Takings from Freund to Fischel." Review of Regulatory Taking: Law, Economics, and Politics, by W. A. Fischel

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 BOOK REVIEW

Takings From Freund to Fischel


JAMES E. KRIER*

The regulatory takings problem is easy to describe but difficult to resolve. The government enacts restrictions on land use that reduce the market value of the targeted parcels by a considerable amount. The restrictions are couched in terms of the police power, but actually they might amount to a taking that requires compensation, not because any of the land has been wrested away (it hasn’t), but because much of the value has. Through the police power the government gets to govern for free, whereas with takings it’s pay as you go. On what does the distinction—police power or taking—depend?

The question is an important one given the reality of activist governments with a taste for regulation that exceeds their ability to pay. The significance of the issue, not to mention its difficulty, probably explains why the regulatory takings problem has become the jurisprudence’s version of Fermat’s last theorem, with Justice Holmes playing provocateur. “[W]hile property may be regulated to a certain extent,” Holmes wrote for the majority in Pennsylvania Coal Co. v. Mahon,1 “if regulation goes too far it will be recognized as a taking.”2 That was in 1922, and anyone who knows anything about takings knows that over the ensuing years a lot of commentators have tried to figure out where and how to draw the line that Holmes said was there, somewhere. Academic mulling over the matter has generated an unsurprisingly large accumulation of “solutions” to or “theories” about the problem. It is easy to conclude that none of these has proved very satisfactory because if any did, the puzzle wouldn’t persist, yet it does.

In Regulatory Takings,3 Professor William Fischel of Dartmouth University takes his own crack at the problem. Fischel is an economist, not a lawyer. He is not the only economist who has addressed regulatory takings,4 but he is to my knowledge the first to do so at such length, with such careful attention to the

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1. 260 U.S. 393 (1922).
2. Id. at 415.
law and the politics as opposed to just the economics of the matter, and with so much curiosity about facts and sensitivity to context. His book is readily accessible to lawyers and refreshingly down to earth, in part perhaps because its author has spent almost ten years in the trenches as a member, and more recently as chair, of the Zoning Board of Adjustment of Hanover, New Hampshire.  

An interesting observation of Fischel's is that the regulatory takings problem comes and goes in a cyclical fashion; it works its way onto the agenda of social concerns, gets resolved and goes away, then reappears later. But judging from Fischel's own contribution, something else is cyclical too, namely, takings theory itself. Apparently, the scholarship of the last three-quarters of a century—and Fischel, to his credit, seems to touch on the bulk of it plus a lot of other related literature—has so exhausted the mine of possible answers to the riddle of regulatory takings that we must now go back and draw on old ore with new technology. Professor Fischel himself ventures back almost a century, to Professor Ernst Freund and his 1904 book, The Police Power. Freund resolved what we call regulatory takings problems by distinguishing between harms and benefits, and Fischel does likewise. Fischel's argument is more subtle, nuanced, and sophisticated than Freund's—exactly as we expect a new version of an old idea to be. And Fischel leans much less heavily on the harm/benefit line than did Freund. The surprise is that he leans on the line at all, because takings mavens have come to regard it as an illusion capable of supporting nothing heavier than hot air. Is that judgment incorrect?

I. THE POLITICAL ECONOMY OF TAKINGS LAW

To get—eventually—to the question, let us begin where Fischel does, with Pennsylvania Coal Co. v. Mahon. Quite a lot has been written about the setting and background of that case, so one might think there's little more of

5. FISCHEL, supra note 3, at x.
6. See id. at 88-90.
7. Sources are collected in a table that also indicates where each item is discussed in the book. See id. at 377-406. There is a table of cases as well. See id. at 371-75. I am delighted to report that in Fischel's book there is not a footnote in cite. (Pun intended.) Abbreviated references geared to the table of cases and the table of secondary literature appear parenthetically in the text, and everything that Fischel has to say he manages to say without leaning on the crutch of footnotes. Law review authors should be so able, and their editors so willing.
9. See id. at 546-47 (asserting that regulations that control harms require no compensation, whereas those that extract benefits do); see also infra text accompanying note 54.
10. See infra text accompanying notes 55-59. I do not mean to suggest, however, that no takings experts at all approve of the harm/benefit test; some do. See, e.g., Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse, 88 COLUM. L. REV. 1630, 1633-38 (1988) (arguing that harm/benefit test is analytically sound and was contemplated by drafters of Fifth Amendment).
interest to know, but the thought turns out to be wrong. Fischel discloses information that is not only new, but arguably more interesting than everything uncovered previously. It is information that he got the hard way, digging through original sources such as local newspapers, visiting the site (Scranton), and interviewing knowledgeable parties (including E. Stewart Milner, for example, a man in his eighties who started working for the Pennsylvania Coal Company in 1926 and never left his job, though his job left him when the company dissolved in 1977).13

Among many noteworthy items, Fischel found one that plays a particularly important role in his "doctrine [by which he means his theory] of regulatory takings":14 Pennsylvania Coal and other coal mining companies in the Scranton area had the practice of repairing or paying compensation for surface subsidence brought about by their mining activities. They developed the practice well before the Kohler Act at issue in Pennsylvania Coal forbade mining in a way that would cause subsidence,15 and they adhered to the practice even after the Court's decision in Pennsylvania Coal invalidated the Kohler Act as a taking. So the case had little, if any, impact on mining operations.16

From that observation springs Fischel's theory, the gist of which is captured by a single paragraph in the introductory chapter of his book:

[T]he owners of coal mines acted as if they had lost the case instead of winning it. They were not eager to remove coal in such a way as to despoil surface owners, and they agreed to repair the damage that they caused. I submit that the owners did so because of a combination of political, eco-

14. Id. at 10.
15. The companies could, however, avoid the Kohler Act's requirements by choosing instead to pay an "optional" tax levied under a separate piece of legislation, the Fowler Act. Id. at 33. "By this method the drafters of both acts apparently hoped that the Pennsylvania courts would regard the Fowler Act taxes as not amounting to an unconstitutional special tax. (Aficionados of modern land use cases might thus characterize Pennsylvania Coal as an exactions case involving unconstitutional conditions ....") Id. at 34.
16. This conclusion of Fischel's—in fact, most of his conclusions and assertions—can be found easily without close reading, thanks to his practice of breaking the discussion in Regulatory Takings into short sections, each headed by a simple declarative sentence. Here are examples drawn from id. at 37-41:

1.12 Mine Owners' Behavior Was Not Affected by Pennsylvania Coal

1.13 Philip Mattes Agreed that Pennsylvania Coal Had Little Impact [Mattes, a lawyer involved in the case, is deceased; Fischel interviewed his son and grandson and read the privately printed autobiography of Philip that they provided. See id. at 39.]

1.14 Pennsylvania Coal Probably Made Little Difference

I found that this technique, coupled with a pretty good index, the table of cases, and the table of secondary literature, makes Fischel's book a handy ready reference—a sort of desk book—for teachers and scholars of takings. Even casual riffling of the pages is productive, a nice feature from the viewpoint of a teacher preparing for class; just a little more effort yields grace notes on a variety of land use topics. These are virtues that stand quite independent of the theoretical contributions on which I focus in this review.
onomic, and social pressures from within the community in which most of their
managers and employees lived. This example suggests that lower courts and
nonjudicial remedies should largely be allowed to determine the course of the
takings issue when the impact of regulation is internalized by local residents.
In other situations, judges should ask, when a taking is alleged, what stan-
dards voters would impose if the economic effects fell on themselves. Such an
inquiry should largely be taken up by state courts, which are closer to the
action. . . . [T]he proper (and arguably actual) role of the U.S. Supreme Court
is to supervise state courts whose political inclinations have been to read the
regulatory side of the Just Compensation Clause out of the Constitution.17

The bulk of Regulatory Takings is devoted to a patient, careful, relatively
lengthy elaboration of discrete segments of the foregoing summary statement.
The result is a wonderfully rich exegesis of the law, economics, and politics of
local, state, and federal land use controls. In addition to a fresh and illuminating
examination of standard takings issues and judicial rules of decision, Fischel
treats his readers to a precise discussion of a wide range of related topics,
including (in alphabetical order) affirmative action, democratic theory, farmland
preservation, housing prices, judicial review, the offer/asking disparity, public
choice theory, rent controls, the Tiebout model, and (of course) zoning. The
discussion is put to particular service when Fischel outlines his theory of
regulatory takings in the final chapter of his book.

We have then essentially two contributions: First, a textbook on the political
economy of land use and takings law; and second, an essay proposing yet
another approach to the puzzle put by Holmes in 1922. Either of these could
stand on its own: the nine parts of text would be worthwhile even without
regard to the tenth part, which outlines Fischel's doctrine of regulatory tak-
ings.18 And that tenth part, I am confident, could have been presented, at not
much greater length, as an independent article incorporating the ideas and
observations developed in what I have called the textbook.

I am not sure that the whole of Regulatory Takings is bigger than the sum of
its parts, but it is at least the equal. I intend to concentrate my critical
commentary on the theory developed in the book's last chapter, but my buildup
to that will suggest something about the rest of the work and how it contributes
to Fischel's thinking.

Let us return to the language quoted earlier, restated piece by piece:

A. POLITICAL, ECONOMIC, AND SOCIAL PRESSURES HELP TO LIMIT UNJUST AND
INEFFICIENT GOVERNMENT PROGRAMS

Anyone passingly familiar with the takings problem knows that it entails two
concerns, one being fairness and the other being efficiency. As to the first

17. Id. at 6.
18. The book has only nine numbered chapters, but really there are ten, because the discussion
begins with an unnumbered introduction.
concern, the Fifth Amendment and related state constitutional provisions implicate fairness by requiring "just compensation."\(^{19}\) As to the second, the obligation to pay compensation gives the regulating government an incentive to consider what losses might be worked by its programs—to consider, in other words, whether the programs are efficient in the sense of being worth their cost.\(^{20}\)

Notice that on this view, takings law (in the sense of constraints overseen by courts) is needed only to the extent that the political branches of governments are not inclined to act justly and efficiently anyway. This is a central point of Fischel's: "The issues of fairness and efficiency that... underlie the takings issue should... be left to the political branches of the state and federal governments," except when political, economic, and social pressures are too attenuated to provide constructive constraints on government activity.\(^{21}\) Indeed, when economic and social forces are working effectively, official legal rules don't even matter much and, thus, aren't really needed. The people in the community will arrive at their own codes of conduct, and it is these informal norms, not the official legal rules, that bind.

This point explains why the Kohler Act and the decision in Pennsylvania Coal didn't make much difference. Even after the coal companies in the Scranton area won their challenge to the Act, they "behaved almost as if they had lost" because of "circumstances that married together the fortunes of coal companies and those of surface owners."\(^{22}\) The local economy depended on coal mining, so surface owners would have had some sympathy for the coal companies' needs. The companies, likewise, "must have been at least a little sensitive to the [subsidence] issue insofar as a caved-in city would make it difficult to hire workers and managers. One reason for the coal companies' desire to maintain 'good public relations,' as Mr. Milner put it, was simple economic rationality."\(^{23}\)

At this point, Fischel gives a nod, not his last, to Professor Robert Ellickson, whose study *Of Coase and Cattle*\(^{24}\) provoked Fischel to think about Coase and coal.\(^{25}\) Ellickson, much in the spirit of a legal anthropologist, went into the field

\(^{19}\) The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. State constitutional provisions are discussed by Fischel at various points. *See, e.g.*, Fischel, *supra* note 3, at 65-66.

\(^{20}\) Fischel provides bit-by-bit instruction in the meanings and concerns of efficiency throughout his discussion, beginning with definitions of terms like Pareto superior and Kaldor/Hicks. *Fischel, supra* note 3, at 65-66.

\(^{21}\) *Id.* at 5.

\(^{22}\) *Id.* at 42-43.

\(^{23}\) *Id.* at 43.


\(^{25}\) *Fischel, supra* note 3, at 24. Fischel gives favorable attention to a good deal of Ellickson's research in addition to the works cited *supra* note 24, particularly (but not exclusively) Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L.J. 385 (1977).
Ellickson chose Shasta County as the field site for his study because county officials had changed local law from an open-range to a closed-range system, thus providing an opportunity to evaluate Coase's hypothesis. What difference did the change make? Ellickson found that it made none, not because affected parties bargained around the law, as Coase would predict, but because they behaved without any regard whatsoever to the law or to the change in the law. No matter what the formal grazing regime in Shasta County was, it was an ongoing informal regime—a set of unwritten norms enforced by neighbors through various self-help measures—that consistently governed ranching practices in the area.

Fischel, provoked by Ellickson, did his own fieldwork and found, as described above, that just as extralegal norms controlled grazing practices in Shasta County, so they controlled mining operations in Scranton, never mind the law.

B. THE KEY IS "INTERNALIZATION" BY LOCAL RESIDENTS

As his story about Pennsylvania Coal suggests, Fischel believes (with Ellickson) that political, economic, and social pressures usually provide constructive constraints in those instances in which the benefits and burdens of economic and social activities fall on roughly the same people in roughly the same area (provided the people are members of a relatively small, close-knit group). In such cases, legal intervention is neither necessary nor sufficient: It isn't needed to resolve disputes, and it isn't likely to have much impact on social practices, whether or not those practices are formally "legal."

When benefits and costs are concentrated on relatively small groups of people with shared interests, governing bodies have little effective power to enact or enforce unjust or inefficient regulatory programs, because political pressures limit governmental excess and because economic and social forces can trump the government's ambitions anyway. It follows that, under the specified conditions, judicial review of alleged takings is largely unnecessary.

[hereinafter Ellickson, Suburban Growth Controls]; and Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681 (1973) [hereinafter Ellickson, Alternatives to Zoning]. Ellickson in turn provides a ringing testimonial to Fischel on the back of the dust jacket of Regulatory Takings, where he is quoted as saying that the book "establishes Fischel as the pre-eminent scholar of land use regulation." For Fischel's earlier work on zoning, see WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAW: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1985).

C. EVEN ABSENT A CONCENTRATION OF COSTS AND BENEFITS, THE MODEL PROVIDES A GUIDE

Suppose, however, that a regulatory measure is challenged as a taking and the court hearing the challenge concludes that the assumptions of Fischel's model don't hold because it thinks that some residents of City A (the enacting government) are realizing the benefits of the measure while other residents of City A, together with residents of other areas, are suffering the burdens. Fischel says his model can still play a role: In deciding the takings issue, the reviewing court should engage in a thought experiment, asking "what standards voters would impose if the economic effects fell on themselves." If the voters would impose the same standards, the court should accept the measures in question as reasonably fair and acceptably efficient regulations, not confiscatory takings.

D. ORDINARILY, THE ULTIMATE REVIEWING COURT SHOULD BE THE STATE'S HIGHEST COURT, NOT THE COUNTRY'S HIGHEST COURT

State courts are usually in the best position to judge the fairness and efficiency of land use controls because they "are closer to the action" than the alternative ultimate judicial forum—the U.S. Supreme Court. The latter should confine itself to keeping the state courts honest in their own attempts to keep state and local governments honest; the Supreme Court, in other words, should intervene only in egregious cases, ones in which the state courts themselves seem to be playing fast and loose—perhaps one should say slow and tight—with the norm of just compensation.

The four points highlighted above reveal the bare bones of Fischel's approach, which we are now prepared to examine more closely. That will get us back to Freund.

II. FISCHEL'S APPROACH TO REGULATORY TAKINGS

As should already be apparent, Fischel approaches the problem of regulatory takings from the standpoint of comparative institutional legitimacy and comparative institutional advantage. Subscribing to John Hart Ely's theory of appropriate judicial review in a democratic system, he argues for primary reliance on
the political process, and thus on the legislative branches, to constrain governmental regulatory activities—so long, of course, as the legislators themselves are acting democratically. Politics protects property well enough when politics works right; the job for judges is to ensure that it does work right. Because courts are better at policing the processes than they are at evaluating the products of legislative deliberations, the primary judicial concern should be to make certain that political insiders are not exploiting powerless outsiders—people who, for one reason or another, lack the ability to protect themselves (and their property) by standard democratic means.

Citizens affect political outcomes primarily through “voice” and “exit,” says Fischel.31 Voice refers to ways of influencing the political process through active participation—complaining to lawmakers, forming interest groups and lobbying, and voting against elected officials who are slow to listen. Exit entails aggressive nonparticipation. If cajolery and threats fail to persuade, disenchanted citizens can leave the jurisdiction for greener pastures. To exit is to vote with one’s feet. But exit is not a viable option for owners who believe that their land is, or is about to be, subjected to excessive government regulation. The asset of concern, being land, is immobile. (Sure, owners could sell their land and move away with the capital, but the selling price would be pushed down by the excessive regulation that is the concern in the first place.) Thus, voice becomes the only feasible alternative for landowners. Just as exit is a function of asset mobility, Fischel argues, voice is a function of the size of the governing unit. In “small republics,”32 chiefly towns and suburbs with little territory and small populations, the political process tends to be dominated by the majority of resident homeowners with shared interests in high housing prices and low property taxes. These homeowners want zoning controls to limit development (and exactions to tax it), and as the voting majority they are able to get what they want. The majoritarian politics of small governments generate land use controls that benefit residents while foisting costs on housing consumers who live elsewhere and on builders and the owners of undeveloped land (who, even if they are residents, are only a small minority).33 Large governments, on the other hand, are much less susceptible to the tyranny of the majority (and much more responsive to special interest groups). This is especially true of the federal


32. Fischel takes the language from James Madison, who applied it to the states (factions, Madison thought, were a problem in small republics but not in a large republic like the proposed federal government). But in Madison’s time, says Fischel, the median size of the 14 states was about the size of a city like Ann Arbor, Michigan (with a population of approximately 100,000). States, now so much larger, are no longer the problem in Fischel’s view; “municipalities are the current repositories of the majoritarian excesses about which Madison worried.” FISCHEL, supra note 3, at 105.

33. Robert Ellickson has earlier argued in the same vein. See Ellickson, Suburban Growth Controls, supra note 25, at 404-10.
government, and Fischel has "generally assumed that the states are like the federal government."34

Judicial deference to the land use controls of large governments (states, the federal government, big cities) is one of "three paths"35 by which Fischel approaches the problem of regulatory takings. The second path has to do with exactions, and the third with a variant of Freund’s harm/benefit distinction. Together these lead to the theory presented in the final chapter of Regulatory Takings.36 That chapter, built as it is on earlier parts of the book, is relatively brief, so I can be brief as well.

A. THE FIRST PATH: DEERENCE

As we have just seen, Fischel’s ideas about judicial modesty, immobile assets, and political process are the motivating themes behind the path of judicial deference to big governments. Close scrutiny of small governments is the flip side. As to governments in between, Fischel believes that courts should perhaps be suspicious of statewide land use measures enacted in little states like Hawaii, Oregon, and Vermont. But big cities, he concludes, "are apt to have pluralistic politics because of their large population and the resulting heterogeneity of interest groups. As such, landowners should generally fare better in the politics of such locales, and judges need to be more circumspect in upsetting the results."37 All in all, governmental size "could be a continuous factor to be entered into the necessarily factual judicial inquiry about takings."38

A related factor is political independence. To say that the big state and national governments deserve deference is not to say that all their agencies do. Agencies set up to govern special areas and special uses (e.g., a state coastal commission) are especially troublesome. Area isolation makes it harder for the owners of regulated land to form effective political coalitions, and usually the owners have no means of exit. The situation is in these respects much like the situation of local governments, so the standard of judicial review should be about the same.39 Fischel’s discussion of deference has more applications than

34. FISCHEL, supra note 3, at 328. In support of his views, Fischel argues that "higher-government" regulation entails lower demoralization costs and higher settlement costs than does local regulation:

Higher-government regulation is both more like an exogenous event—an earthquake rather than a personalized grab—and more subject to the logrolling of pluralistic politics. . . . [B]oth of these reduce the demoralization of apparently being singled out. General laws by definition involve large numbers of people, so the settlement costs of compensation are inherently high.

Id. at 329. The settlement-demoralization cost terminology is Michelman’s. See generally Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967). Fischel discusses Michelman’s work at length in Chapter 4, which is entitled The Economic-Utilitarian Theories of Michelman and Epstein. See FISCHEL, supra note 3, at 141-82.

35. FISCHEL, supra note 3, at 325.
36. Id. at 325-68.
37. Id. at 328.
38. Id.
39. Id. at 329-31. Judges, because they, too, are politically insulated, should be scrutinized—by the
those I have just sketched, but the sketch is sufficient to show the deference idea at work.

B. THE SECOND PATH: EXACTIONS

Exactions, as most readers will understand, are local government measures that require developers to pay certain fees or provide certain goods and services as a condition to getting their projects approved. Fischel says exactions were "pocket change" until about 1970. Developers were usually ready enough to pay for sidewalks, sewer connections, and the like, because these public goods yielded private benefits for their own projects. When communities wanted improvements that benefited everybody in the area generally—ones not so linked to satisfying service demands created by the new development itself—they relied on property taxes and government grants to provide the wherewithal. But today the situation is different, with exactions having become a common substitute means of funding.

The politics of the strategy are so obvious that one wonders why exactions weren't used earlier. Fischel suggests an answer, but it's partial at best and thus not very satisfying. "The source of exactions, and the major reason for their growth," he says, "has been the dramatic expansion of land use regulations since 1970." His well-taken point is that exactions are toothless without overlying regulations that limit development in the first place, so you need a lot of the latter to enable a lot of the former. Because there wasn't much tight-fisted land use regulation prior to 1970, there weren't many exactions either. Fine, but why did land use regulation itself begin to burgeon just a few decades ago? Fischel doesn't say.

Whatever the cause, the fact remains that exactions became so common and troublesome that the Supreme Court itself moved to constrain them with its decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. In *Nollan*, the Court held that there must be some logical connection—some "nexus"—between an exaction and the regulation excepted in exchange for it. Under this rule, writes Fischel, "a community could give an exception

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40. *Id.* at 331-32. Voter initiatives should get the same scrutiny as would the respective legislative body, meaning close scrutiny for local initiatives but not so close for statewide ones. But if a statewide initiative sets up an insulated agency or commission, "a higher level of takings scrutiny should apply to the commission's means of promoting its ends, but not to the general policies." *Id.* at 334. The key in these instances is whether landowners have sufficient means of appealing to democratic processes.

41. *Id.* at 341.

42. *Id.* at 342.


45. 483 U.S. at 837. In *Nollan*, the Court held that the California Coastal Commission could not require the owner of a beach house to grant a public-access easement over land running between the house and the ocean as a condition to getting permission to enlarge the house. The easement had no
to a leash law to dog owners who contributed to a clean-up fund, but it could not give an exception to dog owners who promised to paint their houses white.\textsuperscript{46} In Dolan, the Court went further, holding that even when a nexus exists, there must also be some "rough proportionality" between the thing exacted and the development permitted in exchange.\textsuperscript{47}

Fischel approves of Dolan's proportionality test, but thinks it should serve as a substitute for, not as an addition to, the nexus test of Nollan. Nollan's nexus requirement does keep governments from minting money—enacting regulations that it intends for no purpose other than exchange—but Dolan's test can accomplish the same thing and it has an additional virtue as well: It permits desirable deals that are foreclosed by the nexus requirement. Go back to the dispute between Nollan and the California Coastal Commission, and suppose that Nollan's proposal really had blocked a lot of the view and that such blockage were regarded as a loss of something valuable that the public owned. In this case, the coastal commission's proposed deal would seem reasonable on a proportionality test. But under the nexus doctrine, such a reasonable deal would nonetheless be struck down, because the surrender of the view would have no logical relation to the gain in pedestrian access to the beach.

Substituting the Dolan proportionality rule for the Nollan nexus requirement would not encourage adoption of excessive regulations. A regulation worthless to the public would, on the proportionality rule, require no exaction from the landowner to get rid of it. Hence it would be valueless in a bargaining game.\textsuperscript{48}

\textbf{C. THE THIRD PATH: HARMS, BENEFITS, AND NORMAL BEHAVIOR}

Fischel concedes that Dolan (or for that matter Nollan) does not compel regulators to drop any particular land use control measure; for that one needs an additional standard by which to determine the reasonableness of regulations.\textsuperscript{49} Here Fischel borrows from Freund, by way of Ellickson. Between the extremes of anything-goes land uses and anything-goes land use controls, argued Ellickson, there lies a middle range of "normal behavior" that requires landowners to be more considerate of neighbors than does the common law of nuisance, but

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\textsuperscript{46} Fischel, supra note 3, at 58.
\textsuperscript{47} Dolan, 114 S. Ct. at 2318-22.
\textsuperscript{48} Fischel, supra note 3, at 349. Another reason to replace Nollan, says Fischel, is that it encourages third-party suits: "A developer and a regulatory body may want to trade, but a third party might intervene on Nollan's nexus grounds." Id. If there is a problem with Dolan, it is that it invites suits in federal court by developers unhappy with local decisions, and "the floodgates may be hard to administer." Id. at 350.
\textsuperscript{49} Id. at 349.
not so considerate as to give up all use and development of their entitlements. The middle range of normal behavior is defined by community practice. Essentially, what most of the people in the area have done with their property is what all of the people should be able to do. Government regulations requiring them to do more than the norm are unreasonable, and private development projects proposing to do more than the norm are, too. The norm, however, is a range, as Fischel illustrates with a diagram like this:

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  “Subnormal”   “Normal”   “Supernormal”
  C   B   A   D
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The left side of the drawing stands for the most intense kinds of land uses, those least desired by neighbors. The right side represents the least intense kinds of land uses, those most desired by neighbors. Points A and B are both within the neighborhood norm. Landowners should be permitted to move from A to B, but they might have to pay something “in rough proportion” (à la Dolan) to the harm caused by their move toward (though not reaching) the subnormal. In exchange for a move to subnormal use C, though, “the zoning authority would be permitted to exact any concession or deny it [the move] altogether.” On the other hand, if owners are required to move from A to supernormal D, they should usually qualify for just compensation.

Fischel sees his (and Ellickson’s) normal behavior standard as a variation on the old harm/benefit test that Professor Freund stated as follows:

If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against.

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful ...

Fischel acknowledges the classic problem with Freund’s test, namely that it

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50. See Ellickson, Alternatives to Zoning, supra note 25, at 728-31; Ellickson, Suburban Growth Controls, supra note 25, at 468-69.
51. FISCHEL, supra note 3, at 353.
52. Id.
53. This holds true unless settlement costs exceed demoralization costs, and the move is also economically efficient. Id. Do the same rules hold if an ordinance requires a move from B to A?
54. FREUND, supra note 8, at 546-47.
begs the question of the baseline against which to measure harms and benefits: "[T]he terms harm-prevention and benefit-extraction are relative. Preventing the harm of hunger is providing the benefit of food; providing the benefit of a nice view is preventing the harm of an ugly one." But having noted the problem, Fischel dismisses it as sophistry: "It is cleverness of this sort by which economists read themselves out of the takings debate."

The trouble is, it wasn’t an economist who made the sophist’s argument; it was Frank Michelman, in an article that Fischel knows to be a major contribution. But never mind. "The question of the appropriate base point for compensation is not seriously addressed by saying that it all depends on how you phrase it." That is most surely true, but the problem still remains: On what does it depend? For Fischel, it depends on the way “ordinary citizens” act out their attitudes about appropriate land uses in their communities. What is normal is the norm.

Suppose, however, that community norms are in a state of flux, as of course they so regularly are:

Where does this leave the normal-behavior standard, wherein judges have to decide what is normal, when normalcy is not a constant? The key to the judges’ role is the level of government that adopts the new and higher standard of normal behavior. My idea is that the larger republics are more appropriate sources of declarations of what is normal behavior for property owners. This is not because I think state legislatures are unerring readers of the public pulse, but because they are no worse at it than judges.

III. PROBLEMS WITH THE PROCESS-THEORY APPROACH

Summing up Fischel’s theory, it amounts, I think, to this:

Politics protects property sufficiently when the political process works, but maybe not otherwise. Because the process commonly works in the case of large governments but regularly fails in the case of small ones, judges should usually be deferential to land use controls enacted by big republics and suspicious of those enacted by little republics. In any event, as judges review land use regulations (whether with relaxed or heightened scrutiny), they should accept as legitimate and noncompensable those regulations that, in light of prevailing community norms and practices, impose only “normal” constraints. If the standards of normal behavior are in flux or otherwise difficult to discern, judges should once again be ready to delegate the matter

55. Fischel, supra note 3, at 354.
56. Id.
57. See Michelman, supra note 34. The article, Fischel notes, “has dominated the academic discussion of the takings issue for more than a quarter of a century. No other area of constitutional law has such a durable leading article.” Fischel, supra note 3, at 141-42.
58. Fischel, supra note 3, at 354.
59. Id. at 354-55.
to the political process, on the same terms as before: Be respectful of big republics and wary of little ones.

So Fischel's take on takings is retrograde and avant-garde, all at the same time. The notion of normal behavior is, as we saw, an old one, rooted in the harm/benefit distinction articulated by Ernst Freund at the beginning of the century. The process approach to takings, on the other hand, seems to be the latest fad in the field, a favorite not just of Fischel's but of a number of other scholars. Such a combination of the old and the new could be regarded as odd or as novel, depending upon how one wants to color Fischel's contribution. Since I admire his work very much, I want to accentuate the positive. A novel approach, however, is not necessarily a successful one.

We can dispense with the harm/benefit half of Fischel's equation pretty quickly. In a recent essay, Glynn Lunney considers the harm/benefit test from a number of angles—most interestingly, perhaps, from the perspective of the misfeasance-nonfeasance distinction of tort law—and concludes that "the harm-benefit line should play no role in identifying compensable takings." One problem, a familiar one, that Lunney has with the harm/benefit test is that "it requires a court to discern whether any given government action should properly be characterized as preventing a harm or extracting a benefit." The difficulty, of course, is that a regulation can be arbitrarily viewed as either—unless, of course, there exists "some accepted standard of proper conduct." Here we might conclude that Fischel has the better of the argument, because he has a standard that is accepted: The "standard" is normal behavior, which by definition is "accepted" in the sense that it is defined in terms of general practices prevailing in a given community. And actually, I think, this "golden rule" probably serves well enough—let us ask no more nor less of our neighbors than we ask of ourselves—in settled situations. At least, I am ready to presume that it serves well enough in such instances because in the takings context "settled situations" are sufficiently rare to make debate about the golden rule standard pretty academic. Claims of regulatory takings arise most commonly when matters are unsettled—situations in which community practices are in a state of flux or otherwise unclear.

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61. For an up-to-date and very effective critical summary of the process-theory approach to regulatory takings, see William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 863-78 (1995), which discusses, among other articles, Fischel's earlier writings in the field.
62. Lunney, supra note 60, at 440.
63. Id. at 435; see also supra text accompanying note 55.
64. Lunney, supra note 60, at 435.
65. See supra text accompanying notes 57-58.
66. See FISCHEL, supra note 3, at 359 ("Normal Behavior Implies a Golden Rule").
Fischel, of course, is aware of this problem and deals with it in a manner that reveals the actual crux of his approach. When standards of normal community behavior aren't clear (and I am claiming that interesting contests usually arise only when they are not), judges should be inclined to defer to what the legislative body declares—provided that that body is attached to a big republic. For most purposes, then, everything turns on process theory in general and on Fischel's version of the theory in particular.

The trouble is that process theory—in general and in particular—is not going to win enough subscribers to establish it as the dominant way of thinking about regulatory takings. First of all, the process-theory approach to questions of judicial review is contentious just as a general matter. As Fischel knows, there are respected legal theorists who find it fundamentally wrongheaded; they will, accordingly, find Fischel's approach equally so, and I suspect that reaction will be fairly common among the relevant population of judges, lawyers, and scholars.

Second, and more to the point, even theorists who adhere to the process approach are going to differ among themselves about particulars; in fact, they already do, a point nicely illustrated by William Treanor's thoughtful recent essay on takings and the political process. Treanor develops arguments in support of an approach similar in spirit to many of Fischel's conclusions, but in the course of doing so he indicates a wide range of disagreements among process-theory takings practitioners. He argues, for example, and exactly contrary to Fischel, that landowners "are particularly well situated to secure compensation from majoritarian decisionmakers," citing the work of Dan Farber in support of this conclusion. So where Fischel sees little political power, other observers see a lot.

Treanor's differences of opinion are not limited to Fischel among process theorists. He considers the particular process-theory applications of all the chief contributors and finds significant problems with each. His own conclusion is

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67. See supra text accompanying note 59.
69. Treanor, supra note 61. The article addresses, among other works, an article of Fischel's that sketched some of the ideas later developed more fully in Regulatory Takings. See William A. Fischel, Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?, 67 CHI.-KENT L. REV. 865 (1991).
70. Treanor, supra note 61, at 863-64.
71. Daniel A. Farber, Economic Analysis and Just Compensation, 12 INT'L REV. L. & ECON. 125, 130 (1992) (asserting that landowners as a small group with high stakes have disproportionately great influence on political process); see also Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 MICHL. L. REV. 1892, 1895-96 (1992) (asserting that concentrated interest groups have advantage over dispersed groups when competing for property in legislative process).
72. See Treanor, supra note 61, at 869-76 (discussing, for example, Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985); Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENTARY 279 (1992); Saul Levmore, Just Compensation and Just Politics, 22 CONN. L. REV. 285 (1990)).
that "process failure is most likely [to] involve minority groups (as in the area of environmental racism) and the singling out of individuals or small groups of people."73 The job of the courts, says Treanor, is to protect these particularly vulnerable citizens—people who have little political power at any level of government, local, state, or federal. (It is worth noting that Fischel would accept that generalization, but not all the implications Treanor finds it to have. For example, on the specific issue of environmental racism cited by Treanor as a paradigmatic instance of process failure, Fischel says his "own view is that the political process seems to be handling this problem . . .".)74

While my purpose here has been simply to note rather than engage the arguments about where process theory points, I would like at least to mention a few concerns of my own. Fischel’s ideas about “large republics” strike me as much too neat and easy, too much in the nature of black letter law that makes matters simple only by oversimplifying. In general, I would think, voice is not nearly so handy a means of influencing higher levels of government as Fischel assumes. First of all, state and federal governments are more remote than are local ones; they are further away from the action and, more important here, from the actors. It is much easier to complain to the city council than it is the state legislature, let alone the Congress, a consideration that Fischel should (but I don’t see that he does) factor into the equation. Relatedly, the higher the level of government, the more general its lawmaking is likely to be—general in the sense that enactments will apply on a wholesale basis to a rather wide array of matters that are only roughly similar. This is significant, among other reasons, because it necessarily means that the interests of stakeholders are made diffuse, which in turn increases the difficulties of forming coalitions, which in turn decreases the effectiveness of voice.75

Conversely, and this is a point I owe to William Treanor,76 if large governments do have the process virtues that Fischel attributes to them, then what’s the problem in the first place? Landowners with little political power at the local

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73. Treanor, supra note 61, at 887.
74. FISCHEL, supra note 3, at 327.
75. This observation also suggests to me a reason that the scope of judicial review should expand directly with the level of government involved, rather than contract in the way Fischel suggests. The more general an enactment, the more likely there will be misfits as the law is applied to particular instances. Judicial fine-tuning, therefore, is called for in the name of fairness and, perhaps, for the sake of efficiency as well.
76. See Treanor, supra note 61, at 868-69.
level can simply “challenge adverse decisions at the state level.” So who needs judicial review? As I see it, this trenchant counter turns Fischel’s model back on itself.

It is for reasons like these that Fischel’s approach is unlikely to prove widely satisfying to students of regulatory takings. Rather than advancing the ball, Fischel, and the process theorists generally, tend instead just to move it laterally; disputes and disagreements that might before have been framed in one set of terms (for example, does a particular regulation “go too far”? will now, at most, be framed in another set (was the political process “working” here?) about which there is likely to be little (if any) more consensus than before. If the takings debate has been reshaped by the practitioners of process, it remains a debate nevertheless—about a seemingly intractable problem.

Regulatory Takings is nevertheless a notable achievement, in equal measure provocative, entertaining, and illuminating, as down-to-earth as so much takings scholarship is airy. These are refreshing virtues, and they are sufficient. Fischel himself says that “no one is likely to discover a Loretto stone, so to speak, that will unlock the secrets of the takings issue.” I like the pun, and I agree with the conjecture. Persistent puzzles are the very best kind, and the puzzle of regulatory takings will, I conclude, retain its place among them.

77. Id. at 868.
78. FISCHEL, supra note 3, at 325. The reference is to Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982).