

In the preface to his fresh and insightful new book, William Fischel promises “an eclectic selection of economics, legal scholarship, history, political science, quantitative evidence, and personal experience.” That’s what the reader gets. The sure-footed way in which he weaves together strands of economics, law, history, and just plain politics brings to mind the work of Robert C. Ellickson, whose contributions Fischel acknowledges.

In addition to teaching economics at Dartmouth, Fischel is a member of the Hanover, N.H., zoning board—clearly an experience that has given him empathy for the regulators as well as the regulated. His omnivorous curiosity and engaging style enabled him to utilize a visit in California and field trips to places like Scranton, Pa., to get the behind-the-scenes story from developers, lawyers, engineers, and others in the know, as well as to review primary source materials.

Fischel’s journey to Scranton revealed that Justice Holmes’s decision in *Pennsylvania Coal* had almost no practical effect. Given that townspeople, miners, and executives alike lived over the anthracite seams in a narrow valley, it was customary both before and after the Court’s ruling for the companies to repair subsidence damage to homes. While the companies’ victory spared them frivolous lawsuits for minor subsidence, the continuing social and economic relations among the parties dictated that they act as good neighbors. Fischel attributes our conceit that the case had to have made a big practical difference to the “legal centralism” of lawyers and judges.

Yet legal rules often do determine outcomes. Fischel’s interviews demonstrated that developers and local officials well understood the intent of the California Supreme Court to thwart development at every turn. Systematically evaluating possible contributing factors, Fischel concludes that judicial policy was primarily responsible for the explosion in California home prices, which went from 35 percent above the national average in 1970 to a disparity of 147 percent by 1990.

The major themes of Fischel’s book are that we should rely on competitive forces rather than courts for the protection of property rights from uncompensated takings, that statewide regulation is more apt to protect the value of immobile property than local regulation, and that the “normal behavior” standard advanced by Ellickson is the proper touchstone against which to measure owners’ property rights and government exactions.

However, one reason why Fischel is so successful in harmonizing property rights and economic efficiency is his implicit view that there is no fixed, or pre-political, meaning of “property” to which the framers adhered, or that the Fifth Amendment served to confirm. Indeed, Fischel explicitly adopts John Hart Ely’s “process theory,” under which judges should not reverse the decisions of legislators except where the legislators themselves have acted undemocratically. Yet Ely’s support for the notion of preferred freedoms and fundamental rights is in line with the Supreme Court’s famous footnote four of *United States v. Carolene Products Co.* (1938), which established the bifurcated system under which so-called

personal rights became more worthy of judicial protection than property rights.

Likewise, Fischel's repeated illustrations of how legislative support for property rights varies with their perceived economic value vis-à-vis redistributive regulations bespeak a utilitarian orientation that does not address other roles that property rights play in our society, such as enhancement of individual liberty. Fischel suggests that viewing the takings clause as providing more substantive rights, as suggested by Richard Epstein and others, would lead either to an amount of judicial intervention unseemly in a democracy, or to a continuation of the current intellectually untenable distinction under which physical takings are compensated and regulatory takings generally are not. He might be correct on the latter point, but that only points out the lack of a solution to the regulatory takings problem, not the lack of need for one.

The one situation where Fischel does concede the need for judicial support for property rights is where owners have immobilized assets that are at the mercy of a political process in which they have no meaningful participation. His proffered examples are suburbs in which homeowners vote to obtain monopoly returns by precluding development of the remaining vacant parcels, and municipalities in which tenants vote in rent control so strict as to preclude owner withdrawal of capital. Where regulation is imposed at the state or federal level, however, Fischel is more sanguine that property owners have a chance to mobilize effectively.

The problem of potentially exorbitant exactions on development can be solved, in Fischel's view, through application of the golden rule. If imposition of development fees has been the policy all along, new developers shouldn't object. If it has not been the locality's "normal behavior," or if the developer's building plan is similar to what had been "normal," but which is now forbidden, relief is in order. Fischel tells us, though, that the public view on what is "normal" land use may change, sometimes fairly quickly. But reconciling democratic change with the need for stable and objectively legitimate notions of "property" is the crucial issue.

If the foregoing suggests that Fischel has not solved the regulatory takings problem, that does not detract from his genuine accomplishment. He explicates difficult legal issues for nonlawyers, and he uses economic analysis in varied and powerful ways to help clarify both theoretical and practical aspects of the takings problem. Particularly instructive are his analyses of how the Tiebout model of intersuburban competition can serve the public welfare, and how damages instead of injunctive remedy could curb municipal overreaching. Fischel's work will enrich the understanding of lawyers, economists, and policymakers. We need all the help we can get.

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