "[i]f it were my job to evaluate the wisdom of the Ordinance I would grade it highly questionable if not substantially inadvisable").

⁸ *Chicago Board of Realtors*, 819 F2d at 734.

⁹ Id at 734-41.

¹⁰ See 40 ALR 3d 821 at § 2 (1971) (summarizing the general failure of constitutional challenges to rent withholding statutes).

¹¹ *Chicago Board of Realtors*, 819 F2d at 741 (Posner concurring).

¹² Id.

¹³ Id.

¹⁴ Appellants' counsel did not deserve Posner's criticism. Having raised a plethora of grievances below, counsel sensibly became more selective on appeal, developing the strongest arguments and jettisoning the rest. The appellants thus waived their Takings Clause argument (a likely loser, as the district court correctly held, for the reasons noted in note 58) and their dor-

ferring to Posner's concurring opinion as, "at best, superfluous."¹⁵ Cudahy was of course right in one sense; Posner's opinion consisted entirely of dicta. But Posner's opinion was far from superfluous in another important sense. It analyzed in some depth the economics of landlord-tenant regulation so as to generate a novel, intellectually audacious, and falsifiable hypothesis about the political factors driving the ordinance's enactment. Posner's analysis of these sorts of regulations has been influential in the academy, and this Essay evaluates the merits of his approach.

I. THE ECONOMICS OF LANDLORD-TENANT REGULATION

The central premise of Posner's economic argument is that by making the landlord business less profitable, the Chicago ordinance would induce building owners to convert rental buildings into condominiums, to the detriment of poor renters.¹⁶ This is a testable claim, but the available evidence is not terribly supportive. The leading study on condominium conversions, which was published shortly after Posner's opinion, suggests that demand-side factors (buyers wanting to purchase homes) were approximately twice as important as supply-side factors (landlords finding rental buildings insufficiently profitable) in driving condominium conversion rates.¹⁷

Of course, that study still suggests that supply-side factors play a role in condominium conversions. A more satisfying way of testing Posner's economic thesis would be to study what happened in the many jurisdictions that enacted legislation similar to Chicago's. The most relevant empirical study available when Posner penned his opinion suggested that the sorts of interventions employed by Chicago, such as rent withholding for warranty violations, repair-and-deduct remedies for tenants whose landlords refuse to make repairs, and protections against retaliatory evictions, have no statistically significant effects on tenant welfare, as determined using a hedonic price model.¹⁸ Posner's opinion cited this study, by Werner Hirsch, though he did not

mant Commerce Clause argument (a stronger argument, but one that would have, at most, invalidated a trifling detail in the ordinance—the requirement that deposits be held in Illinois banks). Despite this, Posner criticized the plaintiffs for not having "raised on this appeal their most promising challenges" for "reasons that are obscure." *Id.* at 745.

¹⁵ *Id.* at 737 n 2 (majority).

¹⁶ *Id.* at 741 (Posner concurring).

¹⁷ See Theodore M. Crone, *Changing Rates of Return on Rental Property and Condominium Conversions*, 25 *Urban Stud* 34, 38–39 (1988).

¹⁸ See Werner Z. Hirsch, *Habitability Laws and the Welfare of Indigent Tenants*, 63 *Rev Econ & Stat* 263, 271, 274 (1981). See also Werner Z. Hirsch and Cheung-Kwok Law, *Habitability Laws and the Shrinkage of Substandard Rental Housing Stock*, 16 *Urban Stud* 19, 27 (1979) (concluding that "in no case do repair and deduct laws have a statistically significant effect on the shrinkage of substandard rental housing").

describe its empirical findings.¹⁹ Hirsch, though a skeptic of these laws, found that only the enactment of draconian receivership laws was demonstrably counterproductive from a tenant welfare perspective,²⁰ and Chicago's ordinance contained no receivership provisions. In subsequent work, Hirsch recrunched his numbers to show that habitability mandates were associated with statistically significant reductions in the welfare of black indigent tenants but did not affect the welfare of aged indigent tenants.²¹ No economists, other than Hirsch and his co-authors, have devoted sustained attention to studying habitability and rent-withholding laws empirically. The available evidence therefore suggests that Posner was right to be skeptical that the Chicago ordinance would help poor tenants but perhaps too hasty to conclude that it would harm them.

Why might such legal reforms have minimal effects on the rental housing market? One possibility is that the poor tenants who are likely to be evicted are ignorant of their legal rights, and thus usually do not assert newly authorized causes of action in the courts.²² This explanation is supported by evidence from several jurisdictions, including Chicago.²³ Six months after the Chicago ordinance at issue in this case became law, tenants were largely still oblivious to their newly acquired rights, despite a substantial publicity effort by the city.²⁴

¹⁹ See *Chicago Board of Realtors*, 819 F2d at 742 (Posner concurring).

²⁰ See Hirsch, 63 Rev Econ & Stat at 269 (cited in note 18) ("Receivership laws permit the court to appoint a receiver who takes control of buildings and corrects hazardous defects after the landlord has failed to act within a reasonable time. Rent is deposited with the court-appointed receiver until the violation is corrected, and as long as the tenant continues to pay rent into escrow he cannot be evicted for non-payment.").

²¹ See generally Werner Z. Hirsch, *Effects of Habitability and Anti-Speedy Eviction Laws on Black and Aged Indigent Tenant Groups: An Economic Analysis*, 3 Intl Rev L & Econ 121 (1983). Assuming its robustness, this finding suggests that the effects of the Chicago ordinance would be worse than Posner anticipated in an important sense. Landlords might have relied increasingly on tenant screening after the enactment of the Chicago ordinance, perhaps letting racial animus infect their renting decisions or using criteria that had a disparate impact on African-American renters.

²² See Ben H. Logan III and John J. Sabl, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 Stan L Rev 729, 776-77 (1976) (concluding in part that the implied warranty of habitability is "unknown and relatively unimportant to the very people it was intended to assist"). Relatedly, landlords and tenants might fall back on efficient social norms, regardless of what the law says. See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 279 (Harvard 1991) (arguing that the norm of "you are entitled to get what you pay for" governs landlord-tenant relations more than any legal regime).

²³ For a review of this literature, see Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 Urban L Ann 3, 144-53 (1979).

²⁴ Michele L. Norris, *Renters Still in the Dark about Rights*, Chi Trib Section 2 at 1 (Apr 27, 1987).

II. THE POLITICAL ECONOMY OF LANDLORD-TENANT REGULATION

It is heartening to see a federal judge grappling with the economics of landlord-tenant regulation in a sophisticated way. Indeed, if the debate between Posner and Cudahy in *Chicago Board of Realtors* is about whether the real economic consequences of the ordinance shed light on its constitutionality, the reader should not hesitate to side with Posner. That said, whereas Posner's economic critique of the Chicago ordinance is plausible, his political economy story fares worse.

Posner foreshadows his political economy story early in the opinion, asserting that the "stated purpose of the ordinance is to promote public health, safety, and welfare and the quality of housing in Chicago. It is unlikely that this is the real purpose, and it is not the likely effect."²⁵ Posner's economic analysis of the ordinance immediately follows, but he returns to explaining the ordinance's "real purpose" three paragraphs later:

The ordinance is not in the interest of poor people. As is frequently the case with legislation ostensibly designed to promote the welfare of the poor, the principal beneficiaries will be middle-class people. They will be people who buy rather than rent housing (the conversion of rental to owner housing will reduce the price of the latter by increasing its supply); people willing to pay a higher rent for better-quality housing; and (a largely overlapping group) more affluent tenants, who will become more attractive to landlords because such tenants are less likely to be later with the rent or to abuse the right of withholding rent The losers from the ordinance will be some landlords, some out-of-state banks, the poorest class of tenants, and future tenants. The landlords are few in number Out-of-staters can't vote in Chicago elections. Poor people in our society don't vote as often as the affluent. And future tenants are a diffuse and largely unknown class. In contrast, the beneficiaries of the ordinance are the most influential group in the city's population. So the politics of the ordinance are plain enough, and they have nothing to do with either improving the allocation of resources to housing or bringing about a more equal distribution of income and wealth.²⁶

The block quote is lengthy, and the reader will be tempted to skip over it, often a winning strategy when it comes to block quotes. But this is a rare instance in which the reader ought to resist that temptation, be-

²⁵ *Chicago Board of Realtors*, 819 F2d at 741 (Posner concurring).

²⁶ *Id.* at 742 (citation omitted).

cause in the span of a couple hundred words, Posner has constructed a fascinating, intricate, novel, and wrongheaded account of urban politics.

Let us begin with Posner's assessment of the role of interest groups in the ordinance's enactment. Posner helpfully divides the affected parties into winners (homeowners, renters of luxury apartments,²⁷ and high-income renters)²⁸ and losers (landlords, out-of-state banks, poor renters, and future renters). This political fight turns out to be no contest, according to Posner. Homeowners are "the most influential group in the city's population" and the losers are political pip-squeaks who can't vote (out-of-state banks), don't vote (poor renters), or don't have enough votes (landlords).²⁹

Posner's characterization of the ordinance's winners and losers is, at the very least, controversial. Take homeowners.³⁰ Posner predicts that the Chicago ordinance will lower real estate values, especially for condominiums, but fails to explain why homeowners would want home prices to drop. Home equity is the nest egg of many Americans, to be used for retirement or as collateral for education, businesses, startups, and other important investments.³¹ A decline in real estate prices is hardly a cause for celebration among existing homeowners, just as a decline in stock prices rarely perks up the moods of equity investors. Much of the pertinent economics literature is premised on the idea that homeowners want to maximize the value of their homes, and that this motivation best explains local governments' land use policies.³² To be sure, some people benefit from declines in real estate prices. Among them, two groups stand out: renters who can afford to buy homes and homeowners in other locales who are thinking about moving to Chicago. The former are not a particularly large or powerful interest group. The latter are "a diffuse and largely unknown class"³³ of nonvoters with no clout in Chicago politics.

What about the banks? Posner is surely right that instate banks would gain some business under the ordinance, in light of the new re-

²⁷ Presumably, in the mid-1980s, the moniker "luxury apartments" meant something more than "running water provided." Today, practically every landlord in Chicago claims to be renting "luxury apartments."

²⁸ By implication, instate banks should be counted as winners, though Posner omits them from his tally.

²⁹ *Chicago Board of Realtors*, 819 F2d at 742.

³⁰ Homeowners are numerous and relatively affluent. But their political potency might be mitigated somewhat by their dispersed nature. Nevertheless, Posner's description of their political clout seems apt. See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 4 (Harvard 2001) ("[H]omeowners . . . are the most numerous and politically influential group within most localities.").

³¹ *Id.*

³² See, for example, *id.*

³³ *Chicago Board of Realtors*, 819 F2d at 742.

quirement that landlords deposit tenants' security deposits in the jurisdiction. But servicing interest-bearing accounts is small potatoes in the banking industry. The mortgage lending business is banks' bread and butter, and the market for mortgage loans has long been national in scope. Condominium conversions should engender substantial mortgage lending activity, as renters approach banks seeking loans. So if Posner's economic analysis is right, then out-of-state banks will lose a handful of interest bearing accounts, but will gain substantially from increased mortgage lending activities. That looks like a win, not a loss, for the banks, and it might explain their lack of involvement in this litigation.

One politically powerful interest group is mysteriously omitted from the political economy account: real estate agents. This oversight is odd, given the case caption in *Chicago Board of Realtors*. We can certainly imagine that realtors would be upset by declining real estate prices, since agents have long received a 6 percent commission on the purchase price of residential real estate. On the other hand, if Posner's predictions about rental buildings going condo are correct, these declines in real estate prices could be offset by an increase in the number of sales. But in order to keep their earnings at the same level, real estate agents would have to work harder. Selling ten homes requires more work than selling nine homes, but selling a \$1,000,000 home is probably no more difficult than selling a \$900,000 home. So the real estate agents' involvement in this litigation may have a straightforward explanation.

Tallying the winners and losers from this ordinance, then, turns out to be more difficult than Posner's opinion suggests. But Posner goes further astray in converting his account of the winners and losers into an explanation of why the Chicago ordinance was enacted. Posner sees middle class homeowners as the primary beneficiaries of the legislation and thinks this is no accident. He describes aiding this politically powerful interest group as the ordinance's "real purpose."³⁴ Hence, Posner says, "the politics of the ordinance are plain enough," and he follows this statement with a "compare" citation to Stephen DeCanio's essay, *Rent Control Voting Patterns, Popular Views, and Group Interests*.³⁵

Alas, DeCanio's essay undercuts Posner's claims. DeCanio studied Santa Barbara voters' support for a local rent control ordinance and statewide rent control initiative.³⁶ DeCanio found that renter

³⁴ See *id.* at 741.

³⁵ *Id.* at 742.

³⁶ Stephen J. DeCanio, *Rent Control Voting Patterns, Popular Views, and Group Interests*, in M. Bruce Johnson, ed., *Resolving the Housing Crisis: Government Policy, Decontrol and the Public Interest* 301, 307–10 (Ballinger 1982).

status made voters significantly more likely to support the local rent control ordinance and that party affiliation also had a significant effect.³⁷ After controlling for renter status and partisan affiliation, poverty status and minority ethnic group membership did not significantly affect support for rent control.³⁸ Although DeCanio plausibly posited that rent control could harm poor people and minorities (by prompting greater discrimination by landlords, who would regard the poor and minorities as less upwardly mobile, and hence long-term tenants), he suggested that voters in general would “see no farther than immediate redistributive effects” and hence be unaware of this potential dynamic.³⁹ On the next page, DeCanio elaborates:

Despite the lure of redistributionism, the economists’ arguments against rent control on allocational grounds are not easily dismissed intellectually. . . . [O]nce a measure has been certified for the ballot, there is no *a priori* reason to expect that citizens will acquire and apply the information necessary to make a fully informed evaluation of the arguments. The costs of acquiring the information can be very large indeed. Although rent control is relatively simple in its economic analytics compared to some of the other economic issues facing the public, the analysis is not self-evident. The incontrovertible evidence of economic rationality exhibited at the level of individual economic activity does not imply that individuals will be able to generate, recognize, or support globally optimal economic *policies*.⁴⁰

Rent control, DeCanio concludes, presents a fairly easy economic question, but voters have a difficult time understanding how the second-order distortions that rent control creates may adversely affect them. Accordingly, boundedly rational voters may well vote against their long-term economic interests. If the economics of rent control are too complicated for the median voter to understand, then the same voter would have been at sea in trying to make sense of the economics of the Chicago ordinance’s rent-withholding, warranty of habitability, and other provisions.

Of course, where complex issues arise, the median voter is not necessarily left to her own devices. Political and mass media elites might set to work understanding an ordinance and then explain the ordinance’s effects in language that ordinary voters can understand. To that end, it is worth reviewing the contemporary media coverage of

³⁷ Id at 312.

³⁸ Id.

³⁹ Id at 313.

⁴⁰ Id at 314.

the Chicago ordinance to see if the welfare and distributional effects that Posner posits were discussed in the press.

The Chicago ordinance was the subject of extensive coverage from the local newspapers, but none of that coverage suggested that middle class owners of single-family residences played any part in securing its enactment. Rather, the newspapers uniformly identified tenants' rights groups as the interests agitating for the legislation.⁴¹ Indeed, according to the *Chicago Tribune*, it seemed plain that tenants would be the primary beneficiaries of the legislation and landlords would suffer its consequences.⁴² Although the news coverage occasionally made passing reference to the possibility that landlords would respond to the ordinance by raising rents or scrutinizing incoming tenants more closely,⁴³ these claims were often juxtaposed with anecdotal evidence suggesting that this had not happened in the nearby suburb of Evanston, which had previously enacted similar legislation.⁴⁴

In short, Judge Posner's account of Chicago's political economy seems unsupported by contemporary media coverage. It is not difficult to imagine Posner's political economy story resonating in the dining room of The University of Chicago's Quadrangle Club, but it is hard to believe that voters in the city's other precincts could have fathomed the Posnerian spin on the legislation. For Posner's political thesis to have been right, there must have been a conspiracy of silence among single family homeowners, all of whom tacitly agreed to support the ordinance as an effective means of lowering [!] real estate values, while pushing forward tenant dupes to lend a proletarian veneer to the legislative effort. Nudge nudge, wink wink. Say no more.

In *Chicago Board of Realtors*, Judge Posner appears to have made the mistake of projecting his own dim view of the ordinance onto the minds of the median Chicago voter or alderman. Almost twenty years later, Posner sometimes continues to think about economic regulation through the same lens. For example, one of his 2006

⁴¹ See, for example, Harry Golden, Jr., *Renters Get a Rights Law*, Chi Sun-Times 1 (Sept 9, 1986); Mark Hart, *Cheering Crowd Greets Mayor, Tenants Rights*, Uptown News A1 (Aug 5, 1986); Juanita Bratcher, *Activists Praise Tenants Rights Ordinance*, Chi Defender 4 (Apr 23, 1984).

⁴² See Ann Marie Lipinski, *Tenants Get to Wield New Tool: Repair and Deduct*, Chi Trib Section 2 at 1 (Oct 12, 1986).

⁴³ See, for example, Bill Granger, *For Chicago Renters: A Taxing Situation That Hits You Where You Live*, Chi Trib Sunday Magazine 8 (Nov 2, 1986) (referring to real estate agents and landlords who said that the ordinance would result in higher security deposits); Lipinski, *Tenants Get to Wield New Tool*, Chi Trib Section 2 at 1 (cited in note 42) (quoting a real estate management company president's fear that rents would go up in response to the ordinance).

⁴⁴ See David D. Orr, Letter to the Editor, *Tenants, Rents*, Chi Trib Section 1 at 10 (Nov 26, 1986) (arguing that a similar ordinance in Evanston had not had the dire consequences predicted in Granger's article); Lipinski, *Tenants Get to Wield New Tool*, Chi Trib Section 2 at 1 (cited in note 42).

posts on the Becker-Posner blog argues that (1) middle class teenagers and very poor workers are harmed by minimum wage increases (a plausible claim); (2) these teenagers and very poor workers understand the ways they are harmed by said increases (an implausible claim); and (3) minimum wage increases are enacted because the very poor and teenagers do not vote in large numbers (implausible, given the implausibility of claim (2)).⁴⁵ The political science literature has long noted that teenagers and the very poor typically lack an understanding of the economist's critique of minimum wage laws, and therefore they may not vote in accordance with their purported long-term economic interests.⁴⁶ Public opinion polls and newspaper stories indicate that teens and the poorest voters are typically enthusiastic about minimum wage increases—they believe such mandates will increase their pay but do not contemplate the possibility that their jobs will be eliminated.⁴⁷ So while interest group theories might explain the enactment of minimum wage increases,⁴⁸ it is not the case that the inter-

⁴⁵ See Richard A. Posner, *Should Congress Raise the Federal Minimum Wage?*, The Becker-Posner Blog (Nov 26, 2006), online at http://www.becker-posner-blog.com/archives/2006/11/should_congress.html (visited Sept 29, 2007):

So why are Democrats pushing to increase the minimum wage . . . ? [G]enuinely poor people vote little. The number of nonpoor who would be benefited by an increase in the minimum wage, when combined with the number of nonpoor workers whose incomes will rise as a result of reducing competition from minimum-wage workers, probably exceeds the number of nonpoor who will be laid off as a result of an increase in the minimum wage. Teenagers, moreover, will be among the groups hardest hit, and most of them do not vote.

⁴⁶ See, for example, William R. Keech, *More on the Vote Winning and Vote Losing Qualities of Minimum Wage Laws*, 29 Pub Choice 133, 134–36 (1977). Interestingly, however, even though teenagers often do not appreciate their economic interests, their legislators seem to. Legislators from districts with higher numbers of teenage workers are more likely to oppose legislation increasing the minimum wage. See generally Jonathan I. Silberman and Garey C. Durden, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach*, 84 J Pol Econ 317 (1976) (presenting an economic analysis of legislative voting patterns on the 1973 amendment to the Fair Labor Standards Act).

⁴⁷ See, for example, Jennifer Freeze, *Teens and the Election: Minimum Wage Most Important Issue to Many Local Youths*, Southeast Missourian 12A (Oct 31, 2006), online at <http://www.semissourian.com/story/print/1175362.html> (visited Sept 29, 2007); Bill Bush, *Young Voters Favor Issue 2, Student Survey Says*, Columbus Dispatch 3C (Oct 19, 2006); Exit Polls for Missouri Proposition B, online at <http://www.cnn.com/ELECTION/2006/pages/results/states/MO/1/02/epolls.0.html> (visited Sept 29, 2007) (showing that in the 2006 election, the poorest voters favored an increase in minimum wage by the highest margins); Exit Polls for Ohio Issue 2, online at <http://www.cnn.com/ELECTION/2006/pages/results/states/OH/1/03/epolls.0.html> (visited Sept 29, 2007) (showing that in the 2006 election, the poorest voters and the youngest voters backed a minimum wage increase by the highest margins).

⁴⁸ See Russell S. Sobel, *Theory and Evidence on the Political Economy of the Minimum Wage*, 107 J Pol Econ 761, 779–82 (1999) (focusing on organized labor unions and business interests, and concluding that the minimum wage level can “be explained by the relative strength of interest groups”); Frank G. Steindl, *The Appeal of Minimum Wage Laws and the Invisible Hand in Government*, 14 Pub Choice 133, 133–34 (1973) (providing an economic analysis of why those who stand to lose from the minimum wage support it).

est groups representing teens and the very poor lose these political fights. If anything, they appear to be on what Posner would say is the wrong, but winning, side of those fights.⁴⁹

III. AFTERMATH

Less able and more modest judges would have refrained from telling any sort of political economy story in a case like *Chicago Board of Realtors*, let alone one as intricate as Posner's. Judge Cudahy's boring opinion disposed of all the legal issues necessary for the courts to resolve the case. Constitutional objections to similar rent withholding ordinances were raised in a good number of state courts prior to *Chicago Board of Realtors*, and none of them seem to have succeeded.⁵⁰ The separate opinion in the case is a gambit that non-Posnerian judges would not, and should not, try at home. But should a Posnerian judge try it? Or, more aptly, should *the* Posnerian judge?

Judge Posner seemed to have strong views about the foolishness of landlord-tenant reforms along the lines of Chicago's efforts, so we can assume that he enjoyed airing those views and attempting to influence the public debate over them. In that sense, *Chicago Board of Realtors* was a great success. Posner's opinion (unlike Cudahy's) found its way into the dominant Property casebook used in American law schools,⁵¹ where it is the primary case on affordable housing law,⁵² and its substance has not been heavily criticized.⁵³ The discussion of rent-withholding statutes and housing code enforcement in Posner's treatise on the economic of analysis of law similarly cites to only one case: *Chicago Board of Realtors*.⁵⁴

At the same time, there was a cost to voicing his displeasure with the ordinance. Future jurists confronting similar challenges saw Posner's denunciation of the ordinance, but also his bottom line, and concluded that if Posner could not strike down the ordinance in light of his deep skepticism as to its wisdom, neither could they.⁵⁵ Whatever its impact on 1L Property students, its impact on contemporary jurists

⁴⁹ On the broader phenomenon, see generally Tyler Cowen, *Self-Deception as the Root of Political Failure*, 124 Pub Choice 437 (2005) (advancing a theory that political failure results because "[i]ndividuals discard free information when that information damages their self-image and thus lowers their utility").

⁵⁰ See 40 ALR 3d 821 at § 2 (cited in note 10).

⁵¹ See Lee Anne Fennell, *Common Interest Tragedies*, 98 Nw U L Rev 907, 908 n 6 (2004) (noting the ubiquity of the property casebook by Jesse Dukeminier and his coauthors).

⁵² Jesse Dukeminier, et al, *Property* 444 (Aspen 6th ed 2006).

⁵³ See id at 552-55.

⁵⁴ See Richard A. Posner, *Economic Analysis of Law* § 16.6 at 518 n 9 (Aspen 5th ed 1998).

⁵⁵ See, for example, *Oak Park Trust & Savings Bank v Village of Mount Prospect*, 181 Ill App 3d 10, 536 NE2d 763, 771 (1989).

seems to have been negligible. The one important published case that embraced parts of Posner's analysis, *Action Apartment Association v Santa Monica Rent Control Board*,⁵⁶ employed Posner's characterization of the Chicago ordinance as a naked wealth transfer to hold that a law requiring landlords to pay tenants 3 percent interest on security deposits kept for longer than a year was an unconstitutional taking.⁵⁷ *Action Apartment*, however, applied the Supreme Court's *Penn Central* takings test unpersuasively.⁵⁸ Hence subsequent California courts essentially have limited *Action Apartment* to its facts.⁵⁹

This is a tradeoff that Posner undoubtedly understood. His criticisms of the wisdom of enacting ordinances like Chicago's could resonate with legal scholars and the generations of law students that they would teach. In the long term, Posner's opinion could help lay the groundwork for the eventual repeal or invalidation of such laws. But in the short run, Posner's unwillingness to strike down the ordinance in light of his many qualms seemed to put the final nail in the coffin of a rather broad but universally unsuccessful effort to invalidate these sorts of ordinances on constitutional grounds. As Posner wistfully remarks toward the end of his opinion, the "plaintiffs have brought their case in the wrong era."⁶⁰ Seen in this light, we might treat *Chicago Board of Realtors* as a data point that provides hints about Posner's discount rate. His willingness to tolerate a short-term and medium-term policy that he found deeply misguided, in the hopes that his words might help engender a long-term reversal driven by legal elites, suggests that Posner cares a great deal about the way in which he will be remembered once he puts down his pen.

⁵⁶ 94 Cal App 4th 587, 114 Cal Rptr 2d 412 (2001).

⁵⁷ *Id.* at 426 (citing *Chicago Board of Realtors* to support Takings Clause analysis). Recall that Judge Posner had chastised the plaintiffs for not pressing a takings argument on appeal. See note 14.

⁵⁸ Under *Penn Central*, the extent of the diminution in the landlord's property interest is the most important factor in determining whether a taking has occurred. Regulations that reduce the value of the regulated land by 50 percent or more are often deemed not to be takings under *Penn Central*. See *Tahoe-Sierra Preserv Council v Tahoe Regional Planning Agency*, 535 US 302, 319 n 15 (2002) (noting that diminution of property value cannot alone establish a taking). The idea that a deprivation of the difference between the market interest rate and 3 percent is a taking under *Penn Central* strains credulity, for such a regulation would have a minimal effect on the value of the landlord's real property. See *id.* at 327 (noting that a significant deprivation of property is required to make a taking). See also *Yee v City of Escondido*, 503 US 519, 539 (1992) (holding that a rent control ordinance is not a taking).

⁵⁹ See, for example, *Small Property Owners of San Francisco v City and County of San Francisco*, 141 Cal App 4th 1388, 47 Cal Rptr 3d 121, 133-36 (2006) (distinguishing *Action Apartment* on numerous grounds to hold that a San Francisco ordinance requiring a 5 percent interest on tenants' security deposits did not effect a taking).

⁶⁰ *Chicago Board of Realtors*, 819 F2d at 745 (Posner concurring).