

Commentary

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William Fischel occupies a premier niche in the pantheon of American scholars of land use policy. Over the course of his distinguished career, he has exhibited an exceptional knack for bringing theory to reality and reality to theory. His chapter exhibits many of his characteristic strengths—a command of a wide range of literatures, a holistic and sophisticated view of local government, and an engaging and down-to-earth writing style.

Fischel's conception of local politics has bested the competition. In essence, Fischel sees homeowners, the dominant political faction in most suburbs, as seeking to enhance the value of their houses. Local officials serve, more or less faithfully, as these homevoters' agents. Fischel's model is far more realistic, in particular, than what he calls the "goody-two-shoes theory," which envisions local officials as acting to compel developers to internalize externalities. For example, where the demand for housing is somewhat inelastic, homevoters are likely to favor restricting the supply of new housing in order to raise their value of their own houses to monopoly levels. Instead of eliminating market imperfections, local politics thus can foster zoning practices that affirmatively misallocate resources.

Although Fischel's stimulating chapter addresses other subjects as well, I restrict my comments to the topic identified in his title, that is, the evolution of zoning since the 1980s. For the most part, I agree with his description of recent trends. His core assertion, reflected in his subtitle, is the persistence of localism in land use regulation. In 1971, Bosselman and Callies famously detected a "quiet revolution" under whose banner state planning agencies increasingly were either preempting local zoning or obtaining authority to veto locally approved projects or plans. Fischel observes, as previous commentators have, that by the 1980s this quiet revolution had stalled. Most legal scholars would also endorse another of his basic conclusions, namely, that the threat of landowners' takings claims—the constitutional centerpiece of the property rights movement—in practice rarely constrains local zoning officials.

Two of Fischel's other central assertions, however, warrant closer scrutiny. He maintains that local zoning generally became more restrictive after the 1980s, and that the states and the federal government have been largely responsible for this trend. At the close of this comment, I will conclude that the recent history of land use controls in Massachusetts indeed supports these two central claims. Nonetheless, I have reservations about both Fischel's methods of supporting these assertions and the generality of his articulation of them.

Although Google Earth and local government Internet sites have greatly eased the study of zoning practices, it remains difficult to have a sense of what the 20,000 or so zoning governments in the United States are up to. A few intrepid researchers have investigated practices in a sample of either localities (Gyourko, Saiz, and Summers 2008; Pendall, Puentes, and Martin 2006) or states (Ingram et al. 2009). These investigators, however, have generally been more interested in describing contemporaneous differences in these jurisdictions' policies than in examining how these policies have changed over time. In addition, empirical measurement of actual zoning practices is exasperatingly difficult because many localities, when offered sufficiently generous concessions by developers, are happy to alter the ordinances on their books. For example, as Justice Hall's famous opinion in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), describes, the Township of Mount Laurel, New Jersey, frequently waived its nominal zoning restrictions to permit far denser planned-unit developments.

In light of the dearth of good survey sources about zoning trends, Fischel offers some general impressions. Because his knowledge of the pertinent secondary literature is unsurpassed, these warrant respect. He might have made use, however, of another source of evidence, namely, changes over time in the relative prices of housing in different states and localities. Except in markets where housing demand is perfectly elastic, the tightening of regulations on housing supply can be expected to raise house prices. The meaning of a relative price change should be interpreted with caution, however, because it may also manifest, in whole or part, a shift in either the demand for housing or the relative quality of a jurisdiction's housing stock. Table C9.1, calculated from gross data gathered by the Census Bureau, nonetheless suggests that trends in a state's relative home values can serve as a rough proxy for changes in the strictness of the development regulations within that state. The figures in the table confirm, for example, that constraints on housing supply became much tighter in California from 1960 to 1980, a fact previously well documented by Fischel (1995). From 1980 to 2000, by contrast, the figures in the table suggest that housing developers in Massachusetts witnessed a greater incremental regulatory tightening than did their counterparts in either California or Texas. The winds of zoning politics do not blow nationally, it appears, but differently from state to state.

Is there evidence to support Fischel's second broad assertion that since the 1980s, the federal and state governments have been pressuring localities to zone more restrictively? Fischel recognizes that the pertinent legal history is mixed, especially at

TABLE C9.1
Median Existing Home Value, by State, as a
Percentage of U.S. Median Home Value

	1960	1980	2000
California	127	179	177
Massachusetts	116	103	155
Texas	74	83	69

SOURCE: U.S. Census Bureau (2010).

the federal level. He mentions several pro-development federal actions in recent decades, for example, ones that selectively override local zoning constraints on religious land uses, towers for cell-phone communications, and group homes for the disabled.

The history of changes in state land use policies since the 1980s is similarly mixed. Two of the most ballyhooed state initiatives of the 1990s, the Maryland Smart Growth statutes (Knaap and Frece 2007) and the Washington Growth Management Act (McGee 2007), intrude far less on local autonomy than did, for example, the Oregon and Florida statutes that highlighted the quiet revolution of the 1970s. Both Oregon and Florida eventually required each local government to prepare a comprehensive plan and to submit it to a state agency for determination of its consistency with state-articulated goals. In both states, there have been noisy, if not always successful, counterrevolutionary efforts to vitiate these planning mandates. Opponents of Oregon's planning scheme have repeatedly attacked it with ballot initiatives, two of which have won voter approval (Berger 2009), if only to be subsequently defanged by statute or court ruling. In 2011 lawmakers in Florida, over the intense opposition of environmentalists, greatly eased the state's planning mandates on local governments (Alvarez 2011). New Jersey, home of the famous *Mount Laurel* decisions, has similarly witnessed counterrevolutionary stirrings. The New Jersey Fair Housing Act of 1985 is widely regarded as a retreat from *Mount Laurel's* affordable housing mandates (Haar 1996). And Charles Christie, on assuming the New Jersey governorship in 2010, made clear his desire to lighten further the municipal burdens generated in the aftermath of *Mount Laurel* (Carroll 2010).

What causes the tides of land use regulation to rise and fall? Fischel, like other urban economists (Glaeser & Gyourko 2002), is fully aware that development controls tend to be much stricter in the blue states that tilt Democratic than in the red states that tilt Republican. Although economists strive as hard as scholars in other disciplines to shape ideas, they nonetheless seem, with rare exception (e.g., Kahn [2011]), to harbor an antipathy to the notion that ideological beliefs importantly influence political outcomes. For example, when Fischel (2004) and Glaeser, Gyourko, and Saks (2005) sought to explain why local governments had tightened their zoning restrictions in the 1970s, they gave little weight to the flowering of environmentalist sentiment at that time.

By contrast, I attribute the noisy counterrevolutionary stirrings since the 1980s in significant part to shifts in national and subnational political zeitgeists. In the mid-twentieth century, many Americans envied the economic trajectory apparently achieved by the planned economy of the Soviet Union and also supported Robert Moses-style urban renewal. Today, confidence in the wisdom of the ambitious planning of either economies or cities has ebbed. In the 1980s promarket neoliberal ideas were ascendant around the globe and remain a central, if contested, paradigm. Friedrich Hayek's book *The Road to Serfdom* (1944), a classic attack on the assumptions underlying centralized planning, has reappeared on a few best-seller lists (Schuessler 2010). Although the environmental movement certainly has remained vibrant, the property rights movement, energized in part by Richard Epstein's *Takings* (1985), has emerged as a partially offsetting political force in many venues. A sign of the times is the outpouring of outrage that followed the Supreme Court's decision

in *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* upheld the constitutionality of what would have been a ho-hum event during the heyday of urban renewal: a city's use, for the purpose of economic development, of the power of eminent domain to acquire a modest home. That the Obama administration has been keeping "smart growth" initiatives on the back burner is another clue that federal measures of this stripe are not thought to enjoy widespread popular support.

Contemporary legal scholars and judges also seem to be less enthusiastic than their forebears were about the merits of comprehensive planning. For example, a central issue in zoning law is whether local officials should be required to make piecemeal zoning decisions "in accordance with a comprehensive plan," or are instead free to muddle through case-by-case. In 1955 Charles Haar famously advanced the view that the formal local plan should control. By the 1980s, however, Carol Rose (1983) and other highly regarded legal scholars had begun to challenge Haar's pro-planning stance. A trend against the exaltation of formal planning is also evident in the pattern of decisions of various state supreme courts. Compare, for example, *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973), a decision that explicitly endorses Haar's view, with *Campion v. Board of Aldermen*, 899 A.2d 542 (Conn. 2006), which stresses the need for flexibility in modern zoning practices.

In sum, the political zeitgeist of the 1970s generally helped nurture support for robust state planning mandates. The zeitgeist of the 2010s is everywhere more muddled and, in some states, on balance hostile to ambitious planning efforts. But any national generalization about political and ideological trends invariably is too sweeping. The data presented in table C9.1 strongly imply, for example, that since the 1980s development restrictions have tightened, at the margin, more in Massachusetts than in either Texas or California. Studies focused on Massachusetts confirm the burgeoning use during the past few decades of at least three specific legal devices that crimp housing production. First, more and more Massachusetts towns have been compelling developers to help finance the provision of affordable (i.e., reduced-price) housing. Schuetz, Meltzer, and Been (2011) have found that this policy functions as a tax on housing supply and actually inflates Massachusetts housing prices across the board. Second, towns in Massachusetts increasingly acquire tracts for use as open space, obviating their use for housing development (Hollis and Fulton 2002). Fischel, inspired by Schmidt and Paulsen (2009), insightfully attributes this phenomenon partly to the Massachusetts Anti-Snob Zoning Act, which immunizes a suburb's exclusionary zoning policies from state override when more than 10 percent of the suburb's housing stock has been deemed affordable. He notes that this formula encourages homevoters to oppose all proposed housing subdivisions, including ones exclusively marketed to the well-to-do. Third, Bray (2010) has shown that after 1980 voluntary landowner donations of conservation easements became much more common in Massachusetts. These donations, largely motivated to obtain tax write-offs, inevitably constrain housing supply, although by how much is largely unknown.

Each of these three examples of a burgeoning grassroots practice supports Fischel's general thesis that inducements from higher-level governments have fostered the tightening of constraints on development. The Massachusetts Anti-Snob Zoning Act has spurred municipalities both to acquire open space and compel developers

to provide inclusionary housing, and federal tax policies have helped foster gifts of conservation easements.

Land use laws have made housing unduly expensive in many jurisdictions, disproportionately ones in the Northeast and along the west coast. In these areas especially, beleaguered housing consumers would benefit from legal reforms at every level of government.

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