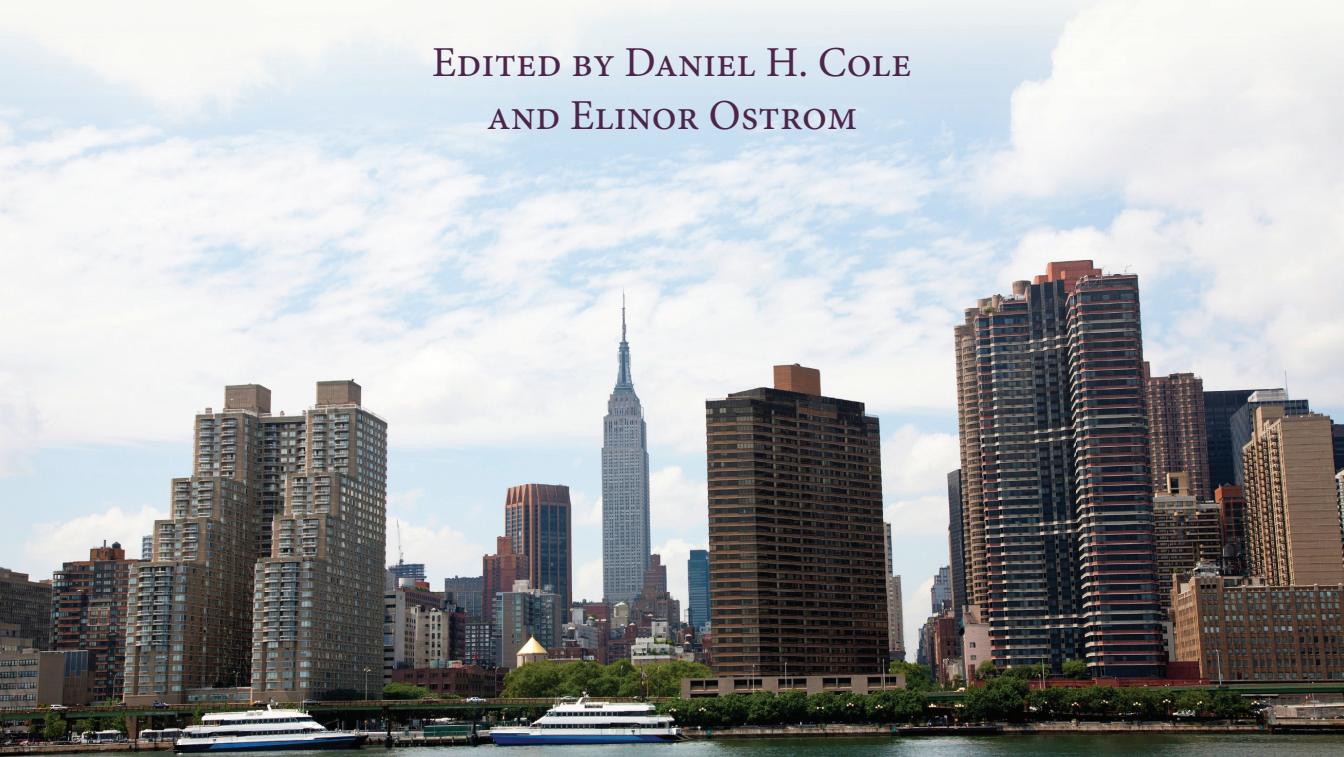
Property in Land and Other Resources

Edited by Daniel H. Cole
and Elinor Ostrom



Foreword by Douglass C. North

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The Persistence of Localism

WILLIAM A. FISCHEL

The word "evolution" in the title of this chapter pulls together three themes. One is an assessment of where the practice of zoning has gone since the publication of *The Economics of Zoning Laws* (Fischel 1985). The major pressures for zoning to change have come from above: the courts and the federal and state governments. There has not been a grassroots movement. Most of the changes have made zoning more restrictive than it otherwise would have been. Zoning has remained resolutely local despite (or perhaps because of) political and legal movements seeking to change it. The second theme is how my views about the American practice of land use regulation have changed over the past 25 years. This has less to do with changes in zoning itself and more with my subsequent scholarship, almost all of which has concerned the economic role of local government in the United States. I have come to see zoning as a critical part of the process of local government and local government as an essential part of a federal system.

The third theme is a gingerly advanced proposition about local government in general, although the focus is land use regulation. Zoning's historical development should be regarded as comparable to that of the common law and thus should be taken more seriously by scholars than it normally is. An example is the development of zoning in Los Angeles that led to the puzzling U.S. Supreme Court decision *Hadacheck v. Los Angeles,* 239 U.S. 394 (1915), which permitted the city to expel a previously established brickyard from a subsequently developed residential area without compensation. The fulcrum issue is why most zoning allows nonconforming uses to continue despite that decision.

This chapter is both postscript and prologue. It is in part an assessment of what has happened to zoning and a prospectus for a revision of *The Economics of Zoning Laws* that I hope to undertake in the next few years. It falls under the rubric of "public rights in private land." Zoning fills that category in a particular way. "Zoning" may be designated as almost all local land use regulation, including subdivision regulations, historic preservation, and public master planning for location of infrastructure. Although different political actors make these decisions, all of them respond to the same underlying local political forces.

Zoning is one land use regulation that affects almost all Americans, and if revealed political preference is any guide, it is the local government function they are

least inclined to give up. Municipalities have incorporated just to control their zoning (Fischel 2001; Miller 1981). National regulations concerning wilderness, endangered species, and water pollution certainly affect land use, but they are usually of only episodic concern to most people. Indeed, one of the puzzles to be explained here is why American land use regulation has remained so steadfastly local despite the many political movements that would seem to undermine its parochial governance.

"Rationality" in *The Economics of Zoning Laws*

The Economics of Zoning Laws (Fischel 1985) was subtitled *A Property Rights Approach to American Land Use Controls*. The "property right" is municipal zoning. Zoning extends to local voters (or to those who are decisive in local politics) the right to control other people's property within a jurisdiction. This was not a new idea. Robert Nelson (1977) had come up with it earlier. Both Nelson and I were quick to disclaim the idea that zoning is formally a property right. That is, courts of law do not recognize zoning as a property right in the same sense in which fee-simple ownership or its varieties, such as covenants and easements, are recognized as one's property. No individual has an enforceable right to a particular zoning category.

The term "property right" is applied to zoning in a sense that is less precise but broader in scope. Zoning is a collectively held entitlement that redounds to the benefit of the politically dominant faction in the community. Lest this definition be thought too adventurous, Jeremy Bentham called property "a basis for expectation" (Michelman 1967, 212), and that is what most zoning offers to community residents. They have some reasonable basis for expecting that zoning categories will persist over time, in large part because they and their neighbors have a lot to say about any changes. This basis is firm enough to encourage property owners to make long-term investments and to assure buyers of property that such uses will not be summarily altered, so that the benefits and burdens of zoning can be capitalized in the price of land that is subject to it. Henneberry and Barrows (1990) present an empirical study supporting this.

The hypothesis that underlies this chapter is that the local electorate exercises its land use authority in ways that look economically rational. Such rationality does not require exact calculation or necessarily result in admirable outcomes. The zoning process can be messy and error prone, as are collective decisions in all areas of life. But the assumption of rationality rules out outcomes that do not generally advance the economic interests (broadly conceived) of those in charge of the local political process. More specifically, it rules out the two models of zoning that economists usually adopted in the rare pre-1980 instances in which they thought about zoning at all, one of which was highly optimistic and the other of which was unthinkingly cynical.

The first theory might be called the goody-two-shoes theory: zoning authorities adopted regulations that would internalize externalities so as to correct market failures in the real estate market. The source of their authority was not investigated. Local authorities were regarded in this mix of normative and positive modeling as folks who sought to maximize social welfare. This view stems largely from the tradition

of Arthur Pigou (1920), commonly regarded as the founder of welfare economics, but his most severe critic, Ronald Coase (1960), actually offered an offhanded endorsement of zoning in the presence of high transaction costs. Coase may have subsequently changed his mind about zoning as a result of the work of Bernard Siegan (1972), whose investigation of Houston, Texas, the only large American city without zoning, was encouraged by Coase. In any case, it was not hard to persuade economists that this model did not yield useful behavioral insights. Neither the motivation of authorities nor the outcome of the process seemed to jibe with reality.

More resistant to intellectual reform was the other model of zoning adopted by economists, which sees it as a cantankerous constraint on real estate development (Mills 1979). This view persists because it captures two true features of zoning: it is a constraint on development, limiting both the gross ratio of capital to land and the type of activities permitted, and it seems contentious in the sense that it is difficult to modify the initial constraint on development even when there seem to be substantial mutual gains to be had.

The problem with the cynical view is that it takes existing zoning laws as somehow exogenous rather than as the product of rational calculation. As a result, resistance to change is seen by theorists as irrationally stubborn. It certainly is stubborn. A good deal of economic research finds that zoning-constrained development results in lower metropolitan density (of capital and people) than would seem optimal. Why would rational economic agents, the kind who control zoning changes, forgo the potential gains from trade that could be had by allowing higher capital-to-land ratios that have the potential to make almost everyone better off? In law and economics terms, why does Coase's theorem seem not to work very well?

The answer proposed in *The Economics of Zoning Laws* was transaction costs. Zoning is a collective property right, and modifying it requires navigating an obstacle course of hearings and procedures whose rules of decision are not always evident to the outside observer. The establishment of this obstacle course is not an accident. It exists because real property is durable, not very movable, and subject to many neighborhood effects. The majority of local property owners in most American jurisdictions own their own homes and not much else, and they are decisive in the zoning process. The theory was expanded in a later book, *The Homevoter Hypothesis* (Fischel 2001): home ownership places most people's major asset in a single local basket, and they cannot obtain insurance against its devaluation from adverse municipal events. The high transaction costs that impede zoning changes are an alternative to an insurance policy against local devaluations of existing homes (Breton 1973).

The success of my 1985 book can be judged by citations and by the current scarcity of the foregoing economic models (goody-two-shoes and cantankerous) against which it railed. Not as many studies assume from the outset that zoning is a welfare-maximizing institution, and at least a few ask what the economic motivation for a zoning regime might be (Bogart 1993; Hilber and Robert-Nicould 2009; Rolleston 1987; Rothwell 2009). Probably more important to the success of *The Economics of Zoning Laws* is that local zoning has proven so durable despite the many criticisms of its shortcomings and the development of political movements that threatened to displace it.

Resistance of Local Zoning to Change

The most striking quality of zoning is that it is still local. Its durability threatens to bury the idea of evolution, but the localness of zoning is itself an evolutionary puzzle. After all, many formerly local activities, such as road building, public health, care for the poor, school finance, prosecution of corruption, and water-quality regulation (even drinking-water regulation), have been largely preempted by federal and state governments. In their book about large central-city governments, Frug and Barron (2008) address the many ways in which local government authority has been circumscribed by the state government, but zoning (with the exception of Boston) is the power that in their description remains almost entirely in the local sphere.

The biggest threat to local zoning was the federalization of environmental law in the 1970s. Informed observers forecast that state and national laws would take over zoning (Mills 1979), and a federal study headed by Laurence Rockefeller (Reilly 1973) encouraged a larger and implicitly preemptive state and federal role. Planners eagerly anticipated that their professional status and incomes would be enhanced as national land use planning took over most of the functions of local zoning (Popper 1988).

It was not to be. Localism has had to make only slight adjustments to accommodate the federalization of environmental law in the 1970s. Indeed, it is arguable that new environmental law supplemented rather than supplanted local zoning, at least where the community was inclined to reduce the rate of development. Opponents to local development could invoke nonlocal hurdles, such as the requirement of an environmental impact statement and legal challenges to those statements that were provided. Prodevelopment communities did have to find their way around new hurdles, especially where wetlands were at issue, but wholesale displacement of local decision making along the lines of the Federal Communications Commission, the Interstate Commerce Commission, or the Federal Aviation Administration has not happened. Federal land use policy is confined to specific activities (soil conservation) and geographic areas that lack local government (and population), chiefly land to which the federal government still holds title. These holdings are vast in area, but small in their contribution to the economy.

The accommodation of federal environmentalism by local zoning was well established by the time *The Economics of Zoning Law* was published in 1985. The federal role was not so much beaten back as it was absorbed by local governments. Wetlands overlays, for instance, are a routine part of most zoning laws (where wetlands are present) and have seldom altered other aspects of zoning regulation. More vigorous federal intrusions were dealt with more directly. A brief attempt by the federal courts to apply antitrust law to municipal zoning (among other local enterprises) was beaten back by congressional legislation in 1982 and a change of heart by the Supreme Court in 1990 (Kinkade 1992). State preemption of local zoning had been identified as "the quiet revolution" by the authors of a book with that title (Bosselman and Callies 1971), but within a few years, even its enthusiasts had conceded that the revolution had gotten so quiet as to be inaudible (Plotkin 1987). Where state regulations have persisted, they continue to be of the double-veto variety: a state agency can veto a lower government's approval of a project, but a higher government can

in only rare circumstances make a local government accept a development that it does not want.

The double veto appears to hold even for most of the more elaborate statewide programs for "smart growth" that have appeared since 1990. The Lincoln Institute of Land Policy embarked on an elaborate and well-conceived evaluation of smart growth by comparing the results from four states (New Jersey, Florida, Oregon, and Maryland) that had at least a decade's experience with it with four that lacked conscious statewide programs (Colorado, Indiana, Texas, and Virginia) (Ingram et al. 2009). Somewhat surprisingly, the objective measures that the researchers could obtain indicated very little difference between the two groups of states. One cannot conclude from the study that statewide policies failed, but the effect of adopting a conscious statewide program of smart growth, as opposed to local initiatives, is difficult to detect.

For purposes of this chapter, I examined the Lincoln Institute volume to see whether any of the smart growth states (or those in the control group) had adopted and enforced regulations that would force localities to rezone for higher densities or for uses that they did not wish to have. Two of the states, New Jersey and Oregon, had long-standing programs (adopted before the smart growth movement became self-conscious) to override local zoning. Most of the smart growth programs identified by Ingram et al. had mild incentives (access to state funds for infrastructure) or requirements to accommodate higher-density housing as a goal for local plans, but none had any serious enforcement along the lines of New Jersey, Massachusetts (not examined in the Lincoln Institute study), or Oregon, all of which had preexisting laws. Smart growth advocates are aware of the double-veto problem, but they have not been able to deal with it effectively, at least in the states the Lincoln Institute's study examined.

The rise of "urban growth boundaries" is a specific aspect of smart growth that also has the potential to compromise local zoning. (As the Lincoln Institute's study notes, some of the states that had not adopted statewide smart growth policies nonetheless had cities that had embraced growth boundaries.) The rationale for growth boundaries is not so much affordable housing as urban form. The general idea is to draw a line somewhere near the existing suburban and rural transition zone and add a little room for expansion (Phillips and Goodstein 2000). Outside the line, development is severely restricted (limited, say, to agricultural structures), but inside the line, infill development is encouraged or even required. In principle, this should not adversely affect housing supply, because the development that is forbidden outside the line should be offset by additional development inside the line. (Standard urban economic theory would predict that more centrally located housing should be more costly per unit because of higher land costs, but it is not clear what the effect would be on average household expenditures on housing.) The higher density, it is thought, would allow more efficient use or development of alternative transit systems, promote walkable neighborhoods, and keep the cost of public infrastructure and services down.

Two problems seem to beset these goals. One is that in most metropolitan areas, numerous governments must be brought on board to agree with the goals. If only one or two adopt growth boundaries, development that is excluded from the municipality

in the rural zone simply jumps to another municipality. This appears to be what happened in Boulder, Colorado, which has an effective urban growth boundary out to its city limits, but no control over nearby municipalities, which have grown inordinately as a result (Pollock 1998).

The other problem is that even when a metropolitan federation can be formed, it is necessary for the close-in, partially developed suburbs to be inclined to rezone their available land for higher densities. The area that seems to have achieved this result is Portland, Oregon. (It is actually part of a statewide program [Knaap and Nelson 1992], but almost all of Oregon's urban population is in the Portland area.) The key to making this program work politically was to have a metropolitan council that was elected from districts whose boundaries did not correspond to local governments, so that local resistance to the infill obligations would not fall on local officials. The Seattle area has a similar program, but its more generously sized boundaries and weaker obligations on local governments to develop make it a less obvious test (Fischel 2001). The success of such programs may require a kind of regional solidarity among communities (which in Oregon could be characterized as "we aren't California") that is rare in other states.

The most notable overrides of local zoning since the 1980s have come from specific federal directives. Most notorious and controversial is the Religious Land Use and Institutionalized Persons Act (RLUIPA), which gives religious organizations a federal boost in local zoning controversies and makes it more difficult for local governments to stop projects that are sponsored by churches and similar institutions. The controversy is due more to high-level constitutional debate about congressional deployment of the Fourteenth Amendment than to actual evidence of discrimination against religious institutions (Clowney 2007). Somewhat less controversial are amendments to the Fair Housing Act that give special status to group homes for persons covered by the Americans with Disabilities Act. Thus, group homes for the aged, the developmentally disabled, and recovering narcotics addicts must be accommodated amid ordinary residential uses (Salkin and Armentano 1993). Another federal intervention concerns the location of communications towers for cell phones, which must be granted reasonable accommodation (Eagle 2005). These exceptions are episodically problematic for local governments, but taken as a whole, they seem to have had modest effects on local zoning.

Housing Price Inflation Pressured Zoning (and Vice Versa)

A second threat to local zoning has been renewed attention to its effects on the price of housing. The housing affordability issue has taken two forms. The older has to do with zoning's retardation of the construction of low-income housing in high-income communities. Economists have given an explanation and a related rationalization for this exclusionary zoning. The explanation is widely understood: low-income housing is a fiscal drain on high-income communities because the property taxes they generate do not cover the additional public service expenditures, chiefly for public schools, required by the new housing.

The economic rationalization for this brake on local redistribution of wealth is grounded in the model of Tiebout (1956). From this perspective, the exclusive

community is but one of many municipalities or school districts from which footloose households can choose (Hamilton 1975). If one cannot afford a home in Richdale and attend its fine schools, a more modest dwelling is available in lower-wealth but high-tax-and-spending Strivertown. Households with low demand for public schools would choose a low-tax, low-spending district. (The reason that the two-thirds of all households who do not have children at home do not all choose such communities is their appreciation of the local social capital that public schools create [Fischel 2009].) With enough municipal and school-district variety, people end up getting the housing and public services (schools and police departments) that they are willing to pay for, and local property taxes are no more than a fee for services. Zoning is seen as a mechanism to ensure that developers do not cheat the system and build homes that do not pay their own way.

A brief comment on the empirical relation of zoning to property taxation (Fischel 1992) and subsequent work have pushed me into the somewhat unexpected role of the leading academic proponent of the benefit view of the property tax (Nechyba 2001). It turns out that almost all economists agree that if zoning operates as a nuanced and effective fiscal gatekeeper for municipal development, property taxes, the mainstay of local finance, are not really taxes at all (Zodrow 2007). They serve simply as a price for local public services and have none of the inefficiency qualities of most taxes.

The main issue for the benefit view is the extent to which local zoning can actually fulfill its gatekeeper function. Zoning does this about as well as corporate finance fulfills its role in the business world (Fischel 2006). This is not an exalted standard. Critics of corporate governance point out the many ways in which business managers overlook the interests of stockholders. Local government's "stockholders," who are resident property owners, are actually more attentive to local governance than are the stockholders of business corporations. Homeowners' lack of diversification of their major asset makes them watchful of local decisions that affect its value. This watchfulness is offset in part by local governments' much greater insulation from bankruptcy and outside takeovers and, as a consequence, closer oversight by the state government of their activities. But this greater supervision has not done much to undo the local hold on zoning. It remains a challenge to determine the extent to which zoning turns local property taxes into fees for services. School finance reform has reduced the connection between taxation and education services, but the connection is still evident in many empirical studies (Hilber and Mayer 2009).

Two movements have attacked the apparent fiscal segregation that zoning creates. One is the "open-suburbs" campaign. Its two most famous successes have been the *South Burlington County NAACP v. Township of Mount Laurel,* 92 N.J. 158 (1983) judicial decisions in New Jersey and the legislatively adopted "antisnob zoning" laws of Massachusetts (Hughes and Van Doren 1990). New Jersey's courts viewed local exclusion as a constitutional infirmity, and they eventually adopted a highly controversial remedy. Builders who could demonstrate that their proposals would add to the stock of low-income housing in communities deemed by the court to be inadequate on this account could get a "builders' remedy." The derelict community would be ordered by the court to rezone the land in question to accommodate both the builder's request for market-rate housing and a quota of low-income housing. The

extra market-rate housing permits (and extra density of development) were in effect a subsidy to make it possible to build low-income housing that was otherwise uneconomical. A similar program was developed in Massachusetts. Towns and cities whose affordable housing was below 10 percent of the total stock are liable for a "40–B" development, named for the statute that authorized the requirement. As in New Jersey, builders can obtain an entitlement to build more housing than is locally allowed if they earmark a significant fraction of it for low-income residents. This often involves protracted negotiations and litigation, but builders do get permits under the law (Fisher 2007).

The success of these programs is best measured by their durability. Both are more than 30 years old. It is not clear that they have produced more low-income housing than would have been available otherwise. Aside from simply crowding out some market-rate housing that would have filtered down from older stock (Sinai and Waldfogel 2005), the problem with both programs is that they rely on percentages for success. A town that finally meets its *Mount Laurel* or 40-B goals will be unmolested by the court (in New Jersey) or the state (in Massachusetts) as long as its ratio of low-income units to total units does not decline. This acts as an incentive for towns to restrict further growth altogether (Schmidt and Paulsen 2009; see also *In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97*, 2010 N.J. Super. Lexis 20 [2010]). The disincentives to grow may account for the immense popularity of open-space preservation in both Massachusetts and New Jersey. From 1998 to 2003, these two states led the nation in voter initiatives to purchase farmland-development rights (Kotchen and Powers 2006). More than 40 percent of all open-space initiatives in the United States between 1997 and 2004 took place in New Jersey and Massachusetts (Banzhaf et al. 2006). It might be understandable that these two urban, eastern states value farmland preservation more than, say, Nebraska or Texas, but it is unclear why they lead other urban and eastern states by such a wide margin. The inclination for growth avoidance has been made much stronger by the effectiveness of the *Mount Laurel* and 40-B programs.

The important point, however, is that New Jersey and Massachusetts are exceptional. Courts and legislatures in other states have made bows in their direction, but no others have adopted their intrusive remedies. "Inclusionary zoning" schemes are popular in some cities and counties, especially in California (Rosa 2010), but their practical impact appears to be modest. Robert Ellickson (1981) first speculated that they are a cover for the more exclusionary regulations that apply to most of the rest of the community. It should be kept in mind that inclusionary zoning operates essentially as a tax on new development, not on current residents. (Tax revenues would have an opportunity cost for the community at large if the money could be used for projects other than housing, a possibility that may be foreclosed by judicial insistence—for example, in *Nollan v. California*, 483 U.S. 825 [1987]—that spending have an identifiable relationship to the purpose of the regulation.) The "tax" is the in-kind obligation imposed on developers to subsidize the below-market-rate housing. Such a tax is much more easily collected where all housing has been made artificially scarce by restrictive regulations. This may explain why inclusionary zoning is more prevalent in cities with highly restrictive zoning (Bento et al. 2009).

The other housing price issue has been the overall affordability of housing. This issue has been taken up by prodevelopment interests and has been around at least since the 1970s. Presidential commissions addressing the affordable housing problem have been convened since 1968 (President's Committee on Urban Housing 1969). They have appeared so frequently that the U.S. Department of Housing and Urban Development (HUD) seems to have institutionalized them. Its Regulatory Barriers Clearinghouse disseminates information on the mostly local hurdles to developing new housing, including a how-to-overcome-them feature on its Web site titled, without apparent irony, "Strategy of the Month." (One wonders why, if HUD had an effective strategy, it would need to come up with a new one every month.)

What has been new in the past two decades has been the amount and quality of the evidence that links land use regulation with high and rising housing prices. A topic that used to be a back-office activity for graduate students without great prospects has now engaged some of the best minds in the economics profession. Edward Glaeser at Harvard is one of the leading scholars to have discovered the link between zoning regulations (especially those that constrain overall density) and general housing affordability (Glaeser, Gyourko, and Saiz 2008; Glaeser, Gyourko, and Saks 2006; Glaeser and Ward 2009). Much of this research has been advanced by economists at the University of Pennsylvania, who have accumulated their own data on local zoning and have lent it to many other researchers (Gyourko, Saiz, and Summers 2008). Among their more robust and puzzling findings is that zoning constraints appear to matter most in metropolitan areas on the Atlantic and Pacific coasts. Cities in the Midwest and South do have zoning, but it appears not to constrain development nearly as much as it does in the Northeast and the West Coast. (Much of the West Coast inflation followed the California Supreme Court's many rulings that were hostile to development in the early 1970s [diMento et al. 1980; Fischel 1995], but why the court took this particular tack is not clear.) Explaining this disparity is an ongoing effort that is related to the more profound issue of why cities in these areas have generally become more attractive to employers and residents in the past three decades.

Regulatory Takings Came and Went

The rise in scholarly interest in zoning's macroeconomic effects (in the sense of affecting large areas) has been paralleled by the property rights movement, whose most notable scholarly work was *Takings* (Epstein 1985). Although Epstein has drawn few formal connections between just compensation and housing prices, I made that connection in my 1985 book, as well as in later works. The problem was that local governments (and the voters who elected them) were making decisions about the use of other people's property without having to face the economic consequences of doing so (Ellickson 1977; Fischel 1985). When local voters do not have to face any budgetary outlay (or an immediate opportunity cost) to expand the scope of regulation, they are inclined to substitute zoning excessively for other public outlays to enhance the value of their property. It is sometimes efficient to substitute regulation

for spending, as Gilbert White (1986) pointed out in the context of flood control. The economic problem arises when one input to local public welfare, zoning, is underpriced relative to other inputs, such as purchases of land for parks.

The traditional legal method of protecting property rights from the excesses of popular legislation was pursued under the due process clauses of the U.S. Constitution and most state constitutions. The remedy for government misbehavior was injunctive relief, which simply ordered the government to do the right thing. The problems with this approach were its dubious constitutional legitimacy and its clunky and intrusive remedial tools, which presumed that judges know more about local conditions than most would admit they did (Ellickson 1977).

The alternative was to invoke the takings clause, which has more constitutional legitimacy (at least property is mentioned in the Fifth and Fourteenth Amendments and parallel state bills of rights), and which in principle does not require that judges know what the right zoning should be. A locality that rezoned a prime and vacant section of land from a quarter-acre minimum lot size (a former suburban standard) to a five-acre minimum would be allowed to do so if it was willing to pay the landowner the difference in the value of his parcel (Fischel 1995). If it was not, it would have to revert to the previous (presumably constitutional) zoning category. This gave the government a choice. If its citizens valued the more restrictive standard more than the money required to compensate for the downzoning (payable through higher local taxes), it could do so. Localities do purchase development rights for open space. The damages remedy also gave the complaining landowner a better bargaining position. Even if he had won his case under the old due process standards, the response by the government might be to rezone his property to something only slightly less burdensome, giving him little more than a ticket to sue again. With a takings claim, which would include profits lost by undue delay, the municipality has a stronger reason to pay attention to his complaint.

The federal courts, for federalism reasons that have not been well articulated, have been reluctant to embrace this remedy. The Supreme Court breathed life into the takings clause in a series of decisions in 1987 (Fischel 1988). The clause's high-water mark was *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which the Court announced a sweeping per se rule. A land use regulation that destroys all "economic use" should in most situations be compensable. Although this left open the question whether a regulation that destroyed 99 percent of economic use should be allowed to stand, *Lucas* led much of the legal and planning community to predict that the Court was about to cut a wide swath through land use regulations (Callies 1994).

However, the Supreme Court imposed burdensome and perplexing procedural barriers to access to the federal courts. A concerted effort to get the Court to impose another *Lucas*-like rule for delaying development was a failure (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 [2002]). The Court further pared the regulatory takings issue in a Hawaii case by knocking out a previous rule that had given some hope (but not much relief) to development-minded plaintiffs (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 [2005]).

The Supreme Court seemed to be pushing the takings litigation down to the state courts, which have been unwilling to grasp that nettle. Indeed, several of the Supreme

Court's rulings can be thought of as attempts to keep the state courts from abandoning the damages remedy for regulatory takings altogether (Fischel 1995). State legislatures have actually appeared to be slightly more receptive to property owners' complaints than their courts. A spate of state legislation that required compensation for regulatory takings appeared in the 1990s, but it has not had an appreciable effect on zoning. Florida adopted a carefully crafted regulatory takings bill in 1995 (Powell, Rhodes, and Stengle 1995). It seems to have had sufficiently little effect that it was not even mentioned in the Lincoln Institute's study of that state's growth-management program (Ingram et al. 2009). The more robust schemes that libertarian and prodevelopment groups have proposed in state plebiscites since about 1990s have largely failed. The exception was Oregon's Measure 37, which in 2004 required compensation for devaluations caused by many land use regulations, and which was subsequently amended by an initiative in 2007 (Measure 49) that pulled out almost all of its remedial teeth (Berger 2009).

One of the reasons for the failure of regulatory takings to do much to rein in local zoning was the inability to agree on a normative baseline for compensation (Fischel 2004b). What minimum lot size would pass muster? Is the income tax system a taking? How about jury service? Deregulation of electric utility markets proposed by Sidak and Spulber (1996)? Without a consensus, the enterprising power of American attorneys would open a flood of cases that would make asbestos litigation look tame and uncomplicated.

An experience that aroused caution was teaching a law and economics course for more than ten years in which I had students closely examine regulatory takings cases of their choosing and talk with participants to find out what had happened before and after the decision. The revealing aspect of their reports was how few students sided with the plaintiff landowners. Often I was convinced by their more searching examination that just compensation was not warranted. But almost as often, students simply thought that the public benefits of the regulation in question were sufficiently important, and the private losses sufficiently minor, that compensation would not have met the fairness and efficiency criteria of Michelman (1967), which they had been taught along with Coase's (1960) theorem and Epstein's (1985) more property-protective theory. If the students had any systematic biases, I would have expected them to fall toward the development-minded landowner whose plans were frustrated. It was like one of those psychological experiments where everyone else turns the wrong way in the elevator, and you start to think that the wrong way is the right way.

My gradual retreat from the regulatory takings doctrine led me to wonder what process might take its place. One possibility is the old-fashioned due process doctrine of the Pennsylvania Supreme Court. This court routinely issues orders to communities to adopt "curative amendments" for zoning rules that it deems outside the pale of proper regulation. Although there is much complaining about abuse of curative amendments (Rowan 2007), at least one economic study found that they had more benign effects on housing-market diversity in Pennsylvania than neighboring New Jersey's self-consciously redistributive zoning reforms (Mitchell 2004).

The problem with the Pennsylvania approach is that it is almost universally disdained by planning lawyers. Urban economists likewise have some difficulties with

its guiding principle, which is that every community should have land zoned for every use. The municipal specialization that lies at the heart of the Tiebout (1956) model would seem not to be allowed in Pennsylvania. A study of diversity within communities by Pack and Pack (1977) found that the state's municipalities indeed displayed an internal heterogeneity that seems inconsistent with the predictions of the Tiebout model. Nonetheless, the long-standing ability of the Pennsylvania courts to make localities pay attention to land uses and densities that local residents would be reluctant to accept without a judicial prod is intriguing.

Contract Zoning Versus Environmental Justice

One of the explanations for the difficulty in changing zoning to accommodate new development that was offered in *The Economics of Zoning Laws* was the legal transaction costs of purchasing development rights (Fischel 1985). "Zoning for sale" was a put-down of many proposals by developers to ease their way through the zoning obstacle course. Courts abetted this hostility with doctrines that undercut what was called "contract zoning."

Hostility to contract zoning seems to have abated considerably in the past quarter century. Communities seem so willing to put dollar amounts on rezonings that Lee Anne Fennell (2009) has used contract zoning as a lead to reformulate basic ideas about home ownership. Courts have increasingly tolerated obvious end runs around the supposed ban on contract zoning (Serkin 2007). At least some of the greater tolerance for cash exchanges has been the rise of tradable emissions permits. Buying and selling "the right to pollute" was once disdained by environmentalists. Now it is eagerly embraced by many such organizations. The fungibility of public environmental entitlements seems to have trickled down to everyday zoning controversies. "Zoning for sale" is no longer a trump card for people opposed to neighborhood change.

One argument in Fischel (1985) was that hostility to cash settlements was a major transaction cost that retarded the transfer of development rights from the community to development-minded landowners. But relaxation of that apparent cost does not seem to have resulted in a great deal of infill development in suburban communities. Housing costs have continued to soar, and land use regulations have regularly and accurately been blamed for at least part of the inflation. I also (Fischel 1985) blamed what economists somewhat nebulously call "the endowment effect" for continuing excess restrictiveness (Knetsch 1989). Because zoning gives entrenched suburban homeowners a generous entitlement to keep nearby densities low, it is more difficult to persuade voters to give up something that they would be unwilling to purchase even if they were endowed with an equivalent amount of money. (This has sometimes been called the wealth effect, but because most suburban residents purchase their homes after zoning has put been in place, they have to pay more for their piece of the community's endowment, and their wealth is correspondingly reduced.)

The endowment effect is not well supported empirically. Most of the evidence for it comes from psychological experiments that lack the rich contextual world in which exchange normally takes place. People regularly sell their homes and move

elsewhere, despite indubitable affections for their neighborhood. A more coherent explanation for reluctance to trade is homeowner risk aversion (Fischel 2001). The concentration of their wealth in their homes and the inability of most homeowners to insure against neighborhood decline seem to offer a better explanation of the fact that American suburban voters are wary of value-enhancing transactions that would promote the higher-density development desired by both profit-minded developers and public-spirited promoters of smart growth.

The lesser constraints on contract zoning would seem to make local land use outcomes more prodevelopment. A parallel movement promoting "environmental justice" seems to push in the opposite direction. Prodevelopment decisions by local governments are second-guessed by both judicial and legislative reviews for their impact on the poor. Some of the acceptance of second-guessing is promoted by economists who view political competition for industry as a destructive "race to the bottom" or, at best, a zero-sum game in which the gains to one community are offset by losses to another (Esty 1997). Even if there were no geographic advantages of one location over another, variation in preferences among residents of communities would justify the competitive process (Fischel 1975). Residents see a trade-off between the loss of environmental amenities and the rewards of nearby industry, chiefly a lower tax price for local public goods, but sometimes more convenient access to jobs and shopping.

Because of ordinary income effects, low-income communities would be more likely to give more weight to the gains from obtaining an industrial development than to the loss of local environmental amenities that it caused. Higher-income communities demand better local environmental amenities (Kahn and Matsusaka 1997). As long as people are less mobile than industry, an efficient outcome will result in more (but not all) noxious industries being located in lower-income communities. Most evidence indicates that higher-income communities are indeed more leery of commercial and industrial development (Fox 1981). Lower-income communities either developed around preexisting industry or were more inclined to allow it to come into their communities (Been and Gupta 1997). Environmental justice advocates may take less resistance to industrial development to be a sign of political ineptitude or corruption by local officials, but there seems to be little systematic evidence of this.

A more controversial issue is whether land use policies have systematically discriminated against African Americans. Because African American communities tend to have lower incomes, the evidence for this is complicated by an identification problem. Also, disfranchisement of blacks in the first part of the twentieth century certainly made them more vulnerable to dumping of noxious land uses in their neighborhoods (Hinds and Ordway 1986). But since voting rights have been restored, the argument seems to have lost its punch, and evidence that African American communities suffer more environmental injuries than otherwise similar nonminority neighborhoods is almost nonexistent. Nonetheless, there continue to be special reviews by the Environmental Protection Agency of industrial location on this account, and such reviews should count as an additional (perhaps desirable) transaction cost for locating problematic land uses.

School Finance and Property Taxation

Another change in the past three decades that should have undermined, or at least changed, local zoning is the school-finance-equalization movement (Hanushek and Lindseth 2009). As described in a previous section, much of zoning's suburban appeal was that it made it possible to exclude housing development that did not "pay its own way" for community services. Zoning kept developers from building modest dwellings that would pay little in property taxes but would generate large expenses for education. Communities that spent more than average on schools used zoning to make sure that their school funding would not be undermined by low-cost development. This is such a common motive that there are standard manuals on how to compute the impact of new housing on local fiscal conditions, including local school taxes (Burchell, Listokin, and Dolphin 1993). These manuals need to be recalibrated in light of the continuing decline in childbearing among native-born Americans, but school costs are a continuing concern in all zoning decisions.

The considerable success of the school-finance-equalization movement should have changed these calculations. Among the earliest equalizations were those that came about as a result of the *Serrano* decisions in California in the 1970s. After Proposition 13 dealt the coup de grâce to local financing for schools (Fischel 1989), fiscal opposition to low-cost housing in the formerly high-spending school districts should have melted away. If the new units housed low-income families with schoolchildren, there was no reason for local property taxes to rise or school spending to fall. Taxes were in effect frozen by Proposition 13, and school spending was determined by a statewide formula that was not affected by the local property tax base.

This radical change in local public finance did not seem to make suburban zoning any less exclusionary, although it did affect some location decisions. Some high-income families seem to have moved to cities whose schools they otherwise would have disdained because suburban schools now hold less of an advantage for them (Aaronson 1999). But most of these high-income families either had no children in school or sent their children to the burgeoning private schools in the urban districts. By far the most distinctive changes in California schools have been the high average class size (by national standards) and diminished participation in the public school system by high-income families (Brunner and Sonstelie 2006). But there is no evidence that California communities have been any more welcoming to low-income housing (or any other controversial developments). The chief trend appears to be requiring new development to pay its own way by land use exactions and to pay for facilities by Mello-Roos bonds, which require homebuyers to pay more of school costs, neither of which appear to be more welcoming of development (Dresch and Sheffrin 1997). The notion that local property taxation for education is the basis for exclusionary zoning is not supported by California's experience or by that of any other state.

This is not to say that school-finance-equalization programs have not changed location decisions. Aside from the back-to-the-city movement mentioned in the preceding paragraph one interesting result emerged from Texas's "top 10 percent" plan (Cortes and Friedson 2010). In response to court decisions that undid affirma-

tive action in Texas state universities, the legislature adopted a facially neutral plan. Students in the top 10 percent of their class in any public high school would gain automatic admission. Thus, the best students in the worst high schools had a much improved opportunity to attend state universities, and students in the best high schools faced a reduced chance of admission. This resulted in some redistribution of population. Families with children started moving into poorer high-school districts, apparently in the hope that their children would have a better chance to get into college. This movement in turn raised housing values in those districts, although it did not appear to reduce home values in the better districts. A similar capitalization effect occurred in Minnesota as a result of its cross-district enrollment programs (Reback 2005). Homes in poorer districts began to appreciate faster than those in richer districts because families could to a large extent ignore the district line, purchase cheaper homes, and still send their children to better schools outside the district. Whether any of the better school districts in Minnesota and Texas became more welcoming to low-income housing is a subject yet to be addressed in the zoning literature.

Google Earth, Crime, and Covenants

Another change in the past three decades has been in the capacity to get information about land use. The development of geographic information systems has enhanced the ability of both practicing planners and scholars to learn about patterns of development. Real estate values and U.S. census information are now easily obtainable. Details of local zoning ordinances and controversies are easily searchable and accessible to scholars far away from the communities in question. Estimating the effects of various kinds of borders—municipal, school district, and zoning—on home values is now an undergraduate exercise, and my own students have confirmed or sometimes altered my views about the effects of zoning.

As a result of such information, it is now more difficult to base justifications of restrictive zoning policies on geographic fables. A federal study in the early 1980s seriously advanced the idea that urban development was proceeding at such a rapid rate that the United States was in danger of running out of farmland (National Agricultural Land Study 1981). Many communities seized on this idea as a rationale for adopting extremely large minimum lot sizes in their rural areas. (In fact, the movement for agricultural land preservation had started in the 1970s.) It was also a justification for some proposed statewide plans to preserve rural farmland both by purchase and by regulation. Fischel (1982) contested the running-out-of-farmland data, and the U.S. Department of Agriculture eventually disavowed the original alarmist data (Heimlich, Vesterby, and Krupa 1991). But Google Earth and similar satellite photography can now demonstrate even to a casual observer that urban development is such a small fraction of the total land area that it is difficult to sustain the original alarmist view about running out of farmland. Remote sensing methods have also been used to get accurate data on the amount of urbanization in North America and in the rest of the world. All these studies show a steadily urbanizing and suburbanizing world that is nonetheless a tiny fraction of the world's stock of arable land (Angel, Sheppard, and Civco 2005; Burchfield et al. 2006).

A more recent trend that potentially affects zoning is the remarkable decline in American crime rates. Anxiety about crime was an important explanation for suburbanization and exclusionary zoning (Fischel 1985). Crime rates rose considerably during the 1960s and 1970s, and at least some opposition to further suburban development was predicated on the possibility that low-income housing development made local crime more likely. Like equalization of school financing, the decline in urban crime seems to have been a discernible factor in reducing the flow of middle-class residents to suburbs (Ellen and O'Regan 2010). It is too early to tell whether this trend will make suburban residents more inclined to accept low-income housing or otherwise loosen zoning constraints. A further complication is the possibility that lower crime and not-so-bad schools in central cities may make poorer people less inclined to move to the suburbs.

The last trend that has become more prominent since 1985 is the development of residential private governments (RPGs). RPGs are associations of homeowners that are governed by legal covenants and are almost always designed by a developer of multiunit housing projects. They are universal in apartment condominiums, but they are also widespread in single-family developments. The most obvious physical manifestation of RPGs is gated communities, but this understates their influence. Almost a third of new residential construction in the United States between 1970 and 2000 was governed by such private arrangements (Nelson 2003). Like municipalities, RPGs come in a wide variety of flavors, from progressive political experiments to conservative religious retreats, although most appear to be supplements to ordinary zoning regulations.

Whatever else the rise of privately regulated communities signifies, it affirms that American homebuyers are not fed up with regulation. The regulations in RPGs are considerably more detailed and intrusive than even the most aggressive zoning laws. Voluntary entrance into private agreements, in contrast to zoning's police power origins, is a distinction without a difference for most home buyers. The real difference is that zoning can be applied to a set of landowners who do not agree to its terms, and so there is a greater hazard that zoning will result in excessive substitution of regulation for public expenditures. But for buyers of already-built homes (or platted lots), zoning and RPGs are essentially the same. Neither is likely to be changed in ways that adversely affect most homeowners' specific investment.

The growth of RPGs has paralleled the development of private substitutes for governments, such as business improvement districts (Nelson, McKenzie, and Norcross 2009). This trend has led some observers to hope (and others to worry) that the private institutions will displace the public institutions. Under this scenario, zoning would be displaced by consensual regulations as residents found that private governance offered them more control over their environs. This has not yet happened. If anything, RPGs have strengthened zoning laws. In many cases, community associations have monitored zoning changes, and many participate (through representatives) in zoning hearing decisions. If zoning is to wither away, it seems unlikely to do so because of RPGs.

A separate trend in private land use regulation is the growth of conservation easements (Pidot 2005). Federal and state tax laws make it attractive for owners of

large (and some smaller) undeveloped parcels to donate them to conservation organizations. This would hardly be of much public concern except that the tax subsidies appear to be very generous (largely because of uncontested appraisals), so that the opportunity cost of private large-lot zoning would seem almost as low as it is for municipalities. The other potentially distorting aspect of conservation easements is that federal tax rules require that donated land remain undeveloped indefinitely. This requirement was instituted primarily to prevent owners from simply avoiding taxes on speculative land investments, but its effect in growing areas is to remove large patches of developable land from the available stock, potentially making suburban infill development more costly.

Overstatement of Zoning Board Misrule

After I had completed my 1985 book, I got some practical experience on zoning by serving on my local zoning board. Zoning boards are not the agencies that formulate or administer the laws. Zoning laws and, more important, the many changes in the laws are passed only by elected officials or, in an increasing number of jurisdictions, the voters themselves in formal plebiscites (Nguyen 2007). Zoning boards are adjuncts of the regulatory process designed to hear appeals from administrative rulings and to grant exceptions, usually minor, to the literal application of zoning laws. Being on a board is a good way to see zoning's application.

An observation about zoning boards that might be useful to scholars is that visiting the site in question is essential. Site visits can change the views of the case enormously. An applicant may show charming pictures of his antique-car hobby and seek a variance only to park some storage trailers. A visit might reveal that he actually harbors a private junkyard. Local knowledge is important because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. One early and well-known critique is the article by Dukeminier and Stapleton (1962). A more recent study was conducted by an attorney who statistically examined variance decisions in five New Hampshire towns, one of which was Hanover, during the years 1987–1992, when I was on the zoning board. His chief finding was that variances are disproportionately granted if abutters do not object (Kent 1993; Ellickson and Been 2000). To which most board members would say, "Who knows better whether the variance will have an adverse effect?" The practice of granting variances if abutters do not object illustrates the recurrence of an early, grassroots approach to land use regulation, which required nonconforming uses to obtain permission of local property owners. It was struck down as unlawful delegation of the police power in several early cases, such as *Eubank v. City of Richmond*, 226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Kent (1993) neglected to point out that four of the five towns in his sample have administrative officers who could discourage applicants with weak cases (Hanover's certainly did), but none of the other "misrule-by-variance" studies worry much about selection bias either. Kent also accurately reported that during the period he examined, the New Hampshire Supreme Court overturned the decisions of all ten towns

whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, the decision in *Simplex v. Newington*, 145 N.H. 727 (2001), changed the court's previous zoning variance criteria, on which Kent had relied as the source of proper variances, to a less exacting standard that more closely reflected actual practice.

Legal error is not practical error, much less economic harm. Although the articles critical of boards mention the possibility that variances will degrade the neighborhood, even anecdotal evidence in support of that contention is scarce. Without visiting the site in question, it is often extremely difficult to tell whether the variance was warranted by legal, practical, or economic criteria. An underappreciated study by David Bryden (1977) established this more systematically. Bryden examined scores of Minnesota lakeshore building and septic variances (which he had no part in granting) and concluded that what looked like a travesty from the legal record in almost all cases made perfectly good sense to local board members who were acquainted with the details of the sites in question. For example, building setback variances, which by themselves seemed to have been issued with little regard to the state's standard criteria, were granted most often to allow septic systems to be even farther from the lake than the state required. The local officials knew the sites and made what Bryden inferred were appropriate trade-offs between the serious risk of septic-tank pollution of water bodies and the less consequential aesthetic concerns of building setbacks.

This is not to say that zoning boards are faultless. Some members can be inclined to promote a political agenda. Favoritism and score settling can influence some members' votes. But even the least sophisticated zoning boards have an asset that is almost never available to appellate judges or to statistical analysts: they know at least the neighborhood and usually the specific site from personal experience. This makes a big difference that critics of boards need to take into account.

The Development of Zoning and Treatment of Nonconforming Uses

The second new perspective I have acquired since 1985 is historical, as is implied by the term "evolution" in the title of this chapter. *The Economics of Zoning Laws* had almost no historical analysis. Zoning just appeared in the 1920s as a result of state legislation (following model acts developed by the U.S. Commerce Department) and Supreme Court rulings that upheld zoning against legal attack. Just why zoning appeared only in the early twentieth century, spread rapidly to both cities and suburbs, and took the form of residential (as opposed to business) protection was not addressed. I attempted to remedy my oversight in an article addressing the economic history of zoning (Fischel 2004a). The main point in that article was that technological change in the form of automobiles, motor trucks, and passenger buses created a demand for more formal and durable land use regulation.

When people walked to work and urban factories were anchored by railroad junctions, river wharves, and seaports, separation of businesses and residences was not practical. The development of intraurban rail transport allowed residents to live farther from their jobs, and this resulted in more demand for exclusive

districts. But most of this demand could be handled by protective covenants and informal agreements, as well as by the simple expedient of locating one's home far enough from the railroad. Once cars, trucks, and buses were introduced, covenants and informal methods were overwhelmed by footloose businesses seeking cheaper land (Moses and Williamson 1967) and apartment developers seeking more pleasant neighborhoods for their clients (Fogelson 2005). Only then did home developers embrace public regulation in order to assure their risk-averse buyers that their investments would not be devalued by subsequent developments (Weiss 1987).

My explanation for zoning emphasized the "bottom-up" demand for zoning (Fischel 2004a). Prospective homeowners were not eager to buy homes where neighborhoods could change in undesirable ways. In Marc Weiss's (1987) account, this demand was transmitted to the first large-scale home developers in the Los Angeles area. They lobbied for regulations at municipal and state levels and eventually persuaded their fellow Californian Herbert Hoover, then secretary of commerce in the Coolidge administration, to promulgate the wildly successful Standard State Zoning Enabling Act (SSZEA) in 1928 (Knack and Meck 1996).

The success of the SSZEA gave rise to the view that zoning was a top-down arrangement. The planning profession promoted the view that zoning arrived as a tidy package in New York City in 1916 with the protection of Fifth Avenue carriage-trade stores from the inroads of low-class manufacturing (Toll 1969). In this popular story, residential protections played a minor role. The story is reinforced by the common account of how the U.S. Supreme Court came to its decision to uphold early zoning ordinances in *Euclid v. Ambler*, 272 U.S. 365 (1926). The Court in its first hearing seemed inclined to overturn zoning until Cincinnati planner Alfred Bettmann filed an amicus brief that carried the day for zoning after a rehearing.

The apparent simultaneity of supply of zoning laws by planners and demand for zoning by homeowners and developers presents an identification problem: which was the primary mover, the planning establishment or the homeowners and developers? One way of identifying the more important factor is to consider an element of zoning that the planners wanted and initially obtained but that the public subsequently rejected. If the demanders (the public) trump the suppliers (the planners), the hand goes to the demand side.

The element is important and current. The planners who promulgated zoning regarded zoning districts as seriously flawed if any nonconforming uses were allowed to persist (Veiller 1916). They consistently proposed that nonconforming commercial and industrial uses be expelled from residential neighborhoods. Expulsion was required regardless of how long the nonconforming use had been there or whether it had arrived long before the residences. A brief grace period to facilitate relocation of the activity might be allowed, but no compensation was to be paid. The idea of terminating nonconforming uses has never faded away. Harland Bartholomew (1939) succinctly stated his thesis in the title of his article, "Nonconforming Uses Destroy the Neighborhood." A *Stanford Law Review* student note (1955) strenuously advocated termination. A modern expression of the same idea, though more nuanced in its application, has been advanced by Christopher Serkin (2009).

American courts bought into this idea without much trouble. The illustrative case—Frank Michelman called it (and thus helped make it) "the undying classic" (1967, 1237)—was *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915). John C. Hadacheck had built a brick-making facility in a rural part of Los Angeles County seven years before the city of Los Angeles annexed territory containing his property. (See an excellent dissertation by Kathy Kolnick [2008], whose title, "Order Before Zoning," honors Ellickson's 1991 book *Order Without Law*.) Hadacheck had moved to his initially rural site specifically to avoid conflicts with his residential neighbors. His business had been expelled from a previous site nearer downtown by a 1902 ordinance aimed at brickyards in general and the objections to his operations by his residential neighbors, who included the owner of the *Los Angeles Times*. Hadacheck moved his operations about a mile west to an eight-acre site at the corner of what is now Pico and Crenshaw. The site was at the time outside the boundaries of the city of Los Angeles. However, Hadacheck's new neighborhood also became largely residential soon after he built his facility. After the new residents petitioned that the area be annexed to the city, the city's "districting" laws—the precursor to its comprehensive zoning law—designated the area as exclusively residential.

The city demanded that Hadacheck (and another nearby brickyard) discontinue operations. Hadacheck demurred, noting the large investment he had made and the considerable drop in value of his property if only residential use was allowed. Expensive and difficult-to-move machinery had been installed on the site, and deep pits from which the clay for bricks had been mined rendered the site problematic for alternative uses. Kolnick (2008) found that sometime afterward, Hadacheck's land was actually developed as mixed residential. However, she does not say what Hadacheck was paid for the land or what remediation was necessary in order to build on it. In any case, both the California and U.S. supreme courts upheld this ruling without a dissent, the U.S. Supreme Court blandly declaring that "there must be progress" (239 U.S. at 410).

Hadacheck is intriguing for two reasons. It seemed to involve a zoning controversy in Los Angeles that arose several years before New York's supposedly first-in-the-nation zoning ordinance of 1916. Los Angeles was not yet a huge city—in 1910 its population was only a little more than 300,000, while New York's was nearly 5 million at the same time—but it was growing rapidly because of migration, especially from the Midwest. Indeed, the major industry in Los Angeles at the time was residential development. Why had Los Angeles not been regarded as the mother of American zoning?

Kolnick's answer is that the zoning to which Hadacheck was subject was not comprehensive or citywide. Indeed, the word "zoning" was not used. Neighborhoods would petition the city to be placed in an exclusive residential district either because business had invaded the area or because residences were now invading areas where industries had come first (as in Hadacheck's case). The city government became especially responsive to these requests after its first experience with a voter initiative on land-use issues, which was a novelty at the time. But the process was actually done piecemeal. What is now called zoning was merely called "districting," and the entire city was not covered with districts. Indeed, the city itself was rapidly growing in land area (by annexation), as well as population, so comprehensive zon-

ing would have been especially difficult to undertake. New York's title for first in the nation in 1916 was based on the comprehensiveness of its zoning map, which designated the entire city for some zone or another. Los Angeles did not get around to that until the 1920s.

The more pressing question is why the *Hadacheck* precedent had not led to a general rule that allowed nonconforming uses to be expelled without compensation. One reason that *Hadacheck* is not a clear guide is that it looked like a nuisance case. If that was all it was, then the fact that his brickyard had to move despite its precedence would not be especially unusual. First in time does not establish an entitlement to continue a nuisance. As Richard Epstein (1985) succinctly analyzed, Hadacheck had been granted an implied but temporary easement by neighboring landowners to conduct a nuisance that did no damage as long as the land nearby was vacant. Once neighboring landowners developed their property for residential use, the brickyard was obliged to leave.

There are two problems with the nuisance theory of *Hadacheck*. One is that both the California Supreme Court and the U.S. Supreme Court did not treat it as a simple nuisance case. *Hadacheck* was a test of the police power, not of the common law of nuisance. (Contemporary defenders of zoning, such as Pollard [1931], specifically emphasized this distinction.) The difference is that under the police power, the city of Los Angeles could have designated Hadacheck's neighborhood an industrial zone, and Hadacheck would have been protected from the wrath of his neighbors. In fact, the city did have to deal with this issue. The other problem is that *Hadacheck* was preceded by two cases that also tested the city's districting regulations, but did not involve uses that would have been considered nuisances.

Ex parte Quong Wo, 161 Cal. 220 (1911), involved the creation by local petition of a residence district near downtown Los Angeles, on Flower near Seventh Street. Quong's was one of more than a dozen Chinese hand laundries (no power machinery was employed) that were affected by the 1911 ordinance. They had long been interspersed with homes and other commercial buildings, as indicated on the map constructed by Kolnick (2008). Quong Wo had operated in the area for more than 14 years but was ordered to close his business. He declined, was arrested (as Hadacheck was in his later case), and appealed his conviction to the California Supreme Court, which upheld the ordinance and the conviction. Chinese laundries would not have met almost any traditional definition of nuisances, and several of Quong Wo's neighbors testified that his laundry was inoffensive (Kolnick 2008). Prejudice against Chinese, which surely informed earlier cases, was declining in Los Angeles as the city's population grew as a result of non-Chinese immigrants from other states. The California court in this instance seems to have treated this simply as a test of the breadth of municipal discretion in the police power and did not mention nuisance issues at all.

The second case was *Ex parte Montgomery*, 163 Cal. 457 (1912). It involved a lumberyard located at North Avenue 61 and North Figueroa Street. It was also required to discontinue operations as a result of a newly adopted residential district. It was possible that some nuisancelike activities occurred in lumberyards at the time, but they surely could have been abated without requiring that the use be entirely removed. The more remarkable aspect of *Montgomery*'s specific circumstance was

that the lumberyard was adjacent to a railroad (the Santa Fe), across from which was a commercial neighborhood. The California Supreme Court specifically noted that a lumberyard was not a per se nuisance but then added that it might be considered a hazard to residential property because it harbored flammable materials.

Politics and People Overruled *Hadacheck*

One would think that the court losses by Hadacheck and the other two defendants would be the end of it. The planners had their way, and the highest courts of the state and the nation gave uncompensated removal of nonconforming uses their unqualified support. Indeed, Illinois courts in the 1920s briefly declared that "grandfathering" was illegal (Schwieterman, Caspall, and Heron 2006). But anyone familiar with zoning law knows that this was not the end of the story. In fact, Hadacheck would nowadays likely prevail, although his brick making might be scaled back by environmental laws. Nonconforming uses are now handled with kid gloves. Some states regard their status as constitutionally protected (Serkin 2009). Others have statutes that support them. Some of the more nuisancelike nonconformers were given a term of years to operate under so-called amortization statutes, reflecting the public unease with simply terminating them.

But *Hadacheck* is still good law (diMento et al. 1980). The explanation for its de facto reversal is twofold. One was popular revulsion at the law. According to Weiss (1987), as well as Kolnick (2008), Hadacheck's case and the other two were causes célèbres. It just did not seem fair that a long-established business could be eliminated by the stroke of a pen. The same popular feeling emerges in modern "right-to-farm" laws, which protect preexisting farming operations against nuisance suits (and sometimes zoning changes) that arise when residential neighborhoods are built around farms. The new neighbors find that the smells and sounds of agriculture are not to their liking, but the right-to-farm laws stay their hands (Adelaja and Friedman 1999) despite common-law principles that disfavor the "moving-to-the-nuisance" defense that right-to-farm laws support, and despite the writings of economists, who disparage the "first-in-time" principle as a general rule. This principle creates incentives for landowners to opportunistically establish what they know will be problematic uses in advance of the regulations or to lazily ignore neighborhood changes that they should anticipate (Wittman 1980).

Aside from popular perceptions of fairness, the city of Los Angeles faced a practical problem. Although the biggest business in Los Angeles in the early twentieth century was residential development, both the city council and voters were aware that some industrial and commercial developments were essential both for the residences and for longer-term employment. The immigrants who flocked to Southern California's pleasurable climate were not all retirees or rentiers. But development was happening so rapidly that *Hadacheck*'s problem cropped up time and again.

The impetus for the industrial districts was the fear that the city would be unable to attract industry. As Kolnick observed, "Though the California state and federal courts had declared it constitutional to require what were considered as nuisance businesses to be removed from residence districts, an anti-industry reputation was one the city council and civic organizations were at pains to avoid" (2008, 254).

City council members were aware that nearby cities were attracting industry with promises of exclusive districts. El Segundo brought in a refinery and established worker housing nearby, apparently able to persuade the refiner that it would not be chased out as Hadacheck had been.

The answer for that problem was the industrial zone. Within such zones, businesses could be more secure. They were not exempt from nuisance litigation, but that was not what caused the problem. What was problematic was residential development and the subsequent demand for an exclusive residential district. People who moved to an industrial zone, on the other hand, could be told that they did not have the right to demand removal of offending businesses.

At first, Los Angeles struggled to determine the location of its industrial zones. Centered on the Los Angeles River (east of downtown), the initial district was fitfully expanded to accommodate industry and was divided into degrees of noxiousness, with the worst being placed farthest from the residential areas. The city council had no stomach for actively removing residents from the industrial zone, but it appears that they left of their own accord over time, and at least those who owned property profited from the sales.

Kolnick's more remarkable finding, however, was that most of the firms that had been officially banished from residential zones actually did not leave. Hadacheck departed, but most of the Chinese laundries remained for many years, probably as long as the ordinary lifespan of an urban business. Other banned businesses often were in place years after the exclusive residential area had been established. Kolnick, an assiduous researcher, found no official record of their being granted exceptions, but after a while, controversies over expulsions simply died out.

Although zoning's national advocates continued to decry the persistence of nonconforming uses, most seemed to accept that it was politically difficult to dislodge them. Some attempted to justify their acceptance of nonconformers by claiming that the California courts were extreme in their deference to the police power. But the bland and unanimous acceptance of California's practice by the U.S. Supreme Court in *Hadacheck* suggests that however extreme California may have looked initially, there would be no opposition from the federal courts. This is not to say that the federal courts always deferred to state courts in these matters. In *Buchanan v. Warley*, 245 U.S. 60 (1917), the U.S. Supreme Court unanimously overturned an attempt by Louisville to establish separate residential zones for blacks and whites. (The city's defense invoked *Hadacheck*.) Louisville's apartheid scheme had been spreading throughout much of the South and the border states in response to the increase in migration of blacks in search of industrial jobs in the World War I era.

Most state courts, as well as many commentators, continue to regard grandfathering previous uses as strictly a matter of noblesse oblige or political necessity on the part of local jurisdictions. Many have accepted the concept of an "amortization period" during which nonconforming uses are granted a reprieve from discontinuance. But even amortization periods have gone out of fashion (Serkin 2009). This seems to be a case in which the leaders of zoning called for a practice that the public was unwilling to accept, even though the courts either endorsed the practice or tolerated it. For this reason, the continuing practice of grandfathering nonconforming uses supports the demand-side or bottom-up theory of zoning's development. The

argument is not that courts have no effect on local government behavior. *Buchanan v. Warley* was indeed important in that it undermined the ability of local governments to perpetuate racial segregation (Fischel 1998). That a less-than-perfect substitute for racial zoning, the private racial covenant, continued to be available may have helped southern cities accept *Buchanan*.

The principle that nonconforming uses need not adapt to current zoning is hardly absolute. Unlike conforming uses, a discontinuation of a nonconforming use for a period of months (usually set by statute) may cause its owner to lose its legally protected status. Even accidental destruction of a nonconforming building may require that it be rebuilt subject to current zoning regulations. And a nonconforming use that threatens health and safety (as opposed to the more nebulous "general welfare") is more likely to be shut down, although the same can be said for conforming uses. The special status of nonconforming uses is largely contrary to the supply side view of zoning and to zoning theory generally. It has been integrated into zoning practice for such a long time that most planners now regard it as entirely natural, but that natural feel is actually illustrative of the power of the demand side of zoning.

Zoning has remained the premier function of local governments everywhere in the United States. The political and technical trends that at first blush seemed destined to undermine it have either strengthened it (although in the direction of more restrictiveness) or been absorbed by the indigenous regulatory culture. This is a reflection of the grassroots appeal of local land use regulation. This appeal is not new. As suggested earlier, bottom-up forces substantially modified the force of zoning on previously existing, nonconforming uses.

Although most professional advocates for zoning urged (and continue to urge) the discontinuance of nonconforming uses, and court decisions have seldom stood in their way, public sentiment has generally favored their continuance. This sentiment has gradually solidified into what appears to be a popular legal entitlement. Although there are serious arguments against recognizing such entitlements, their development might be taken by scholars as an indicator of the ongoing evolution of property rights.

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