

# Book Review

## Takings, Federalism, Norms

*Regulatory Takings: Law, Economics, and Politics.* By William A. Fischel.\*  
Cambridge: Harvard University Press, 1995. Pp. xi, 415. \$45.00.

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### I. INTRODUCTION

William Fischel's *Regulatory Takings*<sup>1</sup> launches a surprisingly energetic shove at property law's most Sisyphean rock. The general question of the "takings issue" is the following: Under our federal<sup>2</sup> and state<sup>3</sup> constitutions, by what criteria should we determine that a governmental action is a "taking" of property that requires compensation to the owner, as opposed to an ordinary regulation to which property owners must submit? To be sure, many takings cases are straightforward: When governments acquire title to private property by eminent domain, compensation is uncontested in principle, if not in amount. But the matter is far hazier for purported "regulatory takings," when governments restrict property use without attempting to acquire title.

Law review articles on the subject have never been in short supply, but lately, the takings issue has attracted the attention of other actors. Recently joining the fray are the United States Congress and a number of state legislatures, which have offered up several different proposals to "solve" this hitherto intractable riddle—proposals that could have considerable effect on regulatory regimes ranging from local zoning to national environmental law.<sup>4</sup>

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1. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995).

2. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

3. See, e.g., ALA. CONST. art. I, § 23; N.Y. CONST. art. I, § 7; WYO. CONST. art. 1, § 32.

4. See, e.g., Bert J. Harris, Jr., Private Property Rights Protection Act, 1995 Fla. Laws ch. 181; Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. 517 (Vernon); Act of Mar. 25, 1995,

Fischel acknowledges that he has no talismanic solution for the elusive *regulatory* meaning of the Fifth Amendment's command,<sup>5</sup> but he has nevertheless written a book packed with interesting ideas and marvelous examples, a book that should inform the modern legislative and jurisprudential debate. What's more, his book reads as if the research was simply a lot of fun. In collecting his material, he poked around in land-use problems in the quite far-flung places where he himself has lived at one time or another. He unleashed his students on his projects. He guided their inquiries into land and housing patterns and the relations of those subjects to local regulations and taxes. He descended on old books and archives, looking for long-forgotten tales of railways and coal mines. He chatted with key players in major modern takings litigation in order to piece together the stories behind the lawsuits and, even more interestingly, to reconstruct the stories about what happened after the lawsuits were concluded and the lawyers turned to other matters. This is no Washington-based, inside-the-Beltway legal researcher; this is a man with a nose for local stories, and with the energy to root around in great masses of them, past and present.

What must have been considerably less fun for Fischel, who is an economist by trade, was the task of engaging the voluminous legal academic literature on property takings. But he has done that, too. Indeed, several of the chapters of this book rework his earlier comments on other legal or law-and-economics literature.<sup>6</sup> To his great credit, Fischel generally treats the sometimes turgid legal prose with admirable charity and politeness, even when he disagrees. Although his book is not always perfectly clear about provenance, readers familiar with legal scholarship will recognize quite a number of familiar themes among those that Fischel discusses, praises, challenges, and sometimes reshapes with twists of his own. Among those

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§ 1(G), 1995 Va. Acts 677 (requiring agency assessment of "impact" of proposed regulations "on the use and value of private property"); H.R. 925, 104th Cong., 1st Sess. (1995) (requiring compensation to "owners of private property for the effect of certain regulatory restrictions"); S. 605, 104th Cong., 1st Sess. (1995) (establishing "uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment"); S. 239, 104th Cong., 1st Sess. (1995) (requiring "certain Federal agencies to protect the right of private property owners"); S. 145, 104th Cong., 1st Sess. (1995) (providing "protection for the Constitutional guarantee of private property rights"); S. 135, 104th Cong., 1st Sess. (1995) (establishing "uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment"); S. 22, 104th Cong., 1st Sess. (1995) ("requir[ing] federal agencies to prepare private property taking impact analyses"); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994) (reviewing state takings legislation); *Recent Legislation—Property—Constitutional Law—Takings—Utah Requires Agencies and Localities to Conduct Takings Impact Analyses*, 108 HARV. L. REV. 519 (1994) [hereinafter *Recent Legislation*] (same); Charles McCoy, *The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 4, 1995, at A1 (discussing potential impact of federal bills).

5. FISCHEL, *supra* note 1, at 325.

6. See, e.g., William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865 (1991); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269 (1988).

themes are Frank Michelman's venerable discussion of the "demoralization costs" and "settlement costs" in takings compensation;<sup>7</sup> Robert Ellickson's creative proposal of using community norms to set a standard for regulation;<sup>8</sup> John Hart Ely's conception of the judicial role as "representation-reinforcing";<sup>9</sup> my own efforts to distinguish local regulations structurally from state or federal ones;<sup>10</sup> Richard Briffault's focus on the suburb as the modern form of local government;<sup>11</sup> Vicki Been's (and my own less impressive) discussion of the impact of "voice" and "exit" on regulatory structure;<sup>12</sup> Lawrence Blume and Daniel Rubinfeld's analysis of takings compensation as a form of insurance,<sup>13</sup> along with Louis Kaplow's follow-up discussion on the moral hazard problems of compensation;<sup>14</sup> Andrea Peterson's observations on community conceptions of fairness in takings litigation;<sup>15</sup> Dan Farber's,<sup>16</sup> Glynn Lunney's,<sup>17</sup> and Mark Poirier's<sup>18</sup> various applications of public choice analysis to takings cases; and Joseph Sax's distinction between governmental regulations aimed at "arbitration" among citizens, and those aimed at "enterprise" for the government's own account.<sup>19</sup> And of course Fischel cannot avoid discussing Richard Epstein's influential *Takings*.<sup>20</sup> There are many more legal scholars whose works Fischel treats seriously in this book—not to mention the numerous works that he discusses from economics and the other social sciences—but his excursions scarcely stop at the well-worn academic paths; he includes a number of once-important but now little-

7. Frank T. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* 80 HARV. L. REV. 1165, 1214–15 (1967).

8. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729–31 (1973).

9. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

10. Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74 (1989) [hereinafter Rose, *Ancient Constitution*]; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983) [hereinafter Rose, *Planning and Dealing*].

11. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault I]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault II].

12. Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); see Rose, *Ancient Constitution*, *supra* note 10, at 96–98; Rose, *Planning and Dealing*, *supra* note 10, at 882–87, 894–901.

13. Lawrence E. Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 571–73 (1984).

14. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 536–42 (1986).

15. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles* (pts. 1 & 2), 77 CAL. L. REV. 1299 (1989), 78 CAL. L. REV. 53 (1990).

16. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 287–308 (1992).

17. Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1954–55 (1992).

18. Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993).

19. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62–64 (1964).

20. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

discussed historical issues as diverse as eminent domain for railways<sup>21</sup> and demolitions to contain fires,<sup>22</sup> to name just two.

Like many books that rework an author's prior articles, *Regulatory Takings* has a somewhat disjointed character—individual chapters may have fascinating insights, but they do not quite fit together in a seamless whole.<sup>23</sup> Perhaps to counteract these disjunctures, Fischel works hard, though not entirely successfully, to apprise the reader of his dominant arguments. To some degree, the book's shagginess is simply an artifact of Fischel's breadth of interest; it would be difficult indeed to juggle so many subjects and approaches without dropping a few connections. But there is more: At several important junctures, Fischel departs from his own arguments and pursues points of view that in fact weaken those arguments.

Because the book romps through so many subjects and viewpoints, my plan in Part II is to identify what I believe are Fischel's principal arguments and to abstract them into what I call a Fairness Thesis, a Federalism Thesis (with an Evolutionary Corollary), and a Normative Thesis. In Part III, I will try to point out some of the complications that ultimately lead Fischel to modify some of his arguments very substantially, if not to abandon them altogether. Readers should be aware, of course, that these "theses" are my own distillations of recurrent themes in Fischel's book, and they necessarily leave much of this imaginative and informative book unexplored.

## II. THREE TAKINGS THESES AND A COROLLARY

### A. *The Fairness Thesis*

Fischel's first thesis (first analytically, that is, if not sequentially) is one that goes to the very heart of the Takings Clause and takings jurisprudence. The primary point of takings jurisprudence, he maintains, is to protect individual owners from unfairness.<sup>24</sup> He denies that takings jurisprudence should concern itself with legislation that is merely inefficient or stupid. In fact, he suggests, stupid legislation is not so bad over the long run, because its

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21. FISCHEL, *supra* note 1, at 80–90.

22. *Id.* at 356–57.

23. A notable example is the wonderfully informative lead-off chapter on *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), one of the most famous cases in the regulatory takings pantheon. FISCHEL, *supra* note 1, at 13–63. Fischel's pre- and postlawsuit history contains some wholly admirable detective work and some penetrating observations, but the chapter still seems to swing quite freely from the chapters that follow.

24. *See, e.g., id.* at 4 (describing just compensation as political decision to spread concentrated burdens); *id.* at 6 (identifying fair apportionment of burdens as basis for historical eminent domain and as appropriate basis for modern regulatory takings jurisprudence); *id.* at 99 (equating advocacy of regulatory takings findings with concern for fairness in distribution of regulatory burdens); *id.* at 182 (connecting takings issue to unfair burdens that localities impose on minorities).

very stupidity is a sign that no one group has been able to dominate another completely, and voters should be able to get rid of it in time.<sup>25</sup>

Supposing that fairness is the point of takings jurisprudence, then, what is fairness? Unfortunately, fairness is generally a slippery term, and not surprisingly, it slithers a bit in Fischel's book too. Several clues come in his extremely interesting chapter on the early exercise of eminent domain for railways, where fairness most clearly emerges as something like "equal treatment," and indeed at times a very finely tuned version.<sup>26</sup>

But Fischel is not content to leave the issue with a superficial nod to equality: Why, he asks, does fairness or equality demand that compensation be paid *at all* for governmental takings? After all, in a Rawlsian experiment with fairness, in which people could devise rules of governance before they knew their own place in the new regime, people might prefer a government that pays nothing at all when it takes private property for public projects. Why? Because from an *ex ante* perspective, the chances of loss would essentially fall randomly across the population, while this noncompensation rule would also minimize transaction costs. Thus, one would think, a noncompensation rule would be both fair and cheap, leaving a bigger total pile of private and public goodies available to everyone.<sup>27</sup>

Alas, as Fischel tells us, that way of thinking presumes a perfectly rational and benevolent government, while our real-life governments are fallible and subject to special influence. These real-life governments may not impose public costs randomly at all—that is, they may not simply look to the total public well-being and may instead systematically foist costs onto some citizens while conferring benefits on others.<sup>28</sup>

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25. *Id.* at 299–301, 314–17.

26. Fischel provides a fairly conventional statement of the equal-treatment point, *id.* at 4, describing takings jurisprudence as stemming from a political decision that the burdens of public projects should be spread broadly rather than loaded on a few. Fischel treats the subject much more subtly in discussing the old "set-off" rule in eminent domain, *id.* at 64–99; this rule reduced acquisition costs in partial takings by "setting off" benefits to the rump property, *id.* at 80–84. The owner was thereby made whole for losses, but unlike the neighboring landowners, he or she did not share in the enhanced land values arising from the proximity of the public facility or road. Courts and legislatures grew increasingly disaffected with the set-off rule, and modified it in various ways. *Id.* at 84–88, 92–93.

The set-off controversy suggests that merely Pareto superior moves—where some are made better off and none made worse off—seemed inadequate under principles of fairness; instead, landowners should be made "equally better off." The argument could be extended to require that condemned owners be made even better off—i.e., that eminent domain compensation in general be adjusted upward to give each owner of a condemned parcel a pro-rata share of the total social benefit, instead of the mere value of the prior private use. For a highly mathematicized version of that argument based on moral hazard grounds rather than fairness, see Benjamin E. Hermalin, *An Economic Analysis of Takings*, 11 J.L. ECON. & ORG. 64 (1995). Fischel touches on this particular moral hazard argument as well. FISCHEL, *supra* note 1, at 161–62. But as Fischel rightly notes, actual eminent domain cases resolutely hold payment to the value of prior private uses, and do not divvy up among condemned landowners any of the social benefit from the public improvement. *Id.* at 174. This solution may be pursuing a different notion of fairness, equating at least some landowners (those of the condemned property) with nonlandowners, who share in general social benefits of a project but reap no enhanced land value.

27. FISCHEL, *supra* note 1, at 197–99.

28. *Id.* at 206–07.

This unhappy fact has economic consequences, which leads Fischel to point out another important reason for preserving fairness: Fairness helps to prevent what Frank Michelman called “demoralization costs.”<sup>29</sup> These are the discouragement, listlessness, and general unproductivity that overcome a person (and the person’s friends, family, and associates) when the person’s things are taken away—especially, Fischel emphasizes, by the systematic depredations of majorities that the person has little opportunity to influence.<sup>30</sup>

Michelman himself may have had more in mind than “majoritarianism” in his discussion of demoralization costs—a subject to be discussed later.<sup>31</sup> But putting that to one side, Fischel next asks under what circumstances a property owner is most vulnerable to the majoritarian oppression that gives rise to citizen demoralization, with all of the attendant costs to productivity? The answer emerges in his *Federalism Thesis*, which is in many ways the central argument of the entire book.

### B. *The Federalism Thesis*

When is a citizen most apt to be unfairly treated and to lose her property to a greedy majority? Fischel’s answer is, when (a) she owns *land* and particularly (b) *undeveloped* land, and most important of all, when her land is subject to (c) *local* regulation.<sup>32</sup> He reasons that under these circumstances, a citizen may find herself unprotected by the possibility of either “exit” (getting out) or “voice” (complaining).<sup>33</sup>

Land is the perfect object for confiscatory regulation, because the owner cannot pick it up and take it away—hence the potential safeguard of “exit” is blocked.<sup>34</sup> Which land is most likely to be so burdened? According to Fischel, it is undeveloped land, because the owners are likely to be distinct minorities, who find themselves pitted against unsympathetic local majorities of homeowners.<sup>35</sup> The latter all too often cast a covetous eye on some undeveloped plot, and conspire to regulate it so thoroughly as to convert it into an unofficial park or other amenity for their own enjoyment, at the expense of the uncompensated owner.<sup>36</sup>

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29. See Michelman, *supra* note 7, at 1214. The original version appears in the discussion of property in JEREMY BENTHAM, *Principles of the Civil Code*, in *THEORY OF LEGISLATION* 88, 115–16 (C.K. Ogden ed., Fred B. Rothman & Co. 1987) (1789).

30. FISCHEL, *supra* note 1, at 148–49.

31. See *infra* text accompanying notes 107–10.

32. See, e.g., FISCHEL, *supra* note 1, at 139.

33. *Id.* at 138–39; see *infra* text accompanying notes 60–61.

34. This immobility was the basis of Henry George’s proposed “Single Tax” on land years ago. See HENRY GEORGE, *PROGRESS AND POVERTY* 418 (15th ed., Robert Schalkenbach Found. 1940) (1879). George’s tax was supposed to fall on all land, and according to Fischel, the chief problem in takings cases is that some land is “taxed” by regulation, while some is not. FISCHEL, *supra* note 1, at 271–73.

35. FISCHEL, *supra* note 1, at 282.

36. *Id.* at 52–53, 278, 287–88.

But the heart of the Federalism Thesis is that this “majoritarian” scenario plays out chiefly in *local* governments, rather than state or federal ones.<sup>37</sup> It is only locally that owners of undeveloped land are likely to be politically isolated, so that majority homeowners care little about how much they squawk, or how “demoralized” they get. If they are unhappy, so what? Who needs them, anyway? They may not even live in town (which of course excludes their voice even more),<sup>38</sup> and, being unable to find sufficient local allies, their turn never comes to join a new majority coalition.

State and national governments, Fischel argues, offer landowners more viable options of exit and voice. This is because state, and especially national, governments are bigger, more diverse, and less likely to be dominated by any particular interest.<sup>39</sup> At those levels, aggrieved property owners can find plenty of fellow sufferers, and they can join new coalitions to get rid of unwanted legislation. Unlike local governments, state and federal legislative majorities are unstable, and they give everyone a shot at coalition politics.

### C. *The Evolutionary Corollary*

To bolster the Federalism Thesis, with its distinction of local from state and federal legislatures, Fischel adds an Evolutionary Corollary. Here he uses state-law history to maintain that at the state level, and presumably at the federal level too, takings and compensation issues have exhibited a cyclical, self-correcting evolution.

On Fischel’s account, the first cycles occurred in the heyday of late-nineteenth-century transportation improvements, when legislatures empowered the new railway and waterway companies to take private land by eminent domain. These entrepreneurs quickly found legal dodges to reduce compensation to landowners, sometimes to nothing at all. Landowner howls of unfairness got nowhere for a time, since the value of the new infrastructure seemed so vastly to outweigh the complaints of, say, the owner whose house was left stranded on a man-made cliff high above the newly constructed roadway.<sup>40</sup> But later in the story, the marginal benefits of still another road or dam waned by comparison to individual claims of unfairness; state legislation, constitutional change, and judicial reinterpretation then considerably improved owners’ chances for compensation.<sup>41</sup>

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37. *Id.* at 7, 284, 298–99, 322–24.

38. *Id.* at 133.

39. *Id.* at 104–07, 289–324.

40. *Id.* at 80–84.

41. *Id.* at 84–90, 93–94. Fischel’s analysis was in considerable measure anticipated by Louise A. Halper’s excellent historical work. See Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850–1915*, 54 ALB. L. REV. 301, 319–20, 328 (1990) (describing New York courts’ greater solicitude for small holders as number of rail improvements increased). It should be noted, however, that there is an important ambiguity in Fischel’s version: Insofar as the *courts* required legislatures to

This cyclical evolution is basically a story of changes in comparative marginal utilities, and Fischel suggests that we are now in a different cycle. In more recent years, he argues, regulation has aimed not at promoting development, but rather at guarding homeowner repose—protecting the security of “land at rest”<sup>42</sup> from additional development.<sup>43</sup> For a time, repose also seemed more important than new developers’ claims to equal treatment, but Fischel hints that times should be changing. Since environmental and land-use regulations are already in such wide use, their marginal benefits should be waning; the fairness claims of individual landowners, accordingly, should loom larger by comparison.<sup>44</sup> Recent takings cases do suggest a swing in the owners’ favor,<sup>45</sup> but Fischel is cagey on the matter. Though the argument is not altogether clear, he seems to propose that the current cycle could be stuck in an anti-landowner mode.<sup>46</sup>

Why might the cyclical model get stuck, or not work at all, with respect to the protection of repose? The reason is that the primary guarantors of repose are land-use regulations, and land-use regulators are predominantly *local*. The cyclical pattern, it appears, applies chiefly to state and federal legislatures, and it reflects the ebbs and flows of coalition-building, pluralistic politics in these larger-scale legislatures. Unlike state or federal legislatures, local legislatures are too small for the ups and downs of coalition building over time. Here, local homeowner majorities stick steadily to protecting their “land at rest”—to the detriment of owners of undeveloped land.<sup>47</sup> Thus the Evolutionary Corollary bolsters the Federalism Thesis and helps Fischel to nail down local land regulation as the special target of fairness problems—and hence of takings jurisprudence.

In short, the Federalism Thesis and its Evolutionary Corollary combine with the Fairness Thesis to reach a common conclusion: Takings jurisprudence should focus principally on *local* governmental land regulations, where no cycles or coalition-building politics promise an eventual upswing for currently embattled owners of undeveloped land. Although Fischel adds some important

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correct unfairness to small holders, his argument of legislative *self*-correction loses force. He seems to realize this, and argues at some points that legislative self-correction was more important than judicial intervention, at least for state and national governments. *See, e.g.*, FISCHEL, *supra* note 1, at 182 (summarizing own historical findings).

42. FISCHEL, *supra* note 1, at 253, 279.

43. *Id.* at 98–99, 281–83.

44. *Id.* at 99. He hedges on this point, though, noting that environmental benefits may be income elastic: People want more as they get wealthier. *Id.*

45. *Id.* at 52–63, 99.

46. *See, e.g., id.* at 99 (noting that demand for environmental protection is exceptional in that it continues to rise as income increases); *cf. id.* at 140 (noting that unfair burdens of environmental regulation receive attention at national level).

47. *Id.* at 292–94. Although Fischel is not entirely clear on the absence of local cycling, I infer it from his consistent reference to state and national governments when describing cycles, and his frequent statements that local governments are not subject to the same pluralistic swings. *See, e.g., id.* at 180; *id.* at 293–94 (billboard lobby); *id.* at 294 (agricultural land regulation).

exceptions,<sup>48</sup> the flipside of this argument appears to be that regulatory measures enacted by pluralistic state and federal legislatures should be more or less exempt from takings scrutiny. There, the legislatures' own patterns of logrolling and cycles would seem to suffice as a barrier to permanent unfairness toward any given interest.<sup>49</sup>

This last point bears emphasis, precisely because of its relevance to current events. Fischel's persistent refrains on the plight of landowners will sound to some readers very much like a prodevelopment stance. But in principle, the Federalism Thesis and its Evolutionary Corollary provide a remarkable defense for federal and state legislation, which, as it happens, currently includes some of the most hotly contested land regulations in the political arena—particularly wetlands protection and endangered-species habitat conservation. Although Fischel waffles quite dramatically on these subjects,<sup>50</sup> under his general theory, there should be little need for the courts to intervene in these matters under the auspices of takings jurisprudence, since at the state and federal levels, something like a “legislative due process” seems to suffice; aggrieved landowners can use the coalition-building process to attack the legislation that they find objectionable. Indeed, if Fischel had completed his book just a few months later, he could have illustrated this point with current events: After years of complaints by farmers, miners, real estate developers, and timber interests, Congress is now besieged with proposals to alter wetlands and endangered-species protections, and to curtail sharply the constraints that those measures have imposed on landowners.<sup>51</sup>

#### D. *The Normative Thesis*

It is all very well to argue that takings jurisprudence should aim primarily at preventing unfairness in local land regulation, but courts still need a standard. What standard are the courts to apply in deciding the key question—that is, when does a taking occur? Here Fischel revives Robert Ellickson's proposal of some years ago that courts use “normal behavior” or “ordinary practice.”<sup>52</sup>

As Fischel correctly observes, the “normal behavior” standard is closely linked to the much older distinction between (noncompensable) prevention of “harms” and (compensable) conferrals of “benefits” on others in the

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48. See *infra* text accompanying notes 101–03.

49. FISCHEL, *supra* note 1, at 367.

50. See, e.g., *id.* at 329–31, 334–35; see also *infra* Subsection III.B.2.

51. See sources cited *supra* note 4.

52. FISCHEL, *supra* note 1, at 351. For Ellickson's application of ordinary practice, see Ellickson, *supra* note 8, at 729–33.

community at large.<sup>53</sup> The idea behind that older idea (which goes back at least as far as Ernst Freund's 1904 book on the police power<sup>54</sup>) is that landowners are not entitled to perpetrate harms on their neighbors or on the community, and they thus need not be compensated when a legislature bans their harmful activities. On the other hand, owners should not be required to use their land in such a way as to provide benefits for others, and when a legislature insists that owners do so, the legislature must compensate them.

Unfortunately, the harms/benefits distinction only pushes the takings question back one notch: Which legislative enactments merely prevent harms, and which require the owner to provide benefits? This is where Fischel finds Ellickson's formulation to be helpful. Rather than trying to define harms and benefits for all times and places, Ellickson turns to normal (and subnormal) activities, and looks to ordinary language and ordinary practice for guidance. As Ellickson notes, ordinary practice is incorporated in a variety of legal regimes, for example in the ways that tort law penalizes subnormal behavior, while contract regimes often reward above-normal activities.<sup>55</sup>

Similarly, in the takings context, an ordinary-practice standard would permit the uncompensated regulation of subnormal landowner behavior, but would require compensation if regulation bars an owner from normal activities or requires her to undertake *supernormal* land uses on her property. In short, each owner gets to do what most other owners can do—she can't necessarily get away with less, but she can't be asked to do more. Surely this normal-use standard comports with ordinary notions of fairness—and that, after all, is what Fischel says takings jurisprudence is all about.

### E. *The Thread and Its Frays*

Those, then, are distillations of what appear to be Fischel's major theses. The one-sentence thread connecting them together is the following: In takings jurisprudence, courts should primarily supervise local regulatory unfairness, using standards of normal behavior to distinguish regulable landowner activities from those that, if regulated, require compensation.

Without for a moment denying the enormous energy and complexity of this book, the remainder of this Review will concentrate on three points at which this connecting thread wears thin. First, Fischel's targeting of local transgressions skews his analysis of "exit" and "voice," which in turn diverts him from several powerful issues that federalism presents for takings jurisprudence. Second, at several critical moments, Fischel allows a concern

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53. FISCHEL, *supra* note 1, at 353. Another well-known variant on the harms/benefit test is Joseph Sax's distinction between government actions that arbitrate disputes among neighbors, and those that demand contribution to a public "enterprise." See Sax, *supra* note 19.

54. See ERNST FREUND, *THE POLICE POWER* 546–47 (1904).

55. See Ellickson, *supra* note 8, at 730.

for land to interrupt his own institutional arguments, in such a way that he vastly expands the takings jurisprudence that he initially proposes, while at the same time he undermines the very courts that are supposed to exercise that jurisprudence. Given these conundrums in his institutional analysis, Fischel's normative standard for takings jurisprudence becomes critically important. His discussion of the norm of ordinary behavior, however, necessarily leads to a third strain in the analysis. A close look at this standard suggests that Fischel's initial concentration on fairness alone may not be well founded. Takings jurisprudence may well serve some other goals as well, particularly that of allowing the regulatory process to cope with genuine resource management issues as they evolve over time.

The following sections take up these problems in order.

### III. THE THESES RECONSIDERED

#### A. *The First Problem: Exit, Voice, and Federalism*

From his argument that local government is structurally different from state and federal governments, Fischel draws the eminently sensible conclusion that takings jurisprudence should reflect these structural differences. Some distinction among levels of government is a much-needed corrective in the discussion of takings jurisprudence; indeed, it is quite amazing that takings cases have so blithely disregarded differences among levels of government and types of governmental agencies. This tendency has been particularly noticeable in decisions of the recently activist U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit, both of which, in entertaining challenges to *federal* takings, have relied on precedents drawn from challenges to *local* governments and specialized state commissions.<sup>56</sup> All the same, there are some real difficulties with Fischel's presentation of these distinctions.

##### 1. *Localism Bashing Rides Again*

In distinguishing state or federal from local legislation, Fischel joins a mainstream tradition that can be described roughly as "localism bashing." He is certainly not the worst in this tradition; indeed, drawing on some of the important literature of economics and political science, he defends local governments (especially the much-maligned suburbs) for the range of choice that they offer citizens and the efficiency with which they deliver services to

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56. See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (ordering compensation for denial of permit by Army Corps of Engineers), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); *Loveladies Harbor*, 28 F.3d at 1175-79 (discussing and applying in federal regulatory context several U.S. Supreme Court cases concerning takings claims against local and state agencies); *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1564, 1568-70 (Fed. Cir. 1994) (same).

the citizens that choose them.<sup>57</sup> But he argues that these governments' very efficiency—their satisfaction of their own “median voters”<sup>58</sup>—is linked to a predilection for unfairness to those who fall outside that category.

Like many earlier writers in the localism-bashing tradition, Fischel takes as a fundamental text the analysis of faction in *The Federalist* No. 10, and the supposed superiority of pluralist large-scale legislatures to majoritarian small-scale ones.<sup>59</sup> His conclusion—that takings jurisprudence should apply largely to local measures but not to state or national legislation—seems to follow from this opening position.

I should warn readers that I have spent a fair portion of my own career attempting to defend local government from this *Federalist*-based hostility, particularly by calling on the categories of “exit” and “voice” that seem to me at least partial safeguards against local overreaching.<sup>60</sup> “Exit” and “voice” are terms that Albert O. Hirschman coined a generation ago to describe the ways that individuals may exercise influence on social or political organizations. “Exit” is the standard consumer response to an undesired product in a thick market. Don't like it? Don't buy it—sooner or later, the producers will get the message. Exit can be a catch-all for a variety of responses of the same type: declining to buy, quitting a club, leaving town, never moving in at all. All of these negative actions convey some information, and they may thus influence organizational behavior. The alternative mode, “voice,” involves positive acts from within: You can complain and kvetch, make suggestions, and perhaps influence decisions through these variations on speaking up directly.<sup>61</sup>

The problem with the localism-bashing tradition is that it has systematically disregarded the ways that exit and voice options constrain local government. Fischel's book ups the ante on that pattern: He turns exit and voice *against* local government, and argues that these constraints give a comparative advantage not to local regulatory measures but rather to higher-level legislation at the state and national levels. To recall his position, he argues that local land regulations affect immobile assets, and thus freeze the exit option; on the voice side, he follows the long line of localism bashers in

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57. FISCHEL, *supra* note 1, at 261–67.

58. *Id.* at 261–62.

59. *Id.* at 105–07. For some earlier versions of this argument, see Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 709–11 (1964); Michael J. Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 43 (1980); Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965). For this *Federalist*-based critique of local government generally, see Rose, *Planning and Dealing*, *supra* note 10, at 853–57.

60. See Rose, *Ancient Constitution*, *supra* note 10, at 94–102; Rose, *Planning and Dealing*, *supra* note 10, at 882–87. Contrast Briffault II, *supra* note 11, at 403–21 (noting tension between exit and voice). Hirschman, too, was aware of the tension. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 44–50 (1970).

61. HIRSCHMAN, *supra* note 60, at 3–5; see also *id.* at 15–16 (linking exit with economic action, and voice with political action).

blaming what have been called local “stable majorities” for squelching minority voices.<sup>62</sup>

As a matter of fact, Fischel probably does correctly identify the points at which exit and voice are most likely to break down locally, and even the points at which takings jurisprudence might most appropriately intervene. But this does not mean that state or federal legislatures are any more amenable to the exit/voice modes of civic influence than are local governments—quite the contrary. In this respect, Fischel’s terminology does him a disservice. To understand this, one need only follow the logic of Fischel’s argument from *The Federalist* No. 10, particularly by taking the extreme cases, and contrasting local and *federal* governments.

## 2. *The Exit of Large-Government “Exit”*

Does exit constrain larger-scale legislatures more than it does smaller-scale ones? That is, does exit give a comparative fairness advantage to larger governments over local ones? Fischel strongly suggests that this is the case,<sup>63</sup> but when it comes to what should be the paradigm example, federal legislation, he does not argue the case at all forcefully. Indeed, it would be difficult to see how he could. You may not be able to move your land out of a local jurisdiction if you disapprove of a local measure, but you can move your other business assets.<sup>64</sup> That is why exit can be a constraint on local government. And that is why the booming exit-based theories of regulatory competition started with Charles Tiebout’s famous analogy of local governments to competing firms,<sup>65</sup> and why the regulatory-competition literature generally

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62. See, e.g., *City Government in the State Courts*, *supra* note 59, at 1596 (discussing “stable majorities”).

63. See FISCHEL, *supra* note 1, at 4–5 (arguing that exit is taken seriously in state/national legislation, but not in local zoning); *id.* at 9 (maintaining that economic exit and political voice are more effective at state and national levels than at local level); *id.* at 131–32 (suggesting that local governments are less constrained by exit than national governments, and more likely to default on obligations despite exit).

64. Fischel may even overstate the case about the immobility of local land. An aggrieved landowner may still have some retaliatory options that act like exit; for an array of possibilities, see Been, *supra* note 12, at 509–11. But see Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992) (noting barriers to competition for residents among municipalities). Fischel asserts that because residents can move freely from locality to locality, they are relatively unconcerned about a reputation for unfairness that may accrue to their local government. FISCHEL, *supra* note 1, at 131–32. If true, this would undermine other parts of his argument, as is illustrated in the following schematic scenario: (1) Town A treats developers unfairly, since residents do not care about reputation. (2) Developers stay away. (3) Town A’s tax burden on existing residents rises, given lack of new or replacement development. (4) Existing residents move out, selling at depressed prices. (5) New residents of Town A, now in distress, loosen regulation to attract new development. (6) Cycle repeats itself. Conclusion: Residents’ mobility, together with their unconcern for reputation, would lead to cycles in local regulation comparable to national and state cycles. This would undermine any need for special judicial supervision of local government. These cycles would of course be capitalized in existing land values. See *infra* text accompanying note 100.

65. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

continues to focus on local and state governments rather than the national one.<sup>66</sup> No doubt that is also why Fischel's own best examples of "exit" are local and state measures, not federal ones.<sup>67</sup>

A moment's reflection reveals why exit loses relevance as governmental scope increases, and why national government in particular has been unproductive of theories of regulatory competition. To be sure, in these days of global trade, there is much talk of the mobility of capital. But aside from cases involving large commercial enterprises (such as international lenders) or persons with unusually strong convictions (such as some Vietnam War protesters), few individuals or firms are likely to leave the country in the face of disagreeable federal legislation.

The real difference between larger-scale and local regulations appears to be that local regulations are far more likely to concern *land*, given that land control is one of the chief vehicles of local governance.<sup>68</sup> But when larger governments do regulate land, this land is every bit as immobile—and as unamenable to exit—as land subject to local regulation.<sup>69</sup> Even more significant in principle is the point that, in the Madisonian "large republic," *every* asset becomes an immobilized one—immobile, that is, with respect to the relevant large-scale authority. If you don't like Oakland's regulations, you can take the Oakland Raiders out of Oakland (and bring them back when things improve);<sup>70</sup> if you don't like California's legislation, you might even take the Raiders to a different state; but where are you going to take the franchise when you don't like the legislation of the United States?<sup>71</sup> The larger the government, the more accurate is Joe Louis's old observation, "You can run, but you can't hide."

Thus the case for federal-level exit is extremely weak, which is no doubt the reason that Fischel uses state examples. But even though the case for exit

66. For a review of these theories, including the "state competition" debate in corporate law, see Been, *supra* note 12, at 506–28, and authorities cited therein. On environmental issues, see, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

67. I may have missed something, but I found only one example in which exit acted as a protection against national actions; this was national-debt repudiation by unnamed countries, causing firms to exit and discouraging further repudiation. FISCHEL, *supra* note 1, at 132. Fischel's other examples were either from states or, oddly enough, localities, including the following: (1) The possibility of exit restrained *county* Jim Crow laws, *id.* at 138, and (2) could have restrained *city* race-based preferences, *id.*; (3) immigrants shunned *states* with undesirable land-holding and brewery laws, causing laws to be changed or reconsidered, *id.* at 290–91; (4) *states* shifted away from plant-closing legislation because of fear of effect on industrial entry, *id.* at 291–92; and (5) *states* changed antirailroad "Granger" legislation when capital dried up, *id.* at 301–02.

68. See Briffault I, *supra* note 11, at 3, 39.

69. In fact, in a major exception to his general Federalism Thesis, which I will discuss below, see *infra* text accompanying notes 101–05, Fischel does seem to want to make federal "physical invasions" subject to takings jurisprudence; these presumably largely concern land. See FISCHEL, *supra* note 1, at 334–35.

70. See Tom Friend, *Davis, Ready to Do Battle, Returns to Oakland*, N.Y. TIMES, July 7, 1995, at B10.

71. You can take it to Canada, but Canadian football rules are different.

at the state level has some merit, it certainly does not have more merit than the case for exit at the local level. Hence the argument from exit effectively drops out of Fischel's Federalism Thesis, and the thesis in principle rests on voice alone, that is, the greater possibilities for voice in large-scale legislatures. But voice has problems too, and once again, the difficulties are best seen by contrasting the extremes, that is, local and national legislatures.

### 3. *Mouthing Off in the Large Republic*

Fischel's claim for a federal "voice" builds on the coalition-building character of the legislature in the Madisonian "extended republic," where multiple interests each get a chance to form a part of some winning coalition. No doubt the opportunities for coalition building can be some safeguard against unfairness nationally, and even at the state level. But is participation in coalition building the same as voice? Reasonable people may disagree, but at best the answer is considerably more ambiguous than Fischel suggests.

On an ordinary-language basis, one might rather think that "voice" means having your say, and having it heard in its own notes, so that your representatives hear *you* and not somebody else. A standard complaint about the national government, though, is that it is "out of touch"—too big, too remote, too distant to hear those voices. One might doubt, as the Anti-Federalists did long ago in damning what they saw as the evils of a "consolidated government," whether voice means much at all in the coalition-building politics of large-scale legislatures.<sup>72</sup> Their concerns might seem particularly apt in an age in which national interest groups are likely to package your particular interests with a great variety of disparate others—some of which may get a good deal more air time than yours.<sup>73</sup>

Some interesting examples come from the property-rights coalitions now pushing for anti-takings legislation and wetlands decontrol in Congress. These groups are a hodgepodge of small landowners, large timber and mining interests, claimants on various parts of the public land, and subsidized Western water users, among others.<sup>74</sup> The small landowners are very sympathetic witnesses, and they get lots of time in the hearing rooms (where, of course, no one is actually listening); but the proposed legislation gets written for (and

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72. See Rose, *Ancient Constitution*, *supra* note 10, at 89–91, 93.

73. See RUSSELL HARDIN, *COLLECTIVE ACTION* 35–37 (1982); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1763–64 (1975) (explaining how interest groups may be captured by leading members or groups).

74. See Timothy Egan, *Unlikely Alliances Attack Property Rights Measures*, N.Y. TIMES, May 15, 1995, at A1; Charles McCoy, *The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 4, 1995, at A1.

perhaps by) the major lobbying groups, with precious little attention to the concerns of small holders.<sup>75</sup> Voice? Whose voice counts here?

In short, it is hard to equate this coalition-building version of voice—a couple of notes in somebody else's tune—with standing up and having your say at the school board meeting, or at a meeting of the town zoning board on which Fischel sits.<sup>76</sup> The people at those meetings may not like what you have to say, and they may vote you down, but they know you, and they know what you stand for. Besides, in a small community, one should never discount the power of nagging, or of other unpleasant behavior that gives even trapped landowners some localized opportunities for retaliation.<sup>77</sup>

Does voice fail to protect individuals at the local level? Some of the time, yes, it does fail—probably especially in the case of undeveloped land, as Fischel argues, although he exaggerates the case. Do national coalition-building activities protect a greater variety of individuals against narrowly focused, systematically unequal treatment? Over time, perhaps they do, in some fashion, but this does not mean that membership in a coalition lets one be heard in any direct way. Instead, large-scale legislatures protect against unfairness because they are *minoritarian*.

Public choice analysts have discussed the minoritarian features of pluralist politics for some time,<sup>78</sup> but as Fischel rightly notes, that line of analysis is much more applicable to state and federal legislatures than to local ones.<sup>79</sup> In these legislatures, concentrated and focused interests have an advantage over large, diffuse interests—even over majorities, whose interests may be systematically ignored. That is why, despite public opinion polls showing wide

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75. See, e.g., John H. Cushman, Jr., *Industry Helped Draft Clean Water Law*, N.Y. TIMES, Mar. 22, 1995, at A16 (describing lobbyists' participation in bill drafting); Earl Lane, *House Set to Ease Wetlands Law*, NEWSDAY (NEW YORK), May 8, 1995, at A11 (describing use of anecdotes from small landowners in effort to amend Clean Water Act, even though small holders are rarely adversely affected). For an especially trenchant description of this disparity, see Marcilyn Burke, *Home Sweet Home or Mansion Great Mansion: An Examination of the Disjunction Between the Rhetoric of Reform and the Intended Results for the Reauthorization of the Endangered Species Act (1995)* (unpublished manuscript, on file with author).

76. See FISCHEL, *supra* note 1, at 367–68.

77. Fischel may not account sufficiently for the way in which outsiders can turn the tables on the homeowners. See, e.g., *With a Motel Permit Stalled, Developer Starts a Pig Farm*, N.Y. TIMES, Dec. 19, 1982, at A66 (reporting that nonresident landowner, when denied permission to build motel due to neighbors' objections, turned land into piggery). For other landowner/developer retaliations, see Been, *supra* note 12, at 509–11. The relative invulnerability of outsiders to informal community norms may explain why neighbors turn to formal regulations. Cf. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 55–64 (1991) (describing community “control of deviants” as progressing in order from gossip, to more forceful self-help, to various legal remedies).

78. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985) (noting that “discrete and insular minorities” have an advantage over large but diffuse interests in pluralist politics). For the classic statements, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 17 (1965) (applying economic theory to political outcomes); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 3 (1971) (discussing “‘exploitation’ of the great by the small”); cf. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49–50 (1991) (arguing that anti-interest group theory proceeds from unstated normative bases); *id.* at 64–65 (analogizing interest group politics to revealed preferences in markets).

79. FISCHEL, *supra* note 1, at 316–17.

approval of national gun control legislation, we have very little of it.<sup>80</sup> That is why commodities producers such as miners, ranchers, agribusiness interests, and timber cutters enjoy a network of seemingly eternal price supports, water subsidies, below-market extraction permits, and the like, all of which impose a variety of taxes on the citizens at large—direct taxes for subsidies, indirect taxes from higher prices, and in-kind taxes in the form of environmental degradation.<sup>81</sup> That is why environmental groups themselves may join with other organized interests to pass measures that do much less than they could for the environment, and that cost business and consumers much more.<sup>82</sup> In short, what we are most likely to see in these large-scale legislatures are the pile-on of special benefits for concentrated and well-organized interest groups, and the pile-off from any meaningful controls on their activities, even if (or rather especially if) their ill-effects fall on large and diffuse groups of people.<sup>83</sup>

Can judges and takings jurisprudence alleviate these pluralistic hurts-by-a-thousand-cuts in the large-scale legislature? Fischel may be right that they cannot,<sup>84</sup> though some of his own examples suggest a different conclusion.<sup>85</sup>

80. On gun control, see Dennis Cauchon, *Gun Owners Back Controls*, USA TODAY, Dec. 30, 1993, at 1A (showing large majorities supporting waiting periods, assault rifle and cheap handgun bans, and other restrictions); *Support "Virtually Unchanged,"* USA TODAY, May 27, 1994, at 10A (similar findings); *Washington Wire*, WALL ST. J., June 9, 1995, at A1 (reporting *Wall St. Journal*/NBC News poll finding that public favors assault weapon ban by 78% to 18%). See generally Peter L. Kahn, *The Politics of Unregulation*, 75 CORNELL L. REV. 280, 284–85, 291–92 (1990) (arguing that interest group model applies to preferential avoidance of regulation as well as to preferential regulations).

81. For some recent complaints, see Jill Lancelot & Ralph De Gennaro, "Green Scissors" *Snip \$33 Billion*, N.Y. TIMES, Jan. 31, 1995, at A21.

82. Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1497–1501 (1980) (discussing coalition of labor and environmental interests in passing command-and-control air pollution controls).

83. The only local giveaway that seems comparable to some of the state and federal ones may be rent control, which Fischel considers at length as a transfer from owners to tenants. FISCHEL, *supra* note 1, at 302–24. Aside from a few uncharacteristic jurisdictions such as Santa Monica, Berkeley, and other college towns, rent control is in large part a New York City phenomenon, where it is maintained with the approval of the pluralist, coalition-building New York State legislature, see *Resolution Trust Corp. v. Diamond*, 18 F.3d 111, 114 (2d Cir. 1994). Although Fischel seems to have his doubts, see FISCHEL, *supra* note 1, at 302, the widespread absence of local rent controls would seem to illustrate the potency of "exit options" in local government. Other municipalities have had the chance to witness and draw the appropriate conclusion from the hash that rent-controlled cities have made of their housing stock, and the departure of private capital from their rental residences. *Id.* at 308–09. This local learning process—the "not buying in" version of exit—seems to be considerably more effective at controlling rent control than is judicial oversight, which on Fischel's own account has been desultory. *Id.* at 320–21.

84. FISCHEL, *supra* note 1, at 317; see also Elhauge, *supra* note 78, at 67–68 (noting that interest group politics may influence judicial review as well as legislatures); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–78) (arguing that on normative public choice model, judges cannot winnow out any particular legislative act for review, since legitimacy lies in entire series of vote trades); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1589–90 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) (arguing that judicial review is less capable of policing legislative rent seeking than are principles of checks and balances).

85. Judges have addressed the legislative squandering of public resources, sometimes indirectly by enlisting private rights against legislative giveaways, as in Fischel's railroad histories, FISCHEL, *supra* note

But what does seem to hush the cacophonous rent seeking of coalition-building politics is not so much judicial review as two other factors. First are the occasional massive upwellings of supermajoritarianism—the Earth Days, the war fevers, the peace movements—unpredictable, accident-driven, and even wrongheaded though they sometimes may be.<sup>86</sup> Perhaps more important are the public-regarding “time-outs” that Hanna Pitkin raises in her insightful discussion of Madisonian politics: The clash of pluralistic interests itself may create a moment of stasis, giving space for a genuine deliberation of larger concerns.<sup>87</sup> This does not suggest voice in the sense that individual citizens speak up, but rather at best an aristocratic form of governance, in which a kind of national political elite pauses to consider the best course of action.

#### 4. *Federalism and Comparative (Dis)Advantages*

To some degree the objection is merely terminological, but when Fischel lumps together local, state, and national political participation as “voice,” he blurs the very point that he is trying to make: that local governments differ structurally from state or national ones, and that in considering judicial review of legislation, we should be looking to the different institutional strengths and weaknesses of legislatures at these different levels.

My own view is that a more accurate formulation is the following: Local legislatures are subject to the constraints of exit and voice, but these may fail, with the result that at the local level, stable minority interests may be treated unfairly. State and federal legislatures, on the other hand, are subject not so much to exit and voice as to the constraints of coalition politics, but coalition politics may have failures of its own, as Fischel himself acknowledges.<sup>88</sup> Those federal and state failings may not be so likely to take the form of focused majoritarian unfairness to individuals, at least over the long run. Instead, the failings of pluralistic politics, at worst, are those of “minoritarian” rent seeking. And even at their best, they are the failings that the Anti-Federalists identified centuries ago as “aristocratic” in a large “consolidated government”—the distance of representatives from ordinary constituents and their problems, the corresponding influence of wealth and organization on

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1, at 90–94, and sometimes directly, as in the use of the public trust doctrine, see Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. (forthcoming 1996).

86. See, e.g., Carol M. Rose, *Environmental Lessons*, 27 LOY. L.A. L. REV. 1023, 1026 (1994) (noting importance of dramatic accidents in focusing legislative attention on otherwise diffuse problems). For more strongly transformative majority movements, see 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7, 266–69 (distinguishing “higher lawmaking” from ordinary legislative mode).

87. See HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 195–96 (1967); see also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1292–95 (1986) (arguing that large and diffuse social issues have often trumped concentrated ones in congressional politics since New Deal).

88. FISCHEL, *supra* note 1, at 140, 317.

elections and legislation, the overly confident belief in uniform national solutions, the bureaucratic rigidity and resistance to local circumstances that so irk citizens about their federal government.<sup>89</sup> Those problems may not all be equally amenable to takings jurisprudence, but they should especially concern us when we consider the comparative advantages and disadvantages of decisionmaking at different levels of government.

## B. *The Second Problem: Institutional Competence and the Land Fixation*

### 1. *Courts or Legislatures as Fairness Watchdogs?*

Much of Fischel's argument on takings jurisprudence concerns comparative institutional advantage. Unlike some legal writers, who would use judicial remedies widely for legislative excesses of all kinds,<sup>90</sup> Fischel argues that judges are not especially well equipped to intervene in most legislation. His view is not, of course, that legislatures are always well behaved, but rather that legislative self-correction is just as effective, and probably preferable to, judicial intermeddling.<sup>91</sup> He would remove most state and federal legislation from takings review, since he thinks that pluralistic, coalition-building politics provides sufficient safeguards against overreaching in those legislatures; in these "extended republics," legislative logrolling gives everybody a chance to get some part of the stack of public goodies, especially over time. Moreover, he argues, even local legislation has its strengths: Its majoritarianism actually makes local legislation efficient (though not fair), and hence local regulation is unlikely to require judicial correction on efficiency grounds.<sup>92</sup>

This seems to leave a fairly narrow band for judicial action. Most takings challenges to state and federal legislation would seem to be excluded, as would efficiency challenges to local legislation. What is left subject to takings

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89. See Rose, *Ancient Constitution*, *supra* note 10, at 89–93 (describing Anti-Federalist critique of "consolidated" national government). An interesting reprise of some of these concerns is the rise of "astroturf lobbying" (simulated grassroots lobbying) in which targeted representatives have to devise stratagems to sort out genuine constituent voices and concerns. See Jane Fritsch, *The Grass Roots, Just a Free Phone Call Away*, N.Y. TIMES, June 23, 1995, at A1 (describing computerized and telephonic letter-writing campaigns, in which mass letters can be "written" by persons ignorant of and indifferent to issues). For some pitfalls of optimistically uniform congressional laws in the environmental area, see, e.g., James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323 (1974) (criticizing uniform national air quality standards). For citizen complaints about federal bureaucratic rigidity, see, e.g., Clyde H. Farnsworth, *Split by Immigration Law, Couple Seeks a Solution*, N.Y. TIMES, June 30, 1995, at D20 (describing bureaucratic rigidities denying veteran's request for residency and citizenship in order to live with American spouse); William Robbins, *For Farmers, Wetlands Mean a Legal Quagmire*, N.Y. TIMES, Apr. 24, 1990, at A1 (describing farmers' complaints about wetlands regulation); Samuel Western, *After 17 Years, Property Rights Finally Win in Wyoming*, WALL ST. J., July 19, 1995, at A11 (describing citizen frustration over compensation for lost claim on federal public land).

90. For a critical review of this literature, see Elhauge, *supra* note 78, at 44–45.

91. FISCHEL, *supra* note 1, at 123, 140, 317.

92. *Id.* at 285, 287–88.

jurisprudence is local legislation, attacked on grounds of fairness rather than efficiency.

But one wonders from Fischel's analysis why even that narrow band is necessary, given the possibilities for oversight by state and federal legislatures over local overreaching. He argues, and quite correctly, that whatever the formal law, local governments are not mere administrative arms of the state; they have considerably more independence than that.<sup>93</sup> But this does not mean that state and federal legislation has no impact on local land use. In fact, the recent shift toward a more stringent takings jurisprudence in the Supreme Court is only one part of a much wider trend toward "regulating the regulators"; *legislation* in the states is another very important element in this trend.<sup>94</sup> Zoning itself has always depended on authorization by state law, but in recent years, new state legislation has added considerably to the planning and regulatory hoops through which local governments must jump.<sup>95</sup> Equally important are the state and federal environmental laws to which local governments must respond, their own narrow interests to the contrary notwithstanding.<sup>96</sup> Indeed, in the last two or three years, most if not all of the state legislatures have entertained bills to require local governments to consider the "takings impact" of their regulations, and several have passed these bills.<sup>97</sup> While much of this new takings legislation seems redundant and wasteful, it undoubtedly could add even more hurdles for local governments to leap if they are tempted to overregulate particular individuals' land.

The point is one that Fischel recognizes, if somewhat uneasily: If state (or federal) legislatures contain self-correcting mechanisms within themselves for unfairness, then over the long run, they can correct *local* unfairness too.<sup>98</sup>

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93. *Id.* at 270; see also Briffault I, *supra* note 11, at 1 (noting that "[s]tate legislatures . . . have frequently conferred significant political, economic and regulatory authority on many localities" and that as a result "[m]any enjoy considerable autonomy over matters of local concern").

94. See Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 589–91 (1990).

95. See, for example, the "housing element" required in CAL. GOV'T CODE §§ 65580–65589 (West 1983 & Supp. 1995) (requiring localities to plan for housing for all economic groups of the community and to meet their respective shares of regional housing needs). See also Rose, *supra* note 94, at 590–91 (noting increasing "state statutory oversight over local regulation"). For other examples of state legislation centralizing previously local land-use regulation, see generally FRANK J. POPPER, *THE POLITICS OF LAND-USE REFORM* (1981).

96. Local highway aesthetic zoning measures, which Fischel disparages as oppressive to landowners, were in fact a response to federal highway statutes, and they changed when the underlying federal law changed, as Fischel's own example shows, see FISCHEL, *supra* note 1, at 292–94. The major Supreme Court case on this subject was *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

97. For some of this legislation, see *Recent Legislation*, *supra* note 4. See also Robert H. Freilich & RoxAnne Doyle, *Taking Legislation: Misguided and Dangerous*, LAND USE L. & ZONING DIG., Oct. 1994, at 3, 6 (reporting that as of October 1994, all states had considered some form of takings legislation, and 10 had passed bills, predominantly of takings review type). Several more state "takings" laws have passed in 1995. See, e.g., Bert J. Harris, Jr., Private Property Rights Protection Act, 1995 Fla. Laws ch. 181; Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. 517 (Vernon); Act of Mar. 25, 1995, 1995 Va. Acts 677.

98. FISCHEL, *supra* note 1, at 321–22. Fischel's counterexample, of the "isolation" of mobile home park operators at the state level, *id.* at 323–24, is not persuasive as an instance of the *permanent* failure

And if state legislatures can substantially police local law, then local measures too enter the pluralistic world of logrolling, where every dog has his day, and cyclical patterns of compensation mollify landowners for temporary local overreaching.<sup>99</sup> Special concern for regulatory-takings jurisprudence then becomes quite unnecessary, even locally. Sure, for the moment you may have to shut up and take it, but just wait—your day will come, as legislators swing back to notice the marginally higher value of more development. At that time you can build a casino right there on your quarter-acre, and thumb your nose at your seething neighbors, just as you could in the good old days of the last prodevelopment cycle. Not only will your turn come, but in the meantime, the knowledge of that fact will be capitalized into your land price.<sup>100</sup> So why get so exercised about fairness *right now*?

## 2. *Land Swallows Everything*

Fischel's response to these difficulties is to head in the other direction: not to limit takings jurisprudence at the local level, but rather to expand it at the state and even federal level. In a series of sections that sit very uneasily with his Federalism Thesis, he argues that takings jurisprudence should be applied to what he calls "politically isolated" state agencies (notably land-use-related commissions such as wetlands and coastal zone agencies);<sup>101</sup> to state courts when they are as antidevelopmental as he says California's were,<sup>102</sup> and even to federal actions that are "close substitute[s]" for physical invasions of property, such as zoning to protect national parks.<sup>103</sup>

All of these claims are made on quite ad hoc grounds, and in spite of his otherwise constant refrain about the superior fairness of large-scale legislatures. Among other problems, Fischel never gives even a hint at what self-interested motives might drive state agencies, state courts, or federal legislatures in an antidevelopmental direction. In the case of specialized state land-regulation agencies, which he seems to think the most important of these expanded takings subjects, there may be a problem of parochialism.<sup>104</sup> The conventional wisdom in administrative law scholarship, however, suggests not

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of pluralistic politics. These owners may have had opponents among other real estate interests, *id.* at 323, but the nature of pluralistic politics should be such that they could find allies with other interests altogether.

99. Indeed, Fischel suggests that localities are already a part of that pluralistic world, lobbying in state legislatures; he seems to think local officials have even more sway in those legislatures than anyone else, *id.* at 273, 336, which seems odd, given the range of differences even among municipalities and municipal boards.

100. Fischel discusses the capitalization of regulation in land prices, *id.* at 193–95, but does not discuss the capitalization of cycles of regulation—i.e., of eventual deregulation.

101. *Id.* at 330–31.

102. *Id.* at 218–52, 331–32.

103. *Id.* at 334–35.

104. See Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426–28 (1990) (arguing that "[i]ndependent [a]gencies are not [i]ndependent" but rather subject to "parochial interests"); Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 341–42 (1990) (same).

an anti-landowner bias, but rather the opposite: Regulated interests take over or “capture” the regulators.<sup>105</sup> In any event, of course, special-purpose agencies are creatures of their respective state legislatures, and on Fischel’s own thesis, they should be subject ultimately to the correcting mechanisms that he attributes to those larger legislative bodies.

Readers may have noticed that all of these extended remedies concern land, just as Fischel’s chief concern with local government stems from its heavy involvement with land use. What, one might ask, is so special about land? To be sure, as Fischel repeatedly reminds us, land is special because it is immobile (and owners hence get little protection from exit), but so what? There is always “voice” as a backstop, and according to the Federalism Thesis, state and federal governments, with their pluralist versions of “voice,” are supposed to be fair *even about immobile assets like land*.<sup>106</sup>

And that is the ultimate problem: These startling extensions of takings jurisprudence suggest that, when push comes to shove, Fischel really doesn’t care much about his central Federalism Thesis at all. What he cares about is land. In his wish to protect undeveloped land from regulation, Fischel lets the air out of his Federalism Thesis, suggesting that it was just a trial balloon all along.

For Fischel, then, land seems to trump his own arguments about federalism. Why is this? Again, what is the big deal about *land*?<sup>107</sup> One clue might come from a point mentioned very briefly above: that is, Fischel’s spin on Michelman’s “demoralization costs,” where Fischel identifies demoralization with majoritarian exploitation. Michelman certainly did discuss majoritarian oppression,<sup>108</sup> but he also raised other elements of demoralization, notably the psychological firmness of an owner’s expectations about whatever property is taken; that is why Michelman thought physical invasions of property are especially significant and could be classed with the disruptions of “investment-backed expectations,” the violation of which is

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105. For just a few of the classics of this literature, see MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 3–4, 74, 86–88 (1955) (positing life cycle in which regulatory agencies become passive and wish to “enjoy good relations with the regulated groups”); PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 135–36 (1960) (describing federal grazing district administration as being taken over by regulated stockmen); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 87 (1969) (arguing that agency “minimize[s] . . . friction” by taking the part of organized interest groups); James Q. Wilson, *The Rise of the Bureaucratic State*, PUB. INTEREST, Fall 1975, at 77, 87–96 (discussing bureaucratic “clientelism”).

106. See FISCHEL, *supra* note 1, at 289.

107. Justice Scalia also singles out land for protection not accorded other property. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899–900 (1992) (arguing that, given history of regulation of commercial matters, owners should be aware that regulation may deprive personal property—but not land—of all economic value).

108. See Michelman, *supra* note 7, at 1216–17.

especially shocking and painful.<sup>109</sup> The currency that this phrase has achieved in takings cases suggests that others think it important too.<sup>110</sup>

This psychological nuance may explain the specialness of land: There is just something about land that makes you think that when you own it, it is really, really yours. Land stands still and lets you poke a fence into it, and hence it is easier to stake out ownership claims in land than in messier, more communal substances like water. On land, we can exclude everybody else and stroll around like lords of the manor.<sup>111</sup> When we let others onto our land, it is by our graciousness or will alone. In earlier traditions of European aristocracy and American civic republicanism, land was associated with independence, authority, even manliness—as opposed to the effeminacy, fluidity, and mutual dependence of commerce, whose products scarcely even counted as property.<sup>112</sup> To a remarkable degree, land still serves as a metaphor for property generally,<sup>113</sup> and it is interesting to speculate whether even Fischel, the hard-headed modern economist, has fallen under the spell of land's ancient and highly charged symbolism. If so, he is so bewitched that his Federalism Thesis has drifted out of focus.

The drift from the Federalism Thesis means that, at least with respect to land-related subjects, Fischel would accord the courts a much wider scope for judicial intervention than that thesis suggests. But when he discusses what courts have actually done, they emerge as only very ambiguous guardians of fairness.

### 3. *The Judges Dethroned*

Judges are among the actors in the evolutionary cycles that Fischel describes—first, in the downs and ups of their attentiveness to individual claims for eminent domain compensation, and later, in their somewhat similar downs and ups in considering individual takings claims against antidevelopment regulation.<sup>114</sup> If judicial remedies do occur in cycles, somewhat like the cycles of pluralistic legislatures, then judges hardly seem to be consistent or reliable agents for correcting local or any other overreaching; their reaction too would appear to depend on the current state of the cycle—not a particularly surprising development if, as some commentators

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109. See *id.* at 1228, 1231, 1233.

110. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (discussing disruption of “investment-backed expectations” as factor in takings); see also *Lucas*, 112 S. Ct. at 2895 n.8 (citing this phrase in *Penn Central*).

111. See, e.g., E.M. FORSTER, *My Wood*, in *ABINGER HARVEST* 22 (1936) (arguing that property makes owner self-important).

112. See CAROL M. ROSE, *PROPERTY AND PERSUASION* 58–59, 61–62 (1994), and sources cited therein.

113. For example, virtually all law school “property” textbooks concentrate almost exclusively on real estate.

114. FISCHEL, *supra* note 1, ch. 2.

suggest, courts are subject to roughly the same interest group pressures that legislatures are.<sup>115</sup> Indeed, if anything, on Fischel's account, judges in the older cases were weaker in picking up fairness claims than were legislatures or constitutional conventions.

Among modern courts, Fischel discusses in detail only California's supreme court, but his scathing comments on that court are most unsettling. On his account, California's highest judges egged on the locals from one taking to the next, notably in the form of growth controls.<sup>116</sup> In the process, he argues, these judges orchestrated a collective monopoly in housing along with an attendant spurt in housing prices.<sup>117</sup> How could this happen? What could motivate these supposedly impartial judges, who operate in a context in which majoritarianism is simply not at issue? The answer, unfortunately, is a mystery, except that they might have been imposing Northern Californian values on poor, long-suffering Southern California.<sup>118</sup>

In short, judicial supervision seems a weak reed for landowners' fairness claims—at best protecting those claims cyclically, and at worst denying them altogether. It is for the latter reason that Fischel himself says that the judiciary itself may be guilty of takings violations.<sup>119</sup> But if the judges themselves may countenance takings, then the institutional case for judicial takings review becomes murky indeed, and it is not salvaged by Fischel's airy suggestion that one court in particular (the U.S. Supreme Court, of course) can manage the whole mess.<sup>120</sup>

Notice what has happened to the entire argument about the respective roles of legislatures and courts. Reasoning from the interlocking Fairness and Federalism Theses, Fischel begins by asserting that judicial takings remedies are best suited to deal with local majoritarian unfairness; state and federal legislatures can manage themselves. But then, the seductions of the land issue lead him to abandon this Federalist distinction, and instead to expand the judges' takings supervision to cover state and federal land legislation. Finally, however, his own examples show that judges themselves may succumb to their own versions of unfairness, to the point that courts themselves may "take" property.

This ultimate suspicion, even of the judges, means that only one thing can salvage some version of takings review: a firm substantive standard, so that we can tell when judges are doing the right thing, and when, at the other extreme, they are flirting with takings of their own making.

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115. See Elhauge, *supra* note 78, at 67–68.

116. FISCHEL, *supra* note 1, at 226–29, 245–48, 251–52.

117. *Id.* at 221–24, 232–46.

118. *Id.* at 229–31.

119. *Id.* at 331–32.

120. *Id.* at 332.

### C. *Norms, Fairness, Resource Management*

On first reading, Fischel's discussion of substantive takings tests seems almost a tack-on to the permutations of his closely interwoven Fairness and Federalism Theses. But with his blunting of his own local-majoritarian rationale for takings review, and with the doubts he raises about the courts themselves, the substantive takings test emerges as a kind of last stand for his theory of takings. The substantive test will tell us when local regulations are takings, when land-related state and federal measures are takings, and even when judicial takings reviews themselves might be takings.

This is a heavy burden to put on a substantive takings proposal—and particularly onerous in view of the enormous number of prior efforts to find such substantive solutions. The standard that Fischel picks, from the generous menu available in the existing literature, is Robert Ellickson's: the standard of normal behavior.<sup>121</sup> Landowner activity that falls below community norms may be regulated without compensation; but regulators cannot demand, without compensation, that a landowner meet some supernormal standard above that of her neighbors.

#### 1. *The Ups and Downs of Ordinary Behavior*

Ellickson's ordinary-behavior standard is not at all a bad choice for Fischel to make. One of its advantages is that it closely resembles legal criteria in other areas—for example, “standards of the profession” in torts, “merchants' customs” in contracts—and thus allows judges to use in takings cases the adjudicative techniques that they have developed in other areas of the law. Thus, this standard gives some substance to the fairness idea, according to which owners of developed and undeveloped land should be treated more or less alike; but at the same time it allows for some play in the joints, so that different communities can define different standards or norms. The latter point preserves communities' ability to do what the Tiebout thesis suggests they in fact do, and what Fischel seems to want them to do as a matter of efficiency: Communities can act as firms, each offering different packages of characteristics to potential residents, thus giving residents variety and choice as they sort themselves out among different localities.<sup>122</sup> This competition enlivens the exit option and permits it to function as a genuine market mechanism.

The prospect of differing norms, however, raises an important ambiguity about the ordinary-behavior standard: Whose norms apply, anyway? Are the

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121. *Id.* at 351–53.

122. *Id.* at 253–54, 261–64.

relevant norms supposed to be local? State? National?<sup>123</sup> The smaller the relevant community that defines “normal behavior,” the less room there is for developers to complain about takings when informed, for example, that the Snobwood Neighborhood Association’s norms preclude prefab houses. But the larger the relevant “community,” the more a purportedly norm-driven takings test clashes with Tiebout’s thesis about citizens sorting themselves into their own chosen localities.<sup>124</sup> Indeed, a national norm of ordinary use, or even a statewide or metropolitan norm, would sharply impair the ability of different communities to offer potential residents different packages of regulations and amenities; except with compensation at every turn, no community would be permitted to differentiate itself from some thin, generalized overarching norm.

Even if we identify the relevant standard as purely local community norms, the Fischel-Ellickson test leaves a good deal to the discretion of whoever is imposing the norm. This is because most areas have some internal variations, even those cookie-cutter suburbs. If every lot is one-half acre, with a two-story house and two-car garage, then yes, we have a pretty strong norm. But if there are some two-acre lots mixed in, or even some quarter-acre ones, we may have problems defining the norm. We have still more problems when the community allows mixed uses—say, when it includes a shopping street—especially since the Supreme Court’s determination that a town with a commercial zone may have to permit quite an array of uses, including nude dancing establishments.<sup>125</sup> Now, *that* could complicate local politics in old Snobwood—and perhaps even more in an already devastated Slumville.

Less spectacularly, it is difficult to decide what ordinary-use norm to invoke when a lot owner wants to open a gas station, a funeral parlor, or a mobile home park in a neighborhood that so far includes only conventional residences and a mom-and-pop grocery. Fischel defines the ordinary-behavior standard as a kind of “golden rule”;<sup>126</sup> it asks what regulations people would impose on themselves if they were outsiders to their own community.<sup>127</sup> But it is unclear how the golden rule would deal with such new but somewhat different uses. Given the trickiness of defining norms, it is hardly any wonder that Fischel ends his book with an extremely ambiguous story about the norms that might apply to a lot in his hometown.<sup>128</sup>

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123. Cf. *Miller v. California*, 413 U.S. 15, 30–34 (1973) (determining that “contemporary community standards” for purposes of defining obscenity may be based on state communities).

124. Ellickson, whose normal-behavior standard Fischel borrows, proposed administration by metropolitan nuisance boards, presumably governed by metropolitan norms. See Ellickson, *supra* note 8, at 762–64. This means a quite thin version of norms, since a metropolis blends a whole range of smaller self-sorted communities. For the takings issue specifically, however, Ellickson later somewhat reluctantly proposed a specifically municipal standard. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 422–23 (1977).

125. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 73–77 (1981).

126. FISCHEL, *supra* note 1, at 62, 359–60.

127. *Id.* at 62.

128. *Id.* at 367–68.

## 2. Norms, Cumulations, and Common Pools

The ordinary-use standard raises, without entirely solving, another question that is the most basic of all: whether takings jurisprudence really is just about fairness, or whether this branch of jurisprudence is also aimed at accommodating regulatory change. This issue arises particularly in trying to apply norms of ordinary behavior to the problem of cumulative effects.

Consider the case of the new subdivision. As one version of the “golden rule,” Fischel seems to suggest that every new development gets to do roughly what most existing development did.<sup>129</sup> But even if a proposed new subdivision consists of houses just like the existing ones, the new development may actually be costlier than the existing ones, in the sense that it congests and consumes common resources proportionally more than the existing ones did.

This is the well-known scenario in which the marginal cost of entry exceeds average cost.<sup>130</sup> Each new entrant to a fishing area, for example, reckons his cost of entry (boat, gear, labor, and time fishing) at the average of other fishers, but his arrival means that all of the fishers have just a slightly lower chance of catching a fish. Similarly, each new subdivision developer calculates that the new houses will get the average share of clean air and quiet in the vicinity, but in fact everybody in the community has just a little less clean air and quiet after the new houses go up.<sup>131</sup>

There is a changing curve to this phenomenon, of course: In the initial settlements in western New England, where Fischel lives now, the early settlers were delighted to see new neighbors move in. In those days, newcomers were good for company and mutual defense.<sup>132</sup> But nowadays, company and defense are scarcely pressing issues, and I would bet that every newly constructed subdivision gets eyed as a source of ever increasing traffic congestion and air pollution. Norms of equality do not help solve increasing pressures on environmental resources; in fact, they can hurt very drastically

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129. *Id.* at 359–61.

130. *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

131. For an analysis of the marginal-cost/average-cost disjunction in city growth, see George S. Tolley, *The Welfare Economics of City Bigness*, 1 J. URB. ECON. 324 (1974). Fischel touches on cumulative effects in considering farmland-protection acts, but he discounts the widely held view that agricultural land is shrinking due to urbanization. FISCHEL, *supra* note 1, at 295–96. He does not discuss cumulative effects of uncontrolled environmental degradation, however, or of more localized congestion. It should be noted, however, that crowding in itself is not always unattractive; in large urban areas, people appear to prefer more dense settlement to more dispersed sprawl. *See* ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS* 854–55 (1981). This may be because dispersal induces more auto use, with the attendant traffic, noise, and air pollution—that is, less dense land settlement induces more congestion in other resources.

132. *See, e.g.*, JOHN FREDERICK MARTIN, *PROFITS IN THE WILDERNESS* 42 (1991) (chronicling 1678 petition by Massachusetts frontier town for relaxation of landownership rules to encourage new settlers after devastating Indian Wars).

when what is needed is not equal access but rationing, however the rations may be allocated.<sup>133</sup>

Norms about resource use may respond to altered conditions of scarcity, of course,<sup>134</sup> and if they do, norms become an especially attractive basis for property law. This is so because a regime based on gradually adjusting norms can give landowners some stability of expectation, but can also signal to landowners that they must accept some change.

But in fact, informal community norms do not always adjust when resources shrink. That is why, among other things, indigenous peoples have sometimes driven their food sources into extinction,<sup>135</sup> and nineteenth-century whalers, using their own informal norms, nevertheless ultimately overfished the very source of their livelihood.<sup>136</sup> We should not think that we are so much smarter today; our fishing industries are doing much the same thing, pushing the nation's wild fish stocks toward a seemingly inexorable crash.<sup>137</sup> Expanding land uses may not raise such disastrous prospects, but continuing development can exert intense pressure on the air, water, wildlife, and visual-amenity resources attached to land—even and perhaps especially when land development proceeds according to constant, equal norms. That is why, somehow or other, takings jurisprudence has to take into account communities' need to deal with shrinking common resources.

Readers will perhaps have noticed that this is not a cyclical story, but rather a linear one. In that linear story, increases in wealth and demand, as well as improvements in technology and transportation, put increasing pressures on common resources—pressures to which informal norms may respond, but may not. And when informal norms do not respond, communities quite sensibly try formal regulations, clumsy and awkward though they may be.<sup>138</sup>

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133. See Gordon, *supra* note 130, at 132–35 (concluding that open-access fisheries encourage overfishing).

134. See, e.g., Robert A. Brightman, *Conservation and Resource Depletion: The Case of the Boreal Forest Algonquians*, in *THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES* 121, 138–39 (Bonnie J. McCay & James M. Acheson eds., 1987) (describing changes in Cree hunting norms as animals became more scarce).

135. See, e.g., JAMES R. MCGOODWIN, *CRISIS IN THE WORLD'S FISHERIES: PEOPLE, PROBLEMS, AND POLICIES* 58–60 (1990).

136. ELLICKSON, *supra* note 77, at 205–06 (suggesting that nineteenth-century whalers' norms may have exacerbated problem of overfishing).

137. See, e.g., Timothy Egan, *Fishing Fleet Trawling Seas That Yield Many Fewer Fish*, *N.Y. TIMES*, Mar. 7, 1994, at A1, B7 (describing heavy impact of new technology on fishing grounds, and inability of fishing industry to restrain take).

138. For a theoretical discussion of this process, see GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 10–28 (1989).

### 3. *A Role for Legislatures*

One of Fischel's most interesting observations concerns nuisance law, whose development in the later nineteenth century reflected an important case-by-case effort to deal with the externalities and conflicts arising from increasing congestion of resources, especially in urban areas. This period of judicial activism, however, was followed by a period of contraction during which judicially defined nuisance law more or less atrophied as legislatures took over the task through formal regulations.<sup>139</sup>

This pattern of legislative takeover one way or another needs to be reflected in our takings law, perhaps considerably more than our current jurisprudence suggests, because legislators have a legitimate role in helping their communities deal with the conflicts that emerge over increasingly scarce common resources.<sup>140</sup> Our courts, in defining ordinary practice, should be taking account of normal *legislative* solutions too, and should not simply be looking backwards to older and more primitive efforts to manage those scarce common resources.<sup>141</sup>

The upshot of all of this is that takings jurisprudence is not and cannot be aimed simply at fairness to individuals. It *is* aimed at fairness to individuals, but it must also be aimed at allowing communities to alter their regulatory practices to confront changing patterns of resource use, and most especially to confront the depletion of finite common resources.

What that means is that takings cases necessarily involve a set of compromises between at least two goals: first, avoiding serious disruptions of settled owner expectations; but second, giving latitude to regulators to adjust their management of increasingly congested resources, with the corollary that private owners should adjust their own expectations, over time, to those common-resource management needs. If takings jurisprudence cannot juggle these desiderata, it may end up being "fair" to particular private owners at the price of impoverishment of the common resources of the whole community. And the depletion of common resources, be it noted, is not something that makes us richer. It may make us poorer. That is because a society's wealth comprises not just the sum of private goods, but the joint sum of private *and*

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139. FISCHEL, *supra* note 1, at 179. Ellickson suggests that nuisance law atrophied after the 1930s because of its preferred remedy of injunctive relief; in order to avoid the inefficiencies of enjoining major industries, courts reacted by defining nuisance more narrowly. See Ellickson, *supra* note 8, at 720–22. But see Halper, *supra* note 41, at 349–54 (chronicling development by New York courts of damage remedy for nuisance at turn of century).

140. See Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 344–52 (1995) (noting Supreme Court's inadequate attention to legislative definitions of public nuisance in traditional nuisance law).

141. See Rose, *supra* note 94, at 590–91 (noting that takings jurisprudence looks to ordinary regulatory practice).

*common* goods. That too is something that takings jurisprudence must take into account.

#### IV. CONCLUSION

At the end of the day, most readers of Fischel's book may find themselves more persuaded by the main lines of Fischel's Theses than he is himself, rejecting not his arguments, but his own departures from them. They may easily agree that takings jurisprudence probably has its most pertinent role in dealing with local governmental actions, even though these governments deserve more room than Fischel wants to give them; this is because in fact local governments are restrained by local exit and voice, Fischel's protestations to the contrary notwithstanding.

Similarly, they may agree with Fischel's general argument that state and federal legislation should receive considerably more relaxed takings scrutiny than local regulation. Fischel's exception for land is much less persuasive, since it is so weakly motivated in his own analysis. Instead, if there is a case for a jurisprudence of regulatory takings at the state and federal levels, it arises not from anything special about land, but rather from something special about fairness problems in state and federal legislatures—a distinction that is deplorably missing from current takings jurisprudence.<sup>142</sup> At the state and national levels, the major fairness problems are likely to arise, first, from the influence of special interests or "minoritarianism," and second, from the pinch of one-size-fits-all uniform national legislation—the fruits of what the Anti-Federalists called "consolidated government."<sup>143</sup>

Fischel may be right that judicial review under the Takings Clause is a relatively poor antidote to special-interest minoritarian government, and that the legislatures themselves are better institutions for correcting such problems, although this reviewer thinks that some of his own examples suggest otherwise.<sup>144</sup> But takings jurisprudence could certainly have somewhat more play with respect to the other fairness problem of large government, that is, the rigidly uniform approaches that ignore local variation. If so, this suggests ways that state and federal takings jurisprudence might diverge from local takings cases; courts here might better adopt the classic role of equity, focusing on state and federal legislation "as applied"—the instances where general legislation or regulations are patently inappropriate for special circumstances.

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142. See *supra* note 56 and accompanying text.

143. See Rose, *Ancient Constitution*, *supra* note 10, at 89–92.

144. His description of the late-nineteenth-century eminent domain cases could be read as an example of courts using *private* takings law to preserve the *public* resources of air and quiet from legislatively authorized depredations; similarly, though Fischel does not discuss the matter, courts at that time also used a public trust doctrine to protect public resources directly from legislative giveaways. See FISCHEL, *supra* note 1, at 90–94.

Thus, if local takings cases especially engage the instances in which certain owners are “singled out” for undue burdens, state and federal takings cases might better focus on the owners whose special plights are ignored in the breezy generality of national legislation.

The underlying task of takings jurisprudence, however, is not simply to restore fairness *tout simple*, but rather to do so with an eye to the transitions that must occur when governments deal with increasingly scarce or congested resources. We expect governments to confront common-pool problems, and we are disappointed with them if they do not; but at the same time, we expect that governmental solutions generally will move deliberately enough that people are reasonably forewarned and can adjust their behavior without undue disruption.

That is why Fischel’s use of ordinary practice is a good beginning—but not an endpoint—as a substantive benchmark for takings jurisprudence. Ordinary practice must include ordinary *legislative* practice as well, because informal norms and case-by-case judicial management simply cannot keep up with complex common-pool problems. Thus, in deciding whether any particular legislative action is a taking, courts should be looking to the reasonable and foreseeable range of responses that organized public bodies—including other legislatures—make to issues of common-pool management.

Those responses are very likely to modify existing property regimes. The evolving nuisance law of the last century was just such a redefinition and refinement of property rights in the face of increasingly congested land uses; so too was the evolving law of zoning, for all its difficulties. And so now are devices like “transferable development rights” and (in the air pollution context) “tradeable emission rights.” Although there are certainly problems with devices of this sort,<sup>145</sup> they constitute new refinements of property rights, moving from a regime of no control at all, through purely centralized control, and finally to a regime of “regulatory property” that permits a greater role for individual decisionmaking and choice.<sup>146</sup>

When existing property definitions leave substantial common-pool problems, there is no yellow brick road to lead us to a land where rights are perfectly defined to solve those problems. Instead, as Gary Libecap puts it, we have to “contract for property rights,” or more specifically, for property *regimes*.<sup>147</sup> A part of the bargaining process entails negotiating with the people who have a stake in the current definitions of property; unless they are mollified, we are not likely to get very far in working out satisfactory solutions

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145. See, e.g., FRANKLIN J. JAMES & DENNIS E. GALE, *ZONING FOR SALE* (1977) (criticizing use of transferable development rights); Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA’s Emissions Trading Program*, 6 *YALE J. ON REG.* 109 (1989) (criticizing then-current version of emissions trading).

146. It is noteworthy that Richard Stewart’s cure for “Madison’s Nightmare” of interest group-driven command-and-control regulation itself embraces regulatory property regimes. See Stewart, *supra* note 104, at 352–56.

147. LIBECAP, *supra* note 138, at 4–5.

to externality and common-pool problems, because the stakeholders will obstruct any redefinition.<sup>148</sup>

Takings jurisprudence is a part of that process of mollification. Although the current “property rights movement” is an excessive and possibly counterproductive backlash, it is still a useful reminder that changes in property regimes must elicit wide acceptance. Environmental land-use controls in particular faced a disgruntled crowd of stakeholders in earlier versions of property rights, and it is no surprise that we are hearing from them again now.

It would be useful to know more than we do now about these stakeholders and their views, and that kind of research may look to Fischel’s book for inspiration. The strongest feature of this book is the author’s willingness to explore the physical and social facts on which legal doctrine and jurisprudential theory must be based. I have left untouched much in this densely packed book, and I have focused particularly on what seem to me to be its major difficulties, but some of these are clearly only the defects of the book’s virtues. Fischel’s sheer exuberance in ferreting out data, and his diligence in examining vast numbers of theories, put most land-use scholars to shame, even if these achievements mean that he cannot avoid ambiguities and conflicts in interpretation. Readers with the slightest interest in takings issues should read Fischel’s work for themselves. If nothing else, they will get an education in the enormous range of theory that bears on this important subject, and in the even more enormous range of data that it could yield.

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148. *Id.* at 19–26 (describing impediments to changes in property regimes). Incidentally, mollifying stakeholders is one reason for “grandfathering” old uses, a practice that Fischel finds quite dubious. *See* FISCHEL, *supra* note 1, at 326–27.