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THE REVOLUTION IN LANDLORD-TENANT LAW: A COMPARATIVE INSTITUTIONAL VIEW

Neil K. Komesar†

Professor Rabin presents an ambitious paper with many facets.¹ I would like to focus on two of the subjects he discusses: his evaluation of the changes in landlord-tenant law and his explanation for rent control laws. My interest in these subjects does not stem from any strong conclusions I hold either supporting or refuting those of Professor Rabin. In fact, these contexts do not easily yield strong conclusions. I am interested in the analysis employed by Professor Rabin and others in these areas. In particular, I feel that many legal and economic analyses suffer from a failure to consider and compare basic institutional features as part of either descriptive or prescriptive inquiry. This is a theme I have sounded in criticism of Posnerian law and economics² and will raise in consideration of constitutional analysis.³ I would like to take this opportunity to briefly follow it out in the landlord-tenant area.

I

EVALUATION OF THE LEGAL REFORMS

First, I will consider Professor Rabin's evaluation of the revolution in landlord-tenant law. More exactly, I would like to examine the analytical tools and assumptions that underlie this evaluation. He begins with the conventional law and economics format: given competition in the industry, "a laissez-faire policy will normally obtain maximum efficiency in the use of economic resources."⁴ He then goes on to look at "well-known exceptions" to this general rule.⁵ The exceptions, such as those based on concern for social cost, consist of a partial list of market (or laissez-faire) "failures."

My major problem with this analysis is its preoccupation with the

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¹ Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

² Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981).

³ Komesar, *Taking Institutions Seriously—Introduction to A Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. (forthcoming).

⁴ Rabin, *supra* note 1, at 578.

⁵ *Id.*

attributes of the market and, in turn, its failure to adequately consider and compare the attributes of other imperfect societal institutions. But before expanding on this comparative institutional theme, it seems useful to briefly consider another analytical omission—Professor Rabin's apparent assumption that the sole criterion for social welfare in this context is resource allocation efficiency.

I am uncertain why Professor Rabin has focused on allocative effects to the exclusion of distributive ones. He begins the evaluation section by stating that the primary purpose of the changes in the landlord-tenant law is to improve the position of tenants, primarily poor tenants. That goal seems distinct from general resource allocation efficiency. Yet he never evaluates the changes in landlord-tenant law in terms of this criterion. Perhaps he is convinced that redistributive effects simply will not occur. Thus, if all the incidents of the additional costs are eventually passed on to tenants, there are no redistributive effects. In that case, an analysis concerned with the interests of tenants could ignore issues of redistribution.

I do not think, however, that the absence of distributive effects has been established and that, therefore, redistributive goals can be ignored analytically. Approximately ten years ago, I responded to a long article by Professor Bruce Ackerman in which he attempted to establish ease of redistribution based, in part, on the limited likelihood that the costs of code enforcement would be passed on to the tenants.⁶ Indeed, Judge Skelly Wright employed the Ackerman article for such a proposition in one of his important landlord-tenant opinions.⁷ It was Professor Ackerman's analysis, not his conclusions, which concerned me. I had no strong view on whether the enforcement of housing codes through landlord-tenant law would aid or harm tenants or who would pay. Nor did I suggest that housing code enforcement was obviously an inferior alternative mode of achieving redistribution (a concern of Professor Ackerman) or economic efficiency (a goal often associated with the economic analysis of law). My argument was only that it was not so obviously superior and costless as Professor Ackerman would have had his readers believe.

The incidence of a tax or a government-required expenditure is a complex determination. Highly competitive markets do not indicate that the incidences will fall solely on consumers. As far as I can determine from Professor Rabin's description of the literature, no one has adequately shown the extent to which tenants rather than landlords (or

⁶ Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973) (critiquing Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971)).

⁷ *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972).

indeed various other parties involved in providing rental housing) would bear these costs. Professor Ackerman and Judge Wright were wrong to the extent that they believed that it was obvious that tenants in general, and low income tenants in particular, would not bear any of these costs. To my knowledge, however, the opposite proposition has not been established. As such, the goal of income redistribution remains a plausible concern in the landlord-tenant context and one that Professor Rabin ought not have ignored.

But the feature of Professor Rabin's analysis that is the most troubling and, in turn, most intellectually interesting, is the skewed nature of the analytics he employs—his incomplete institutional analysis. Although my commentary will point to the incompleteness of Professor Rabin's analysis, it is not meant to suggest that Professor Rabin stands alone in these failings. Indeed, when Professor Rabin focuses on variation in market attributes as the controlling feature, he is in good company. Posnerian law and economics suffers from the same form of institutional myopia on both prescriptive and descriptive levels. In a recent article, I argued that the economic analysis of the common law evolved by Professor Richard Posner focuses almost exclusively on variation in the ability of the market to make valuations that provide efficient results: when the market works well, common law judges defer to the market; when it does not work well, the judiciary assumes the valuation function.⁸ Even if one assumes that economic efficiency is the goal of the common law, such an institutional approach is intrinsically incomplete. Variation in the attributes of one alternative yields little of value without regard to parallel variation in the attributes of other alternatives over the relevant range. Thus, that the market is more or less perfect means nothing unless we have some idea about the relative ability of the relevant alternative allocative mechanisms. Although the judiciary is often the alternative in the Posnerian examples, Professor Posner fails to consider carefully whether as the market varies in its allocative abilities the judiciary also varies. Professor Posner yields solutions that are apparently determinative, but the appearance is illusory. The institutional configuration is more complex and the intellectual task richer and more difficult than the Posnerian analysis suggests.

So it is with Professor Rabin's analysis of these changes in landlord-tenant law. Consider first, resource allocation and the implied warranties of habitability. Professor Rabin suggests that when the courts protect the reasonable expectations of the contracting parties they promote efficiency and justice. "A very different situation arises, however, when the law enforces a duty on which the parties did not in fact agree, and on which they would not have agreed if the question had been posed to

⁸ Komesar, *supra* note 2.

them directly.”⁹

On one level, such suggestions seem unobjectionable. Contract law has commonly been cast in terms of the expectations of the parties. However, even assuming that contract law in general, and landlord-tenant law in particular, should be focused solely on the parties' expectations and further that this focus is related to a basic concern for the efficient allocations of resources, the conclusions one can draw about the evolution of landlord-tenant law are more complex than Professor Rabin indicates. A wide range of alternative means of determining expectations and enforcing contracts is involved here, and the relative merits of these means depend on a range of unspoken assumptions about the market, the courts, and even the political process.

When Judge Wright declared in *Javins v. First National Realty Corp.*¹⁰ that a warranty of habitability would be measured by the housing code and that the warranty could not be waived, he ventured further than any judge in the area. Cases like *Lemle v. Breeden*,¹¹ *Pines v. Perssion*,¹² and *Marini v. Ireland*¹³ can be seen as part of a more gradual evolution rather than a revolution in landlord-tenant law. At least the first two reached results that were consistent with traditional doctrines—albeit written with a great deal of broad language. The courts in *Lemle* and *Pines* presumably would have respected a knowing waiver and perhaps the *Lemle* court would have been more respectful of standards deviating from the housing code. Is Judge Wright's approach obviously less efficient than these other observable alternatives? In turn, are any of these modern approaches obviously superior to the traditional (pre-evolution) rules, under which the parties' expectations were determined from the agreement's express provisions only?

Evaluating which of these approaches is the most consistent with efficient resource allocation (or distribution or some other measure of justice) depends on assumptions about the abilities of several institutions to determine expectations and the value of resources. Consider first the traditional (pre-evolution) rules. If we assume that the market is strongly competitive and that the parties are both well aware of what they want and sophisticated, why should judges even determine what the parties might have decided if confronted by a question posed to them directly? Judges are isolated from the particulars of leasing transactions and are informed only by an ex post adversary process. Under these circumstances, guesses by judges under the aegis of “implication” may well more often deviate from the expectations of the parties and be

⁹ Rabin, *supra* note 1, at 580.

¹⁰ 428 F.2d 1071 (D.C. Cir. 1970).

¹¹ 51 Hawaii 426, 462 P.2d 470 (1969).

¹² 14 Wis. 2d 520, 111 N.W.2d 409 (1961).

¹³ 56 N.J. 130, 265 A.2d 526 (1970).

less efficient than a rigid requirement of clear writings and minimal judicial determination.

One can blunt the force of this argument by altering these assumptions about the market or by a greater faith in the legal process. That is my point. Professor Rabin's seemingly straightforward adherence to enforcement of implied terms, which theoretically represent the intent of the parties, is not so straightforward. It depends upon the relative abilities of two admittedly imperfect institutional modes of valuation—the courts and the market.

Suppose we now consider the efficiency of employing housing codes as the source of implication of reasonable expectations, but with the ability to waive by express terms. This is essentially the *Pines* position. Is this superior to the *Lemle* position of broad based implication? The answer lies mainly in one's perception of the relative merits of the judiciary versus the legislature. I have already noted some of the constraints on a judiciary informed by an adversary process in determining what a given tenant or landlord might have reasonably expected. One might argue that the legislature, with its greater leeway in factfinding, is superior to the judiciary in its ability to determine reasonable expectations.

Although one might see relative advantages in a legislative determination, questions also arise about this institution. First, there are issues surrounding the political process. If all results were the product of a simple majority vote, there would be obvious sources of deviation from ideal allocative determinations. Votes and intensity of preference do not necessarily correlate. When one introduces the representative political process, bureaucracy, and the presence of concentrated interests, the possibilities for inefficient results increase. These are issues I will raise in the second part of this commentary. Even if there are no deviations and the political actors have the incentive to seek the efficient solution, a general legislative determination or standard has some disadvantages relative to case-by-case judicial determination.

Ultimately, deciding whether a housing code, replete with special interest provisions and general maxims, is superior to an adversarial judicial process or to formal market transactions between less than fully knowledgeable or sophisticated parties is a difficult task. Nevertheless that is the question we must face.

Next, consider the refusal to allow waiver of the code standards, which is, to me, the core of the *Javins* decision. Is such a requirement "efficient" as compared to the requirement of explicit provisions, the enforcement of clauses implied from the circumstances of the individual transaction, or the enforcement of clauses implied from the housing code with waiver available? It is easy enough to make the argument that it is not. But it is not difficult to spell out the counterargument as well.

Many tenants lack the knowledge and sophistication to realize the

implications of their waiver of housing code standards and courts are often unable to identify which tenants actually had such problems. Arguably, under these conditions, the *Javins* solution might be superior to the other real-world alternatives. In fact, the potential for consideration of institutional features can be extended beyond concern about the characteristics of tenants. Housing codes represent a societal response to the external effects of the deterioration of one building upon others in the neighborhood. To the extent that bureaucratic code enforcement is an imperfect mechanism, code enforcement through the judicially enforced landlord-tenant law might yield efficiency gains.

In this vein we can consider Professor Rabin's approval of the courts' refusal to enforce exculpatory clauses. He finds this acceptable because tenants have little opportunity to shop for variation in lease terms.¹⁴ But this argument barely scratches the surface. Form leases provide information to tenants and increase the chances that tenants have had experience with similar exculpatory clauses. If these clauses were not cost justified, we might well expect that market forces would remove them from form leases over time. It is probably a more damning critique of the market here to suggest that these exculpatory clauses deal with events that are infrequent albeit quite injurious. As such, one may argue that a tenant would have less knowledge and sophistication about the implications of such exculpatory clauses than he or she would have about the implications of waiving rights to varying levels of quality or habitability.

It is always possible to find market imperfections and often possible to identify gradations of these imperfections. But market imperfections taken alone tell us little about whether a legal rule refusing to enforce exculpatory clauses is efficient or just. Thus, the torts system is hardly perfect and the costs of dealing with it can form a sensible basis for an arrangement to avoid litigation. In addition, one can view more litigious people as imposing costs on the less litigious if the latter are not allowed to manifest their desires in the form of devices like exculpatory clauses.

As a general matter, variation in institutional attributes and comparison of institutions must dominate analysis of landlord-tenant law. The degree of market imperfection is useful but hardly determinative. There must be at least one other decisionmaking mechanism considered in our examples—the judiciary. The parallel attributes of that mechanism in the relevant context must be integrated into the analysis. Indeed, there are often a number of institutional or decisionmaking alternatives among and within the judiciary and the political process. A theoretical analysis of these landlord-tenant laws is not valuable unless

¹⁴ Rabin, *supra* note 1, at 582-83.

the analysis recognizes these institutional variations, or at least assumes they do not exist. The theory then is only as good as these assumptions—or the empirical testing of the results.

Thus far, I have focused on the institutional issues associated with the societal goal of resource allocation efficiency. I will also briefly consider the comparative institutional elements of the distributional goal. The question is whether the enforcement of code standards through unwaivable implied warranties of habitability is the best means of achieving a redistribution from rich landlords to poor tenants. I take this goal as an important feature of Judge Wright's objectives in *Javins* and an element underlying the Ackerman proposal.

There are certain evident features to any analysis that begins at this point. To the extent that the tenants receive something without paying the full cost, they receive a redistribution in kind rather than cash and arguably may not value this in-kind element to the extent to which their rents have risen. It is therefore possible that the incidence of the cost falls to some degree on the landlords even though the tenants also suffer a detrimental redistribution. There certainly could be a negative sum outcome.

It is more interesting, however, to examine the implications of an outcome that is to some degree favorable to tenants as a whole. One might ask which tenants would receive the greatest benefit. The answer may lie in the particulars of the legal process as well as the political process. Professor Rabin points to the potential reduction of government subsidy for rental payments. In addition, one might consider changes in governmental or voluntary sector provision of free or subsidized legal services. To the extent that legal services are less available or available only at higher costs to the low income tenant, the redistributive impact of the *Javins* remedy on the poorer tenant may be considerably less attractive. As a general matter, the legal process has the potential for significant nonegalitarian, income-regressive elements. The sophistication necessary to employ the system can be seen as strongly related to the number and the size of transactions. The costs of pursuing awards (lawyers, investigators, court reporters, etc.) do not relate proportionally to the size of the stakes.

There is a conventional economist's response to those who would argue that redistribution through a judicially created contract remedy like *Javins* is superior. If redistribution is desirable, it should be carried forward by a broad based public sector response that taxes the rich and gives to the poor. In its simplest form, this program is envisioned as cash transfers—a negative income tax, perhaps.

But this program is an idealized response and it is always treacherous to compare an imperfect judicial outcome with an ideal political one. It is necessary to recognize the imperfections in the political mech-

anism as well. However one imagines social desirability—utilitarian, wealth maximization, egalitarian, contractarian—the political process is hardly a perfect mode of achieving it. Often the same economists who criticize hodge-podge, in-kind judicial redistribution, such as that attempted in *Javins*, in favor of the cleaner redistribution of a straightforward cash transfer are quick to note that the political process has severe problems as a mode of manifesting public will. The economic theory of regulation associated with George Stigler is one of several economic treatments that view the political process as something less than an ideal reflection of social desirability.¹⁵ It is essential to compare the judiciary with the political process as a mode of determining and manifesting socially desirable income redistribution or other social policy. In fact, I would suggest that it is an intrinsic part of any analysis of the law associated with the Constitution¹⁶ and even with nonconstitutional statutory interpretation.¹⁷ The relative abilities and attributes of the judiciary and the political process are essential and largely ignored features of a great deal of the law and can claim a central role in any legal analysis, whether descriptive or prescriptive. Perhaps careful analysis may often prefer the imperfect political process to the imperfect judiciary. But that largely remains to be seen.

II

THE POLITICS OF RENT CONTROL

I will now proceed from Professor Rabin's evaluation of features of the landlord-tenant revolution to a section in which he offers an explanation for the political outcome of rent control.¹⁸ Professor Rabin searches for an explanation for the political popularity of a program that most economists argue will harm tenants more than it helps them. Landlords are not supporters of rent control, so where does the political support come from? Why would tenants vote for a program that would harm them? One answer may be that tenants misconceive the effect of rent control, believing that when rents are forced down, landlords will bear the costs and that the supply of housing will not change. Professor Rabin, however, seeks a more "economic" explanation—one founded in informed self-interest rather than in ignorance. He suggests that those tenants who vote are benefited and it is other tenants not well represented in the political process who are disadvantaged. He identifies tenant gains with the short run or with those tenants who will not change

¹⁵ This theory will be considered at greater length subsequently. See *infra* text accompanying note 19.

¹⁶ Komesar, *supra* note 3.

¹⁷ G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Komesar, *supra* note 2, at 1375-81.

¹⁸ Rabin, *supra* note 1, at 558-78.

their living arrangements in the long run. Those tenants harmed in the long run are either young or not residents of the voting community. These are people who are not well represented in a local democratic political process.

Whether Professor Rabin's characterization aptly captures all or most of the reality of rent control approval, it certainly offers a provocative and useful picture. More importantly, it is a representation generated from a given conception or model of the political process. This conception is not the only plausible one and not the one which underlies the dominant economic model of regulation. Thus, we can see a range of institutional assumptions at play and a wide divergence in possible outcomes.

As Professor Rabin casts rent control politics, there are three basic interest groups—(1) landlords, (2) present tenants, and (3) prospective tenants. If each voted their interests, the landlords and prospective tenants would oppose rent control, and present tenants would favor the laws. Because prospective tenants do not vote, however, their interests are not considered and the more numerous present tenants prevail over the less numerous landlords.

This simple majority voting model, however, does not characterize the most prominent economic analysis of governmental regulation. Here I refer to the Stigler model. Professor Stigler has suggested that economic regulation may often serve the purposes of those regulated by providing controls on competition and redistribution to producers, often at the expense of consumers.¹⁹ Presumably, the consumers adversely affected by such regulations outnumber the producers who would profit from the regulations. Professor Stigler's analysis is based on a more complex model of the political process. The producers, whose interests are far more concentrated, are able to organize efforts to affect the political process better than the far more dispersed consumers. One may envision a political process characterized by political representatives whose self-interests lie with the more organized interests. Such a result may be consistent with a simple graft model. The better organized group can pool funds and negotiate a bribe with far greater ease than the dispersed group even though the dispersed group would in theory have a greater aggregated interest and therefore a larger potential bribe.

Although the simple graft model represents an extreme, one could envision a more moderate example of honest but ignorant representatives interested only in the public good, but in need of guidance. The lobbying and other informational activities of the concentrated interests may be far more effective than the efforts of the dispersed group because they are better organized. In turn, one might conceive a politician in-

¹⁹ Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971).

terested in reelection and aware that the populace may be less than fully informed. Such a politician may be swayed by concentrated interests who can promise campaign contributions or threaten large scale efforts to convince the public that any politician who opposes them also opposes the interest of the populace.

Professor Stigler's model of political behavior puts great emphasis on the organizational advantages of a concentrated group. In the local rent control setting, there is some tension between the Stigler model and the actual results. The most concentrated interest should be the landlord group. It is smaller and the per capita impact of the legislation should be highest for this group. The position of this group, however, does not prevail. Instead, the present tenants—a less concentrated group—prevail.

This tension between models of the political process does not indicate that either is wrong. Rather it indicates some incompleteness in all of them. As a general matter, Professor Stigler deals with regulation at the federal level and envisions two groups that can have great differences in concentration of interest—producers and consumers. The consumer group has such a low per capita interest (despite its large aggregate interest) that it may not be worthwhile for any consumer even to become aware of legislation affecting that interest. As the less concentrated consumer group becomes smaller and its per capita interest becomes larger, however, the possibility of awareness and the possibility of organization become greater. Consumers may still be less effectively organized than their opponents, but they retain their advantage in number of votes. It is the combination of these qualities that may make the less concentrated group more effective politically.

There is a spectrum of political outcomes that ranges between the power of the vote and the power of organization.²⁰ The likely outcome and any deviation from an ideal solution depends on the context. This again suggests that institutional features and variation in institutional efficacy and choice are complex and highly significant. Analysis of the law—whether descriptive or prescriptive—would profit from closer attention to these features.

CONCLUSION

I have attempted to sketch some important institutional issues that should underlie any attempt to evaluate the landlord-tenant revolution. The points I have made here need expansion. They require better tools of institutional analysis than those that are immediately at hand. It is

²⁰ See Komesar, *Housing, Zoning and the Public Interest*, in B. WEISBROD, J. HANDLER & N. KOMESAR, *PUBLIC INTEREST LAW—AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 218 (1978).

my opinion that economic analysis has the potential to aid in the building of institutional analysis for nonmarket institutions. Such attempts have already been made for the political process.

More importantly, effective legal analysis will require a careful comparison of institutional capabilities in real-world contexts. Generalizations about institutional advantage are necessary, but treacherous. It will take more than broad maxims to effectively evaluate and describe the institutional factors that underlie changes in legal doctrine. It will take some sense of the texture of the law—an exposure to the law and legal institutions. This seems the place for experienced lawyers sophisticated enough to borrow useful insights from economics (and other relevant disciplines).

Professor Rabin is a sophisticated lawyer with a bent for economic analysis. As he expands upon the themes he has presented in the ambitious article discussed here, I hope he will turn more attention to the central issues of institutional comparison.