Michigan Law Review

Volume 101 | Issue 6

2003

Consuming Government

Richard Schragger
University of Virginia School of Law

Recommended Citation

Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824 (2003).
Available at: https://repository.law.umich.edu/mlr/vol101/iss6/19

CONSUMING GOVERNMENT

*Richard Schragger**

THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES. By *William A. Fischel*. Cambridge: Harvard University Press. 2001. Pp. xi, 329. $45.

In his ambitious new book, William Fischel, a Professor of Economics at Dartmouth College, gives us a new political animal: "The Homevoter." The homevoter is simply a homeowner who votes (p. ix). According to Fischel, she is the key to understanding the political economy of American local government. By implication, she is the key to understanding state and national government as well.

Homeowners warrant special attention because "residents who own their own homes have a stake in the outcome of local politics that make them especially attentive to the public policies of local government" (p. ix). That is because local decisions — about how much to spend on schools or trash pick-up, for instance — directly affect home values in ways that most state or national decisions do not. The "homevoter hypothesis" is deceptively straightforward: decentralized, local governments provide a desirable balance of taxes and government services because the homevoter seeks to maintain or increase the value of her single largest asset — the family home (pp. 4-6). The homevoter explains why local governments "work better at providing local services than do larger-area governments" (p. x).

This plausible sounding thesis has its roots deep in the decentralizing tradition of public finance theory. The idea that multiple local governments provide government services more efficiently than does a centralized government originated with Charles Tiebout's seminal article, *A Pure Theory of Local Expenditures*.[1] Tiebout's solution to the problem of how to ensure the proper level of expenditures on public goods was to posit a market in public services. In his model, multiple local governments offer distinctive tax and spending packages, and "consumer-voters" choose to reside in jurisdictions that best fit their

* Associate Professor, University of Virginia School of Law. B.A. 1992, University of Pennsylvania; M.A. 1993, University of London; J.D. 1996, Harvard. — Ed. Many thanks to David Barron, Jon Cannon, Lee Fennell, Gerald Frug, Risa Goluboff, and James Ryan for their comments on previous drafts.

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

preferences, exiting those jurisdictions that do not.[2] The notion that consumers of public goods "vote with their feet" by choosing where to live has become something of an economic maxim.[3]

Fischel amply recognizes his debt to Tiebout (the book is dedicated to him): the homevoter hypothesis relies on the same market mechanism to monitor the fiscal decisions of local governments. Fischel's contribution is connecting the market in local services to a political account of local behavior driven by housing prices: Tiebout's "consumer-voter" becomes Fischel's "homevoter." The resulting portrait of the political economy of local government is one in which homeowners assess every local decision — from education policy to who moves in next door — for its impact on property values, which are defended at all costs.

In other words, the homevoter hypothesis is a portrait of the political economy of the suburbs and an account of the political behavior of the suburban voter. Much of the academic literature on the suburbs is critical, bemoaning the homogeneity and parochialism of suburban life, the decline of the city, and, more recently, the rise of sprawl.[4] Fischel, however, embraces the suburb, pointing out that more than half the American population now resides there (p. 15). And he turns what some would consider the suburb's leading vice — its residents' obsession with property values — into its leading virtue. In praising the ideal of decentralized, home-centered local government, Fischel rejects as unsound the entire panoply of progressive-minded, "good government" reform proposals of the last forty years: municipal consolidation, metropolitan property-tax-base sharing, education funding equalization, and metropolitan-area or statewide land use reform (pp. 1-3). Fischel argues that these reforms undermine the homevoter's incentive to invest in local public services because they sever the link between property values and government policy. Homevoters, Fischel claims, favor locally funded and provided public services because local services are an investment in their primary asset. If they do not see a return on this investment, they will stop investing. Indeed, the homevoter's desire to increase the value of her

2. *Id.* at 419.

3. As Fischel notes, "The metaphor 'voting with one's feet' is older than Tiebout's economic exposition of it. (Tiebout did not actually use the term.)" P. 73.

4. There is an extensive literature critical of the dominant American model of suburban development. *See, e.g.*, ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994); PETER DREIER ET AL., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY (2001); ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (2000); JAMES KUNTSLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MANMADE LANDSCAPE (1993); MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY (2002); NEAL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD (1993); DAVID RUSK, CITIES WITHOUT SUBURBS (2d ed. 1995).

property results in "a race to the top in public education and environmental protection instead of, as is commonly alleged, a race to the bottom" (p. ix).

There is certainly something about Fischel's account. The suburbanite's obsession with property values has been often observed, and the suburban voter seems to dominate local, state, and even national politics. This may be why she has been so successful at resisting efforts to reform the existing fragmented system of local government. Nevertheless, the homevoter hypothesis is highly stylized as a descriptive matter. In the first place, it is difficult to pin down precisely where the homevoter lives. Fischel quickly eliminates cities as either relevant or important as a matter of local political economy because (as he argues) only a small percentage of Americans live there.[5] In light of the important role urban centers play in generating and controlling regional (not to mention global) cultural, financial, and political capital, this marginalization of cities should be controversial in itself. But even if one puts cities aside, it is not clear that most homeowners act like rational property-value-maximizing agents all the time, or that most local governments can or do cater to their desires. The political economy of local government is complex, and Fischel's model often fails to take into account the varied motivations of local actors and the actual powers of local governments.

To the extent that Fischel does capture a subset of the suburban political economy, one then has to ask whether this is an attractive form of local governance. Fischel likes — and wants us to like — the homevoter. His normative claims, however, are just as stylized as his descriptive ones. In a local political economy premised on property values, virtually all the homevoter's energy is directed towards guarding the jurisdictional gates of her community. Fischel recognizes that homevoters are also NIMBY ("Not-In-My-Backyard") voters (pp. 8-10), and he offers some suggestions in his last chapter to suppress bad homevoter motivations. He is seemingly less aware of the distributional consequences of a political economy that gives the homevoter almost unfettered control over who gets to move in next door and that reduces significantly the options for those who are barred. The losers in the interlocal competition for low-cost, high-tax-base homeowners — the urban poor, racial minorities, families in search of affordable housing, the elderly — are nowhere to be found in his account of local power.

I begin my Review by describing how Fischel's economic and political theory generates a privatized account of local government, one in which public services are distributed according to ability to pay.

5. *See* p. 15. Fischel observes that "[o]nly about a quarter of the U.S. population lives in a municipality with more than 100,000 people," and (more provocatively) that "big cities by themselves are not all that important anymore." P. 15.

Part II highlights some of the descriptive limitations of this account. Part III shifts to normative ground, focusing on the losers in the "property-values game" — namely those residents who are undesirable from a public finance perspective. Part IV turns to the most significant public service that local governments provide — primary and secondary education — and examines Fischel's argument that education is properly funded through local property tax revenues. Parts V and VI describe how suburbanized local government has become a constitutional value, and challenges the conception of local autonomy that equates self-government with consumption. Part VI also suggests that an alternative to our current localism — one that takes into account the interlocal costs of decentralized decisionmaking — is virtually unavoidable. I conclude with some thoughts about why the market model of local government continues to be so attractive despite its limitations.

I. THE ECONOMICS OF PRIVATIZED LOCAL GOVERNMENT

Fischel describes and defends a market mechanism for the distribution of public services. Local government works well because there are multiple local governments offering many tax and spending packages, and because these tax and spending decisions directly affect people's pocketbooks through their home values. These are the key elements of the homevoter hypothesis: Tieboutian competition among various local governments and capitalization of local government policies into residential property values (Chapter 3). The bottom line for Fischel is that the provision of local public goods approximates a market. The consequence of the market is that public goods are distributed (as in markets for private goods) according to one's ability to pay.[6]

To understand this market model of local public services, we have to begin with Tiebout's theory of local expenditures. Tiebout's device for properly allotting public goods was migration: "Moving or failing to move replaces the usual market test of willingness to buy a good and reveals the consumer-voter's demand for public goods."[7] In order for consumer-voters to "vote with their feet," Tiebout posited that there were a large number of communities in which a consumer-voter could choose to live, that she would have full knowledge of her avail-

6. Economists have contended for quite some time that the local public economy resembles a market. *See, e.g.*, Bruce Hamilton et al., *The Tiebout Hypothesis and Residential Income Segregation*, *in* FISCAL ZONING AND LAND USE CONTROLS 101 (Edwin S. Mills & Wallace E. Oates eds., 1975) ("There is a growing consensus among economists, the courts, and the public that local public services, most notably primary and secondary education, are distributed largely according to ability to pay. In the language of economists, the local public economy resembles a market.").

7. Tiebout, *supra* note 1, at 420.

able options, and, most of all, that she would not be limited by resource constraints, employment opportunities, or other constraints on her ability to relocate.[8] Tiebout assumed perfect mobility because without it consumer-voters could not "exit" a jurisdiction that was not providing the preferred combination of taxes and public goods.

The assumption of perfect mobility is easily criticized as unrealistic,[9] though it can serve as a useful ideal in pursuing redistributive policies. If one's goal is Tieboutian efficiency, one might seek to adopt policies that increase individuals' ability to choose where to live.[10] Fischel, however, following on the heels of work by economist Bruce Hamilton,[11] has mostly jettisoned the idea of perfect mobility. Indeed, in his modified Tieboutian world, local governments must be able to restrict new in-migrants by limiting or eliminating the provision of new housing.[12] It is *restrictions* on mobility that are necessary for the system to function (p. 51). These restrictions come in the form of zoning laws, which allow existing homeowners to put up (often impenetrable) barriers to entry of newcomers. So-called "fiscal zoning" — minimum acreage requirements, minimum square footage requirements, and outright limitations on multi-family housing — is a common (and much condemned) suburban strategy to limit development and ensure that newcomers purchase a minimum level of housing. Fischel makes fiscal zoning the linchpin of his political economy (pp. 51-57).

Zoning is critical for maintaining the link between property values and the quality of local public services because it allows "homeowners to control net additions" to the jurisdiction (p. 52). Here is how it works: On Fischel's theory, home prices reflect the good and bad policies that local governments adopt — in economic terms, local taxing and spending decisions are "capitalized" into house values. This is a good thing, because it gives homevoters a strong incentive to monitor local behavior and invest in those amenities — like schools — that will maintain or contribute to higher property values. In the per-

8. *Id.* at 419.

9. *See, e.g.*, Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420 (1990) [hereinafter Briffault, *Our Localism: Part II*] (criticizing mobility thesis); Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93 (1981) (stating that the Tiebout model "involves a set of assumptions so patently unrealistic as to verge on the outrageous"); *see also* Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998) (challenging the assumptions of the Tiebout model).

10. *See, e.g.*, Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607 (1997) (arguing in favor of region-wide wealth redistribution to encourage individual choice at the local level).

11. *See* Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, *in* FISCAL ZONING AND LAND USE CONTROLS, *supra* note 6, at 13.

12. *See* p. 51. Tiebout's original model does include reference to zoning as a mechanism for preventing over-migration into any one community, though Tiebout assumed that there would be no resource constraints preventing the creation of new optimally sized communities offering similar amenities. *See* Tiebout, *supra* note 1, at 420.

fect homevoter world, if a local government raises property taxes to build a new high school, that tax increase should be offset by a corresponding increase in the homevoters' property values (pp. 47-51). But for capitalization to work, existing homeowners must own a scarce and desirable item that they can sell on the housing market — not just a home, but a home in a particular jurisdiction that has recently invested in a new high school.

Zoning, and the entire regime of land-use controls, is the mechanism for ensuring scarcity. Zoning restricts the development of new housing in the jurisdiction, thus ensuring that all the benefits of local investment accrue to existing homeowners in the form of increased property values. It makes buying a house of a certain value a prerequisite for entry into the jurisdiction, ensuring that the cost of new entrants is offset by what they pay in property taxes. And it controls for overcrowding, ensuring that local public goods that are susceptible to overuse (like a school) are not devalued by congestion (pp. 51-59).

The housing market is thus the engine for the distribution of public services. The device for pegging property values to the quality of local public goods is zoning, which provides residents with a collective property right to exclude others from the jurisdiction analogous to their individual property right to exclude others from their homes (p. 54). On this model, the local public schools and other "public" amenities of the jurisdiction are not "free" at all; they have been paid for up front through the price of one's home (pp. 40-42). The homevoter's goal is good services at lower cost, and because both taxes and the quality of services will be capitalized into the value of the home, the homevoter can immediately see how her local government is doing. Higher house prices indicate lower taxes and better public services; lower house prices indicate higher taxes and worse public services. The market discipline of house values compels homevoters to seek out and encourage the former rather than the latter.

II. LOCATING THE HOMEVOTER

The central idea of the homevoter hypothesis, then, is that property values and local government tax and spending decisions are fused. The distribution of public goods hitches a ride on the private housing market and the distribution of combined housing/local government products can proceed as do all fairly competitive markets. This model functions, however, only by making a number of fairly heroic assumptions about the efficiency of the housing market and the behavior of homeowners and local government officials. First, both the good and bad effects of local decisions actually have to be capitalized in property values; second, local government officials must be able to control for local fiscal effects and be able and willing to respond to homeowners' desires; and third, homeowners must prioritize property values above all else.

Fischel's first claim — that local government decisions are reflected in house values — has intuitive appeal. Anyone who has ever purchased a home knows that the price of a particular house reflects a myriad of characteristics of the neighborhood, such as the quality of local schools or the availability of local amenities. Capitalization is not a foregone conclusion, however. If capitalization of tax and spending decisions is low, the incentives for local monitoring weaken or disappear altogether, and the homeowner's fiscal incentives are dramatically muted.

In fact, capitalization studies have been somewhat mixed, enough for one author to write recently that "[a] continuing debate questions whether capitalization of taxes and public services into house price occurs."[13] As Fischel recognizes, even optimistic accounts of capitalization require that localities enforce rigid limits on new housing production (pp. 51-52). Without land use limitations, developers will respond to the increased demand for housing in the more desirable jurisdiction by building there, thus increasing supply and erasing any capitalization gains.[14] Capitalization, in other words, may be more significant in nondeveloping, old-line suburbs, like those found in the Northeast, but much less so in the growth belts of the South and the West, where there is ample room for development. This means that as a descriptive matter we need to know something about local housing markets to know if home values are a good barometer of local behavior.

The effect of local government behavior on property values becomes even more difficult to assess once one tries to establish a link between house values and specific local government policies. Fischel's second assumption is that local government officials have the fiscal ability and political power to respond to downward shifts in home values. As a matter of state law, this simply may not be the case: local governments are often constrained by state constitutional or statutory limitations in their ability to raise taxes, assume debt, or otherwise alter their mix of taxes and services.[15] Moreover, for house prices to serve as a meaningful discipline on local government behavior, there must be a visible one-to-one relationship between the costs and benefits of a local decision. The decision to build a new performing arts

13. David M. Brasington, *Edge Versus Center: Finding Common Ground in the Capitalization Debate*, 52 J. URB. ECON. 524, 524 (2002).

14. *See id.* at 526.

15. These include state taxing ceilings, debt limitations, and unfunded mandates. *See* DANIEL MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 243-48, 265, 347-49, 389-92 (2002); MARK SCHNEIDER, THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA 41 (1989) (discussing "intergovernmental rules and regulations restricting both the flow of money into the community and its freedom to design the service/tax product mix it wants to offer").

center, invite a job-creating industry into the locality, or license a local landfill has to include all the decisions' costs and benefits. Yet in each of these cases, it is probable that the full costs and benefits of the local decision are not borne solely by the residents of the jurisdiction. Users of local amenities regularly cross borders to do so, and the costs of local siting decisions regularly fall on neighboring jurisdictions.

The existence of externalities means that the quality or availability of "local" amenities is often beyond the control of a specific local government or the homeowners who vote within it. Fischel tends to treat localities as isolated, autonomous actors: the hypothesis works because homevoters — like corporate shareholders — can trace the value of their housing investment directly back to the decisions made by the locality. But much of the value of one's housing investment — negative or positive — might very well turn on the specific decisions, activities, or fiscal health of neighboring jurisdictions.[16]

Fischel has no place in his political economy for interlocal or regional effects. He seems to assume that the costs and benefits of local decisions stay within the jurisdiction, are captured by housing prices there, and thus can be rationally accounted for by home-owning residents when they and their elected representatives make local political decisions. Yet if regional or interlocal spillover effects dominate home values, then local governments may have little ability significantly to affect the primary determinants of shifting property values.[17]

Fischel's shareholder analogy assumes not only that local office-holders are capable of responding to homevoter pressure to maintain or improve home values, but that they are also *willing* to do so. Once again analogizing local governments to corporate firms, Fischel argues that local office holders serve as "deliberate, value-maximizing agents" (p. 220) of their homeowning constituents. Fischel claims that in contrast to larger jurisdictions like big cities, where special interests are able to exercise significant political power, the majority tends to get what it wants in small-scale residential jurisdictions dominated by homeowners (p. 87). The politics of local government, Fischel claims,

16. For example, there is increasing evidence that a fiscally weakened central city depresses both the local urban economy and the surrounding suburban economy. This finding lends support to those who have advocated cross-border revenue sharing on the theory that "[e]conomies don't stop at the city's edge." *See* Andrew F. Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS: 2002, at 45, 45-46 (William G. Gale & Rothenberg J. Pack eds., 2002).

17. Indeed, macroeconomic conditions such as large-scale shifts in employment — something local governments have little control over — may have more to do with local fiscal health than the specific taxing and spending decisions of local governments. *See* SCHNEIDER, *supra* note 15, at 40-41, 130-31 (observing that "policy effects are often quite small compared to the importance of demographic factors"). After studying a range of strategies suburbs employ to obtain higher service-to-tax ratios, Schneider concludes that "[a]t bottom line, local government policies are relatively ineffective in producing the outcomes local actors want." *Id.* at 210.

is the politics of the "median voter," and the median voter in the suburbs is the homevoter. Local officials have learned that they neglect these constituents at their peril.

This description of homeowner majoritarianism is certainly contrary to those who have a more skeptical view of the motives of government bureaucrats.[18] Though there is some evidence that small-scale jurisdictions follow a median voter model, Fischel is too quick to dismiss the influence of developers, commercial interests, and local elites on the politics of small places.[19] These actors have a significant stake in local decisions that makes them particularly eager to influence local decisionmakers, and that may make small localities more susceptible to what Clayton Gillette has called "one-sided" bargaining.[20] In local jurisdictions that contain large institutional or commercial players, or significant owners of vacant, developable land, homeowners may play a less dominant role.[21]

Indeed, Fischel's home-based, suburban politics sounds somewhat nostalgic in an America that is increasingly dominated by large, urbanized metropolitan regions. While Fischel's claim that most Americans live in municipalities with less than 100,000 residents may be formally true, the size of any particular municipality seems beside the point. In fact, the bulk of Americans live in large metropolitan

18. One model asserts that public officials are primarily interested in expanding their own budgets as a way of aggrandizing their power. *See, e.g.*, ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 5-12 (1971); AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (4th ed. 1984).

19. For a case study that takes into account the elaborate politics of one suburban county, see Stephanie Pincetl, *The Politics of Influence: Democracy and the Growth Machine in Orange County, U.S.*, *in* THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES TWO DECADES LATER 195 (Andrew E. G. Jonas & David Wilson eds., 1999) [hereinafter THE URBAN GROWTH MACHINE].

20. Clayton Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law*, 67 CHI.-KENT L. REV. 959 (1994).

21. As Fischel observes, the dominant literature asserts that local politics tends to be driven by prodevelopment elites in a quest to expand the local economy and accumulate wealth. P. 15. *See* Harvey Molotch, *The City as Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976). Molotch, who invented the "growth machine" thesis, continues to adhere to it, arguing that "[w]hile we tend to think of neighborhood leaders, environmentalists, and 'no growthers' as inciting conflict over land use issues, it is the developers who are the omnipresent activists. That we think of developers' maneuvers as the baseline of urban process, rather than as 'disruption' or even 'activism,' shows just how much we take their political presence for granted." Harvey Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFF. 29, 32 (1993). There is some evidence that the ability for a locality to resist the political pressure brought by prodevelopment elites may depend significantly on its residents' education and income level. *See* John R. Logan et al., *The Character and Consequences of Growth Regimes: An Assessment of Twenty Years of Research*, *in* THE URBAN GROWTH MACHINE, *supra* note 19, at 73, 81-83. Fischel concedes that "developers and their allies are active players in municipal affairs even in small cities." P. 15.

areas with effective populations much greater than 100,000,[22] are participants in regional political economies, and are subject to regional political pressures that have not respected formal jurisdictional boundaries for quite some time.

Homeowners are unlikely to be the dominant political force in these metropolitan regions. As commentators have pointed out, many formally "residential" locales now contain more office or retail space than nearby central cities.[23] This emergent "post-suburban" metropolis — an interdependent mix of "business, retail, housing, and entertainment focal points scattered about the low-density cityscape"[24] — requires a redefinition of "city" and "suburb" and a more nuanced portrait of local politics along the urban-suburban fringe than Fischel's model provides.

Moreover, even in small-scale, predominantly residential locations, homeowners may have more complicated motives than Fischel acknowledges. The last critical assumption of the homevoter hypothesis is that homeowners prioritize wealth maximization in the form of higher property values above all else. Putting aside for a moment the general validity of Fischel's public choice assumptions,[25] it is not clear that homeowner interests are exhausted by property wealth maximization. Certainly, property values are important to the suburban voter, but, as Fischel observes (with some puzzlement), many homeowners even object to property-value-*enhancing* local decisions (p. 9). Fischel has to explain this "irrational" resistance as an example of risk aversion — homeowners simply cannot be certain whether a local policy decision will have adverse effects. Because their homes are their single largest assets, homeowners are going to err on the side of caution and

22. Fischel's choice of a "rough threshold" population size of 100,000 at which homeowners stop being politically effective, p. 92, seems at best arbitrary and at worst an attempt to save his model from being descriptively irrelevant for a significant percentage of the American population. The overwhelming majority of Americans live in metropolitan statistical areas with populations of more than 250,000. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 2001, tbl.29; *see also* WILLIAM FREY ET AL., AMERICA BY THE NUMBERS: A FIELD GUIDE TO THE US POPULATION 68-69 (2001) (fewer than 25% of Americans live outside an "urban" area).

23. *See* JON TEAFORD, POST-SUBURBIA: GOVERNMENT AND POLITICS IN THE EDGE CITIES 165 (1997).

24. *Id.* at 1 (internal quotation marks omitted). As Teaford observes, "Basic to the emerging post-suburban polity is the tension between suburban ideals and post-suburban realities." *Id.* at 5. For additional accounts of the post-suburban reality, see ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA (1987), and JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1991).

25. Fischel adopts the public choice assumption that individuals vote their material interests. For a recent summary of the arguments questioning the rational-actor assumptions of public choice theory, see Edward Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out that Baby*, 87 CORNELL L. REV. 309, 320-21 (2002).

reject most local government policy changes that have uncertain effects (p. 10).

This explanation avoids other, perhaps more obvious, possibilities. Even a rational homeowner may be more sensitive to a significant short-term rise in property taxes that follows from increased property values than to underinvestment in long-term municipal services, like the school system.[26] It is fairly common for local majorities to reject school bond issues even though an investment in schools should bring concomitant benefits in property values, perhaps because homeowners cannot calculate the value of the long-term investment, or simply do not want to pay higher taxes in the short term. More significantly, the homeowner may fail to treat her home as a commodity altogether, but choose instead to enhance its personal value at the expense of its market value.[27] A homeowner may "rationally" reject a property-value-enhancing new development project because she prefers to retain the rural quality of her neighborhood, is sensitive to issues of sprawl, or is simply uncomfortable with the pace of change in her neighborhood.

In short, the homevoter only exists to the extent that homeowners have the capacity and desire to act like ideal (profit-maximizing) corporate shareholders, that local officials have the capacity and desire to act like ideal corporate boards, and that both have a suitable mechanism in property values to judge the profitability of their collective enterprise. Local citizens and their officials are too imperfect — and most local communities are too complex and fluid — to be captured by this construct.

III. THE PROPERTY VALUES GAME

Undoubtedly, some residential communities come closer than others to Fischel's ideal of the shareholder-value-enhancing corporate enclave. Indeed, though his model is highly stylized, Fischel has captured a central characteristic of the suburban political economy: the fact that local public services are increasingly being distributed according to ability to pay. Recall that in a homevoter-dominated local government, house price serves as the cost of entry into the jurisdiction and buys locally provided amenities and the right to control (through zoning) the price charged to new entrants. Land use laws

26. *See, e.g.*, Bev McCarron, *School Board Nervous About Budgets — Many Districts are Asking Voters to Accept Higher Taxes or Live Without Some Programs*, NEWARK STAR-LEDGER, Apr. 14, 2002, at 21 (reporting that state budgetary shortfall has put New Jersey towns in the awkward and unpopular position of having to raise property taxes and quoting one borough council member as saying: "They are split down the middle. People on fixed income are not going to go for it.").

27. *See, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing personhood value of one's home).

ensure that potential in-migrants who cannot afford the price do not gain entry into the jurisdiction. The homevoter hypothesis captures the mechanism by which suburban local government has essentially become privatized.[28]

The immediate objection to allocating local public goods based on ability to pay sounds in distributive justice. Fischel is so intent on proving that dramatic interlocal differences in service provision and tax rates are not "unfair" because those differences are reflected in house prices[29] that he ignores the more thoroughgoing objection that the quality of local public services should not be a function of house price *at all*. The commodification objection states that certain basic public goods like education, environmental quality, sanitation, housing, and policing should be provided on a relatively equal basis regardless of individuals' private resources. The normative intuition that it is unjust to distribute public services based on ability to pay animates the fair housing, school funding equalization, and environmental justice movements.

But one can put aside this more global critique and still question the desirability of the homevoter model. The test of the homevoter hypothesis — and the one that Fischel sets for himself — is whether

28. The closest real-world analog to Fischel's hypothetical local government is one he barely mentions: the private residential community association or homeowners association. Perhaps the most popular form of residential development in the United States today, *see* ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 5 (1992) (observing that 30 million Americans were subject to RCA governance in 1992, with that number expected to double in less than 15 years), homeowners associations tend to be fully residential, homogenous along socioeconomic and racial lines, relatively self-contained, and increasingly self-sufficient. *See id.* at pp. 61-103. Members "buy into" the community by purchasing property there, which gives the members access to local amenities and subjects them to an often elaborate array of covenants, rules, and regulations ("CC&Rs") that govern the use of individual and common property within the association. Moreover, in most states, voting rights for association boards of directors are distributed based on members' property ownership interests. *See* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1543 (1982). Homeowners associations are explicitly committed — in both name, institutional structure, and purpose — to protecting the interests of their homeowning residents. If the homevoter can be found anywhere, it is there.

Fischel's failure to embrace this obvious haunt of the robust homevoter is somewhat puzzling. If local public services are distributed according to market criteria then why not dispense with public local government altogether and let the private sector provide local amenities, as others who have written in the Tiebout-inspired tradition have suggested? *See id.* Fischel never arrives at that conclusion, perhaps because he believes that homevoter-dominated governments are already the equivalent of homeowners associations. In a homevoter-dominated local government, as in a homeowners association, house price serves as the cost of entry into the jurisdiction and buys locally provided amenities and the right to control the price charged to new entrants.

29. *See* pp. 40-42. Fischel explains that he served as an expert witness in the New Hampshire school funding equalization case, *Claremont v. Governor*, 703 A.2d 1353 (N.H. 1997), arguing on behalf of the state-defendant that high local tax rates were not "unfair" to taxpayers because they were offset by lower house prices. Pp. 40-42.; *see also* William A. Fischel, *Home is Where Our Interests Are: The Way We Value Houses from Town to Town is Fairer Than You Might Think*, BOSTON SUNDAY GLOBE, Apr. 14, 2002, at E1.

the current structure of home values local government encourages citizens to act in socially desirable ways (pp. 16-18). Whether one understands social desirability in efficiency or distributional terms, Fischel's endorsement of the homevoter's political economy is normatively troubling.

Indeed, Fischel's praise for the homevoter is somewhat puzzling in light of the fact that her political economy is based on the legal right to exclude. Local government works for the homevoter only because she has been empowered to keep lower-income, higher-cost newcomers out of her neighborhood: her incentives are explicitly defensive and separationist. His praise is even more puzzling when one considers the litany of costs that flow from the homevoter's defensive posture: the sprawling, inefficient use of land and associated costs in terms of infrastructure investment, commuting times, social isolation, and environmental quality; the concentration of the poor in urban cores with dwindling tax bases and reduced city services; and the extreme segregation of Americans by race and income.

These costs have been amply described by critics, and I cannot possibly recount them all here.[30] But it may be a useful antidote to Fischel's optimism to focus — at least briefly — on a few of the losers in the "property values game." While Fischel acknowledges from the start that the homevoter is the NIMBY voter (pp. 9-10), and that there are costs associated with inefficient, low-density development (pp. 229-32), he has comparatively little to offer those concerned about racial and income segregation and the plight of postindustrial cities. Racial minorities and the urban poor do not fare particularly well under the homevoter hypothesis.

Indeed, the book's most glaring omission is any sustained treatment of race as a component of the homevoter's political economy. In reviewing the history of the municipal corporation and the development of zoning, Fischel fails to note how suburban local governments were explicitly racialized from their inception.[31] Developers, banks,

---

30. For critiques from legal scholars, see FRUG, *supra* note 4; Briffault, *Our Localism: Part II*, *supra* note 9; William Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

31. Fischel's failure to mention racism as a factor in the development of zoning seems almost willful. Though he identifies apartment buildings as "threats" to the "autonomous character" of the suburbs, p. 213, and observes that "[b]y the 1920's, zoning was the only practical way to protect residential neighborhoods from the newly footloose industrial and apartment developments," p. 215, he studiously avoids one of the primary motivations for limitations on multi-family housing: the race or ethnicity of the people who might occupy it. For discussions of zoning's racialized origins, see CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 193-209 (1977), and Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 603-14 (2001).

and federal and state lending agencies drew explicit racial lines around new suburban developments, which were sold as buffers against the ethnic and black masses of the city.[32] Nor does he mention that homevoters still remain overwhelmingly white. Homeownership is heavily correlated with race: in 2002, 74.5% of non-Hispanic whites owned their homes, but only 47.3% of blacks, and 48.2% of Hispanics.[33] And finally, Fischel does not mention how suburban local governments have provided the jurisdictional opportunity necessary for whites to flee the central cities.

Perhaps Fischel does not address white flight directly because it is an embarrassment for the homevoter hypothesis. By hitching a ride on the housing market, a local political economy based on property values smuggles in all the values of that market, benign *and* pernicious. Fischel tacitly assumes that market values will be positive — that policies that increase house prices will be socially beneficial ones. But, of course, the market's values need not be benign at all, and in the case of race, have proven not to be. As Richard Ford has persuasively argued, even in the absence of discriminatory intentions, the current structure of locally funded public services can lead to (and does further entrench preexisting) segregation.[34] When the property tax is the primary means of funding local services, homeowners have a powerful incentive to exclude lower-income, higher-cost newcomers. Because race is correlated with income, it may be market-rational for the homevoter to use race as a cue for higher cost.[35] This incentive is amplified if the bulk of the home-buying population is even mildly racist or maintains a preference to be the majority race in a particular jurisdiction. Because she will want to cater to the largest segment of homebuyers, the homevoter will want to be aware to what extent the housing market values skin color.[36] Binding local services to property values reinforces the financial gains of segregation.

Fischel briefly argues that racially and economically heterogeneous local governments are possible because diversity might be a selling point for certain homebuyers (pp. 68-70). These well-meaning homebuyers, however, are taking an extraordinary risk that the market will value diversity independently from the fiscal signals that having racial

32. *See* Peter L. Abeles, *Planning and Zoning*, *in* ZONING AND THE AMERICAN DREAM 122, 132-34, 137 (Charles M. Harr & Jerold S. Kayden eds., 1989).

33. *See* U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2001, tbl. 20 (2001).

34. Ford, *supra* note 30, at 1849-57; *see also* Alex Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995).

35. Ford, *supra* note 30, at 1853-54.

36. *Cf.* Jan Brueckner & Man-Soo Joo, *Voting With Capitalization*, 21 REG. SCI. & URB. ECON. 453, 464 (1991) (arguing that the voter's ideal level of public spending reflects a blend of his own preferences and those of the eventual buyer of his house).

minorities in the neighborhood sends. Permitting racial minorities to enter the jurisdiction will tend to lower existing owners' property values, either because these lower-income arrivals actually increase the costs on existing owners without offsetting benefits, or because these minority arrivals are *perceived* to increase costs on existing homeowners. Moreover, the market in diversity is a limited one: when asked to define an "integrated" community, whites generally respond with 20% minority; blacks consider "integration" closer to 50%.[37] The difference in perceptions shows up in the housing market as a tipping point: black in-migration has to be capped at the lower preference or there will be no residential mixing at all because even whites with a preference for integration will exit before blacks with a preference for integration are satisfied.

The current extreme segregation of American metropolitan regions owes a great deal to the power of localities to restrict in-migrants based on income. Urban cores and inner-ring suburbs contain the bulk of racial minorities (and lower-income persons), while outer-ring suburbs are almost completely white or, in the few cases of affluent black suburbs, almost completely black.[38] Despite this obvious demographic evidence, Fischel has an almost utopian faith in the housing market to sort everything out. Mentioning three moderately integrated communities, Fischel declares that "the casual evidence is that [racial integration] has done nothing bad to their housing prices" (pp. 69-70). The "casualness" of the accepted evidence is a somewhat telling statement from an author who is not normally shy about invoking empirical evidence to support his contentions. In truth, the very paucity of integrated communities belies their market success.[39]

What the demographic evidence does show is the separation and concentration of races into homogenous suburbs and declining, post-industrial (largely minority) cities. For Fischel, the housing market is

37. *See* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1987 (2000).

38. *See* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001); *see also* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). As Edwin Mills and Wallace Oates observe, the "Tiebout model implies powerful tendencies toward segregation by income level." Edwin S. Mills & Wallace E. Oates, *The Theory of Local Public Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, *in* FISCAL ZONING AND LAND USE CONTROLS, *supra* note 6, at 5 [hereinafter Mills & Oates, *The Theory of Local Public Finance*].

39. While it is true that segregation levels between blacks and non-blacks have been decreasing since the 1970s, the rate of decline has been "glacial." Cashin, *supra* note 38, at 738-39 ("It would take another seventy-seven years for ... [northern metropolitan areas] just to reach the upper bound of the range for moderate segregation."). Even optimistic accounts of desegregation note that "[t]he large number of metropolitan areas with extremely high levels of segregation remains quite striking." EDWARD L. GLAESER & JACOB L. VIGDOR, RACIAL SEGREGATION IN THE 2000 CENSUS: PROMISING NEWS 4 (Brookings Institute, Survey Series, April 2001).

the answer to the latter's woes as well. Take Camden, New Jersey, for instance. Camden, along with the neighboring suburb of Mount Laurel, was the setting for the New Jersey Supreme Court's famous *Mount Laurel* decision outlawing suburban fiscal zoning.[40] In the case of Camden, middle- and upper-income white (and some black) families fled to the suburbs, leaving behind poor and service-needy minorities in an increasingly resource-starved city. Fischel argues that this "death spiral" — decreasing revenue resulting in increased taxes leading to further decreases in revenue — is cut short by the housing market (pp. 152-53). According to Fischel, housing prices will bottom out in towns like Camden and savvy buyers will purchase houses there because those houses will be affordable compared to the surrounding jurisdictions. As Fischel writes: "[P]rice cures all" (p. 153).

Price does not cure all, however, in a world of sprawl. It is not at all clear that urban housing has a price advantage in light of the relative ease of developing cheap land in the expanding suburbs. Nor is "price cures all" a real answer for the citizens living in a jurisdiction like Camden while they await a market upturn. Fischel correctly observes that no local government is likely to go out-of-business (p. 153), but that is actually a disadvantage of municipalities. Unlike other corporate entities that can disappear, municipal corporations are a geographical reality. One cannot simply ignore those people who remain in a failing jurisdiction.

Fischel's recommendation is that the government distribute money to those who live in distressed areas so that they can move out of a jurisdiction and choose a better one in good Tieboutian fashion (p. 264). The cost of effective relocation, however, is prohibitively high, and has to include investments in transportation, jobs, and community support to be even marginally successful. Even if one wanted to redistribute money to individuals to exit decaying jurisdictions, one has to convince the suburbs to lower their barriers to entry of new housing developments. And the result of a successful relocation effort is that those left behind are in even worse fiscal condition.[41]

Arguably, fiscal zoning could raise house prices in the suburbs to such a degree that even people of some means stayed put or moved back to the city. This comparative advantage of the decaying city, however, is unlikely to translate into gains by existing residents. As Fischel observes, if the poor or fixed-income resident garners some improvement to her city services (say, better education outcomes or an increased property tax base), the property values in the jurisdiction

40. *See* S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975).

41. *See, e.g.*, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 100 (1970) (observing that public goods decline rapidly upon the exit of quality-conscious consumers of that good).

will increase (pp. 135-36). This is good news if she is willing to sell, but bad news if she wants to stay. If she owns, she will have to pay property taxes on the new higher assessments (which she may not be able to afford), and if she rents (which is much more likely), she will be priced out of her home altogether.[42]

Ethel Lawrence, the lead plaintiff in the *Mount Laurel* case found herself in this position. In the mid-1970s, Mount Laurel — a semi-rural neighbor of Camden with ample farmland available for suburban development — had adopted a large-lot, single-family zoning ordinance that made it impossible for developers to construct affordable, multi-family housing. The predictable result was that Mrs. Lawrence and other low-income, mainly minority residents were being priced out of their homes and replaced by predominantly white, middle- and upper-income newcomers — an outcome favored by the existing large landowners, the more recent residents of the town, and local officials.[43] On Fischel's account, Mrs. Lawrence could have moved to Camden, the nearest place where housing was affordable (though she would be consigned to a segregated, poor, and crime-ridden neighborhood with decaying public services). But this move, too, might have been temporary. If the housing market detected any improvement in Camden's fiscal health, wealthier newcomers would again force Mrs. Lawrence to relocate.

One can assert a basic fairness objection to such dislocations. The New Jersey Supreme Court certainly believed it was unjust for localities to use their state-granted powers over land use to displace lower-income households.[44] More important for my purposes, however, is that Mrs. Lawrence's story suggests that the claimed benefit of decentralized local government — that it better fulfills individual preferences — is undermined by linking local services with house values. Recall that Fischel's thesis relies on a direct causal relationship between the quality of local public services and local property values. This link may encourage those who can afford it to invest in local amenities, but it may actually create perverse incentives for lower-income persons, especially renters, to *underinvest* in local public goods. Lower-income owners and renters (particularly the elderly) are

42. Tiebout's original market mechanism was criticized as a recipe for "musical suburbs," with the less rich chasing the rich around the metropolitan area in search of good public services. Bruce Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975). Fischel's "price cures all" model is just the opposite — a recipe for musical cities, with the richer chasing the less rich around the metropolitan region. The homevoter hypothesis celebrates gentrification on a grand scale.

43. For an account of the *Mount Laurel* litigation, see CHARLES HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996), and DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995). *See also* J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265 (1997) (book review).

44. *See S. Burlington County NAACP*, 336 A.2d at 723-27.

caught in a bind: though they want and need good public services, their desire to stay in their homes creates a fiscal incentive not to invest in them.[45] Mrs. Lawrence's concern about displacement may well override her preference for better public services, an outcome that could be avoided if local public services were not paid for through the housing market but through another mechanism, such as a progressive income tax.

Second, it is obvious that significant numbers of people, unable to afford the price to enter (or to remain in) their "preferred" jurisdiction, are not receiving the level of public services that they would choose under Tieboutian conditions. As the problem of affordable housing indicates, one's "choices" about where to live fall off dramatically as one moves down the income scale, particularly in times of drastic real estate inflation. Calling Mrs. Lawrence's locational decision a "choice" that balances what she is willing to pay with the services she receives mistakes the initial distribution of capital and services across the metropolitan area with its optimal distribution.[46]

This points to a third consequence of linking house values to local public services — it tends to reinforce preexisting distributions of social and financial capital.[47] Access to particular locally provided public goods, especially personal safety and education, are the prerequisites for building future social and financial capital. If the quality of local services depends on where one lives, then initial location has outsized consequences. Residential location determines the type and quality of the public goods that enable future mobility. The spatial distribution of public goods tends to reinforce existing economic and social hierarchies, mapping geographically the unequal distribution of wealth.[48] Under a privatized local government regime, individuals "get

45. Fischel acknowledges that renters have an incentive not to invest in local public services, but resists the argument that rent control or other rent stabilization devices might effectively change those incentives and turn renters into homevoters. *See* pp. 85-86.

46. *See* Briffault, *Our Localism: Part II*, *supra* note 9, at 422-23 (arguing that poorer jurisdictions spend less on local services, like education, not because they have a different "taste" for education than do wealthier jurisdictions, but because of the "inadequacy of local taxable resources"). The Tiebout hypothesis is tautological if "preferences" includes all possible variables that affect the mobility decision, including availability of employment, familial ties, and resource constraints. In that case, Tiebout merely tells us that where people "prefer" to live is where they currently live. *See* Harold Hochman, *Individual Preferences and Distributional Adjustments*, 62 AM. ECON. REV. 353, 359-60 (1972).

47. *See* Hochman, *supra* note 46, at 359-60 ("While individuals, by relocating, can mitigate their dissatisfaction, their clustering cannot undo the dependence of their claims on initial endowments of physical and human capital.").

48. *See* Bell & Parchomovsky, *supra* note 37, at 1966-68. In addition, concentrated segregation by race and income fosters a set of pathologies that are independent of the relative quality of local services. *See generally* MASSEY & DENTON, *supra* note 38, *passim*; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY (1987).

what they pay for,"[49] and one's life chances are significantly set when one's jurisdictional fate is sealed.

IV. SCHOOL FUNDING

It is perhaps for this reason that the leading battleground in challenging the "pay as you go" structure of local government finance has been in the area of primary and secondary education, which has been traditionally funded through the local property tax. Though the equal protection challenge to school funding disparities under the federal Constitution failed in *San Antonio Independent School District v. Rodriguez*,[50] challenges under state constitutional guarantees have been somewhat more successful.[51] Fischel spends a significant amount of time arguing that the efforts of school funding equalization reformers are misguided (Chapters 5-6). He argues that local financing of primary and secondary education results in a "race to the top" in education quality because local education spending is reflected in home values (p. 98). School funding equalization, on the other hand, leads to underinvestment in education because it eliminates one of the primary bases upon which local governments compete: education spending. Homevoters, most of whom do not have school-age children, will only invest in education if that investment is reflected in their property values (pp. 148-52). Equalize school funding across jurisdictions and the homevoter will find little reason to fund schools through taxes that will not be captured in her property values. The result will be less spending on education and declining educational outcomes across the board (pp. 129-33).

Fischel offers California as "proof" for this contention. He repeats his provocative argument (which he first made in 1989[52]) that the California Supreme Court's 1971 decision in *Serrano v. Priest*,[53] which threw out California's local property-tax-based school funding system, *caused* homevoters to pass Proposition 13, one of the largest and, to its critics, most destructive property tax revolts in the country (pp. 98-128). Working from the assumption that local property-tax-funded educational spending is capitalized into property values, Fischel argues that it would be irrational for a homevoter to approve Proposition 13 (because it would depress home values) without some *Serrano*-like push. Fischel claims that once the California Supreme Court held that

49. *See* Fischel, *supra* note 29.

50. 411 U.S. 1 (1973).

51. For a general discussion of state school finance litigations, see Mildred Robinson, *Financing Educational Opportunity*, 14 J.L. & POL. 483 (1998).

52. *See* William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 465 (1989).

53. 96 Cal. Rptr. 601 (1971).

local governments could not spend what they wanted on education, homevoters decided not to spend very much at all. The result has been an overall decline in education outcomes in California, a product of the disastrous "leveling-down" brought on by misguided court interference in *Serrano*.

The causal chain from *Serrano* to the current quality of education in California is problematic, however. A recently published study argues persuasively that the voters' approval of Proposition 13 had little to do with *Serrano*, but rather was animated by a confluence of factors, including senior citizens' fears of being priced out of their homes by soaring tax bills, higher-income voters with little need for government services reaping a property tax windfall, and a general populist, anti-government sentiment that tax reformers used to their political advantage.[54] Indeed, numerous property tax revolts throughout history and in many states have been unrelated to educational equalization.[55] Property taxes are highly visible and tend to be unpopular because they tax wealth rather than income,[56] which presented a tremendous problem in 1970's California as property values increased dramatically.[57] Fischel's thesis requires that the *Serrano* decision presaged or caused noticeable *reductions* in home values, and that homeowners responded by cutting their taxes so as to starve *all* their local public services, not just education.

Moreover, the next step in the argument — that equalization will lead to school underinvestment across the board — does not necessarily follow. School reformers, as Fischel acknowledges, have long advocated state funding of education, trusting that it would be both more equitable and more substantial than the local variety (pp. 146-48). Fischel assumes that state residents will not approve income tax or general receipts taxes to fund schools, but empirical evidence shows that in many states with equalization regimes, the state increases

54. *See* Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003); *see also* GARY MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 3 (1981) (quoting John Kenneth Galbraith as stating that Proposition 13 was "a revolt of the rich against the poor"). Property owners overwhelmingly favored Proposition 13, while renters, public employees, and the majority of blacks were opposed. *See id.* Fischel has responded to Stark & Zasloff with a paper entitled, Did Serrano Vote for Proposition 13?: A Reply to Stark and Zasloff's *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?* (Aug. 2003) (working paper No. 03-13, on file with Dartmouth Coll. Econ. Dep't).

55. *See* ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS 1-5, 32 (1995) (describing circumstances of property tax revolts in a number of states and the United Kingdom in different historical periods and noting that forty-three states adopted new property tax limitations between 1978 and 1980).

56. *See id.* at 11.

57. *See* MILLER, *supra* note 54, at 190-91; O'SULLIVAN ET AL., *supra* note 55, at 2-3; Frederick D. Stocker, *Introduction* to PROPOSITION 13: A TEN YEAR RETROSPECTIVE 1, 3 (Frederick D. Stocker ed., 1991) [hereinafter PROPOSITION 13].

funding for poor districts, while leaving others relatively untouched.[58] Certainly, one has to be cautious about the details of the school-funding scheme — some equalization programs may penalize higher-spending districts instead of supplementing lower-spending districts[59] — but there is no necessary relationship between centralized funding and reduced funding, nor centralized funding and reduced educational outcomes.[60]

Indeed, on Fischel's theory, centralized funding should not make much difference at all to homevoters concerned about local education outcomes. As Fischel recognizes, educational quality depends in large part on local residents taking an active interest in the management of their schools. If capitalization is significant, the *quality* of a jurisdictionally restricted local education should still show up in home values, regardless of how that education is funded. This may be the reason that most suburbanites oppose vouchers, even in California.[61] A comprehensive voucher scheme encompassing suburban and city schools *might* have the effect of decoupling home values and school quality because one would not have to buy a house in the jurisdiction to go to the schools there — a collective property right that the housing market could no longer value. But the opposition to vouchers indicates that even in California after *Serrano*, suburbanites believe that localities have something that the housing market can value — namely the quality of a particular jurisdictionally exclusive education, never mind where the money comes from.[62] Even if Fischel is right that

58. *See* Sheila Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789 (1998).

59. *See* Caroline M. Hoxby, *All School Finance Equalizations Are Not Created Equal*, 116 Q.J. ECON. 1189 (2001). Hoxby suggests that leveling down occurs because it is cheap for states to forbid high spending but expensive for them to supplement low spending. She observes, however, that school finance equalization does not have to lead to leveling down and that flat grant categorical aid "has almost no potential to generate leveling down." *Id.* at 1218.

60. In fact, state funding provides close to 50% of school revenues already. *See* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 59-60 (1990) [hereinafter Briffault, *Our Localism: Part I*]. Fischel acknowledges that there are ways to increase overall funding for education without undermining local district incentives, but argues that school-finance reform involving *any* state funding "overlooks the long-run impact of an increased state role in education." P. 146. Retreating from his fiscal incentives argument, Fischel equates centralized funding with centralized control, arguing that the state may attach strings to funds or might demand curricular reforms. *Id.* Additionally, Fischel assumes that such strings or reforms will inevitably lead to reduced educational outcomes. *See id.*

61. *See* James Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2062-63 (2002) (arguing that a "statewide or even robust regional [school] choice plan" that truly helps poor, urban students is unlikely to materialize because suburbanites are generally satisfied with their school districts and will resist any attempts to "join them forcibly with urban districts").

62. Fischel recognizes that Californians' opposition to vouchers casts some doubt on his *Serrano* thesis because it means that home values remain tied to education outcomes. Pp. 156-57. Fischel attempts to explain the fact that "Los Angeles-area school districts with bet-

homevoters invest in education only in pursuit of higher home values, he is wrong in asserting that the source of money matters.

The California suburbanites' opposition to vouchers indicates that these suburbanites know something about education that Fischel does not: that there is not a one-to-one relationship between local government budgetary inputs and local government outputs, that is, money spent and education received. Studies show that (for a host of reasons) it is simply more difficult and costly to educate lots of poorer students with limited private resources than it is to educate relatively fewer well-off students who come from families with more ample private resources.[63] This means that the local funding of education is less significant to the political economy of the suburb than is the power of localities to exclude entrants who might increase the cost of education or reduce its quality, such as large or low-income families. This so-called "public goods zoning"[64] looks exactly the same as "fiscal zoning," but its goal is slightly different, in that it is intended to control for the characteristics of in-migrants, not for their fiscal contribution per se.[65] If the primary determinants of the quality of public goods are what the consumers who use them bring to the table, then local governments can exert a "much greater influence over the levels of public *outputs* through policy variables that control the make-up of the community than through the local budget."[66]

In other words, suburban house values do not primarily reflect some portion of the value of that extra social studies teacher, but rather the value of buying education services with others who will contribute to the value of those education services. Suburban housing prices essentially set a minimum income level for users of local public goods, house price being a proxy for overall wealth. When one buys a house in the jurisdiction, one is buying an education-quality "user pool"[67] — the assumption being that higher-income residents will pro-

---

ter education numbers had higher home values, even though *Serrano* and Proposition 13 had leveled the fiscal differences" by arguing that fiscal differences were reintroduced through private funding and state categorical grants. P. 156.

63. *See* James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

64. Mills & Oates, *The Theory of Local Public Finance*, *supra* note 38, at 7.

65. *Id.* Public goods zoning and fiscal zoning often look exactly the same, making it difficult to determine to what extent a locality is engaged in one or the other. Ideally the suburbanite wants to avoid school-age children altogether. "The normal profit-maximizing strategy of a suburb dominated by a homeowner majority is to discourage construction of modest priced housing for occupancy by families with school-age children and to attract blue-chip fiscal assets like light industrial plants." Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 452 (1977) [hereinafter Ellickson, *Suburban Growth Controls*].

66. Mills & Oates, *The Theory of Local Public Finance*, *supra* note 38, at 7.

67. *See* Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEXAS L. REV. 1, 5 (2001).

duce better (i.e., "quality-enhancing") consumers of public education.[68] Education is a collectively produced good; its quality depends in large part upon how other consumers use it. Unlike a toaster or other consumer good, it makes a great deal of difference who is buying it with you.

This is not to say that the money that local governments can raise and spend through the local property tax does not matter at all. Wealthier communities can and do spend more on education than do poorer ones, and this money makes a difference in educational outcomes.[69] Public goods zoning and the jurisdictional monopoly, however, do the lion's share of the work. Thus, the voters who approved Proposition 13 believing that property tax limitations would not affect the quality of local education were mostly right.[70] Suburban communities could still exclude low-income, higher-cost entrants through public goods zoning and let the state pick up a much larger portion of the education tab. In fact, it may be more accurate to say that Proposition 13 is a mechanism by which current homeowners shift the costs of education to *newer* homeowners. Under Proposition 13, property is reassessed at the time of sale, making for significantly different tax bills depending on how long one owns one's home.[71] Lower taxes without a corresponding decrease in the quality of public services is the holy grail of the homevoter and it is what she got, at least in the short term.[72] This may better explain why property values increased in California after voters passed Proposition 13.

---

68. *See* HIRSCHMAN, *supra* note 41, at 99 (discussing "quality-makers"); Fennell, *supra* note 67, at 5.

69. For evidence that increasing resources to poorer schools generates increases in school quality, see Thomas Dee, *The Capitalization of Education Finance Reforms*, 43 J.L. & ECON. 185, 209-13 (2000).

70. *See* O'SULLIVAN ET AL., *supra* note 55, at 3. Contemporaneous polls indicated that many voters believed that current service levels would remain unchanged after Proposition 13, *see id.*, and that if they had to choose services to reduce, they would choose welfare (54 %), parks (26 %), libraries (25 %), and public transportation (21 %). MILLER, *supra* note 54, at 3. Very few mentioned schools. *Id.*

71. *See* O'SULLIVAN ET AL., *supra* note 55, at 6-9, 137; George F. Break, *Proposition 13's Tenth Birthday: Occasion for Celebration or Lament?*, *in* PROPOSITION 13, *supra* note 57, at 189-90. If one agrees with Fischel that property taxes are fully capitalized into property values and that homevoters seek solely to maximize house values, this aspect of Proposition 13 appears to be irrational: the eventual value of the home will be reduced by the higher assessments when it is sold. It may simply be incorrect that homeowners seek solely to maximize the value of their homes. *See* Brueckner & Joo, *supra* note 36, at 464 (arguing that homeowners choose a level of public spending that blends their own preferences and those of potential house buyers). It also may be incorrect that homeowners will eventually have to account for the property tax avoided when they sell, but instead enjoy a current (untaxed) property tax windfall. *See* Mildred W. Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as Case in Point*, 35 U. MICH. J.L. REFORM. 511, 530-32 (2002).

72. O'Sullivan notes that "initially it was relatively easy to replace lost property tax revenues in California because the state had a surplus to draw on" and that California resi-

In fact, both proponents and opponents of school funding equalization have overstated its impact. School funding equalization is one means of garnering some additional resources for poorer districts, but it is not a panacea for the problem of educating poorer students. Equalization alone will not alter the spatial determinants of educational outcomes. Nor, contrary to Fischel's argument, does school funding equalization unsettle the suburban political economy and lead to disastrous underinvestment. Even after equalization, house prices will still reflect a premium for entry into wealthier jurisdictions with better schools, poorer (and often minority) students will still receive a dramatically less effective education, and income will still be correlated with educational success.[73] The homevoter — children in school or not — will still invest in schools, but she will do so as she always has: by investing in boundaries.

V. THE RHETORIC OF OWNERSHIP

Boundary defense is at the heart of the homevoter's political economy. But this does not completely explain the vehemence that often meets efforts to enforce some interlocal parity. The assumption that homeowners will only pay taxes for goods that increase their property values is obviously wrong — the bulk of taxes paid at the federal and state level are unrelated to residential property values. Yet Fischel is correct that suburbanites often believe that "their" property taxes "belong" to them and are therefore unwilling to have "their" tax revenue shipped-off to educate some "other" people's children (pp. 120-21). The suburban voter is finely attuned to local crossjurisdictional redistributions, in a way that is somewhat at odds with the citizenry's general tolerance for interstate or even international redistributions. It is difficult to get New Jerseyians upset that they subsidize many other states by contributing more in federal income taxes than they receive in services,[74] though it is easy to get the suburb of Mount Laurel upset about subsidizing the educational outcomes of children in Camden. The rhetoric of local autonomy has become synonymous with local ownership — the ownership of the collective property within the boundaries of the jurisdiction, and ownership of the jurisdictional boundaries themselves. The suburbanite often perceives her

dents only began to feel the effects of Proposition 13 twelve to fifteen years later. O'SULLIVAN ET AL., *supra* note 55, at 116.

73. *Cf.* Ryan, *supra* note 63 (arguing that education finance reform is a poor substitute for desegregation).

74. In 1999, New Jersey residents paid $2,342 per capita more in federal taxes than they received in federal spending. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 313 no. 462 (2002). Compare that with Alabama, which received $2,091 per capita more in federal spending than in federal taxes paid. *Id.*

borders as an entitlement, and her right to defend them through zoning as the core of self-rule.

This attention to local boundaries is a product of the political economy of privatized local government. If one believes that one has "paid" for a particular service by buying entry into a jurisdiction, then any distribution across jurisdictional lines raises the specter that one is not getting what one has paid for.[75] The rhetoric of ownership surfaces throughout Fischel's text: higher-tax-base school districts are the "victims" of school funding equalization and are rightfully concerned about the "expropriation" (p. 183) of "their" (pp. 101, 111) tax dollars. As Fischel puts it, homevoters simply want to see the benefit of their tax bills (p. 175): "It seems no more insidious than a desire to have the plumber do the work for which you pay her."[76]

Why the appropriate "owners" of a tax base and its accompanying property tax dollars should be those who happen to reside within a state-created local government jurisdiction is unclear, however. The perception that taxes and services are "owned" by the residents of a particular jurisdiction relies on a naturalized view of local boundaries, a sense that the jurisdictional lines reflect a preexisting community that has a "right" to its "own" tax dollars. But incorporation and land use are governmental powers and the regional geography of fragmented local governments is a product of legal rules. A jurisdiction's tax base is often the result of luck, not skill — for example, having desirable natural features like beaches or mountains that attract investment, or having a large commercial tax base from one particular industrial plant.

The presumption of ownership is even more tenuous when one considers that the value of the tax base relative to local costs is a product, in large part, of the power to zone that comes with jurisdictional boundaries in the first place.[77] As Fischel recognizes, the chief goal of most incorporating entities is to gain power over land use (p. 258). Though Fischel occasionally suggests that there is an organic or

75. *Cf.* Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, *in* FISCAL ZONING AND LAND USE CONTROLS, *supra* note 6, at 28 (arguing that suburbanites regard their taxes as a quid pro quo for local services and not as a tax on housing, and therefore consume more housing than their central-city counterparts).

76. P. 224. Fischel's conception of local government as fee-for-service operates in the context of environmental regulation as well. He argues that poorer communities should be able to bargain for noxious industrial sites that contribute to the local tax base. He observes that "community residents get just as good an environment as they are willing to pay for in fiscal benefits foregone." William A. Fischel, *Fiscal and Environmental Considerations in the Location of Firms in Suburban Communities*, *in* FISCAL ZONING AND LAND USE CONTROLS, *supra* note 6, at 166.

77. *Cf.* EDWARD L. GLAESER & JOSEPH GYOURKO, THE IMPACT OF ZONING ON HOUSING AFFORDABILITY 7 (Harvard Inst. Econ. Research, Discussion Paper No. 1948, 2002) (arguing that zoning laws are responsible for a significant portion of the difference between house values and construction costs).

civic quality to these incorporations — that these smaller governments give "like-minded people" (p. 252) a chance to control their own destiny — he admits that in most cases, the fiscal objectives of the neighborhood are all that residents have in common (p. 223). This is the lesson of the incorporations undertaken by cities and towns in Los Angeles County in the 1950s and early 60s[78] and in the Seattle region during the 1990s. As Fischel describes it, somewhat admiringly, many of the new towns in Kings County, Washington were born of preventative agendas — incorporating to avoid being annexed to a less-affluent area (Newcastle); to preserve its single-family zoning ordinances (Covington); to stop the building of a new airport runway (Burien), a new jail (Woodinville), or higher-density housing (Kent); or simply to "stop growth" (Sammamish).[79] The incorporation frenzy of the 1990s in Kings County is a story of "defensive" incorporations in the shadow of a state legislature pursuing a regional growth agenda that would have required modifications to local zoning laws.

By incorporating and gaining local power over land use decisions, neighborhoods can insulate themselves from costs and generate increased revenue.[80] In a Tieboutian world, resources and demands for resources begin evenly distributed. In the real world, resources and demands for resources are already spatially determined. The city and inner-ring suburbs simply have more people in need of social services, poor or rich. Crime and poverty are not evenly distributed but are spatially concentrated in specific higher-cost or lower-cost geographies. As suburbanites realized quite early on, geography itself is an effective substitute for services. Simply by moving away — from a more densely to a less densely populated area — the homeowner can reduce the need for public services. The drawing of boundaries between high- and low-cost geographies has obvious distributional effects, depriving high-cost geographies of revenue that was once "theirs" and creating a new corporate entity that now "owns" that revenue.

There is no normative basis, however, for privileging one set of owners over another set of owners — the drawing of the jurisdictional

78. Pp. 220-28. These were the so-called Lakewood Plan Cities. For a powerful critique of Lakewood Plan cities, *see* MILLER, *supra* note 54. Miller's thesis is that the primary motivation for Lakewood Plan cities was the creation of enclaves where taxpayers could escape from the redistributional patterns of old-line cities. *Id.* at 77. As Miller argues, most Lakewood Plan cities developed under the threat of annexation because incorporation with low or zero property tax was more favorable than annexation to a city with a large tax base and ample public services, but with high property tax rates. *Id.* at 79-82.

79. *See* pp. 241-51; *cf.* MILLER, *supra* note 54, at 77-82.

80. *See* MILLER, *supra* note 54, at 47, 59, 77-78 (discussing the blatant fiscal ambitions of towns like Commerce and Industry and arguing that "Lakewood Plan citizens benefited through an 'externalization' of the costs of local government"). Lakewood Plan cities were not just low-property-tax havens; they were, in many cases, no-property-tax havens or, as Miller calls them, "minimal cities." *Id.* at 83-85.

lines is itself a distributional choice. Consider the relatively well-off suburb of Mount Laurel and its relationship to neighboring Camden. If the quality of public services turns on the relative wealth of the residents, then it makes perfect sense for Mount Laurel to seek out wealthier residents and use zoning to force the relatively poor (like Mrs. Lawrence) to go somewhere else. In order for Mount Laurel to cater to the relatively wealthy, however, there must be somewhere for the relatively less wealthy to go. The low-cost, resource-rich jurisdiction cannot exist without its neighbor and opposite — the high-cost, resource-poor twin — because the only way to get the former is to exclude the class of potential residents who will populate the latter. Mount Laurel exists because it has the legal ability to displace lower-income residents to neighboring Camden or other neighboring jurisdictions. To treat Mount Laurel as an autonomous owner of "its" property tax base is to ignore its necessarily parasitic relationship with neighboring jurisdictions.[81]

Moreover, the rhetoric of local autonomy effectively hides the transfer of wealth from Camden to Mount Laurel. Suburban land use regimes increase property values in the suburbs and depress them in neighboring, poorer communities by continuing to displace poorer people into urban cores.[82] By excluding lower-income arrivals (or, indeed, any cost-imposing arrivals *at all*), Mount Laurel can shift those costs to Camden. This reduction in suburban costs (which translates into added property values) is not "earned" and "paid for" in any way. Instead, jurisdictional boundaries result in a windfall for first-in-time homeowners, who realize often significant capital gains when their jurisdiction obtains the legal power to zone out cost-imposing newcomers.[83] The actual cash transfer is made by new home buyers, which may be why new homeowners are often the most NIMBY residents of all. Recent homeowners are eager to jump on the exclusionary bandwagon to preserve the value of their just-purchased asset and perhaps to realize the capital gain of a new, more restrictive zoning regime.[84]

81. *See* Briffault, *Our Localism: Part I*, *supra* note 60, at 39-58; Richard Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 416-429 (2001).

82. *See* Schragger, *supra* note 81, at 416-29; *cf.* MILLER, *supra* note 54, at 179 ("The sorting out of people that accompanied the incorporation of the Lakewood Plan cities was not a neutral process in which people with different tastes found each other under sympathetic local governments, but a political process in which resources were redistributed."); William Neenan, *Suburban-Central City Exploitation Thesis: One City's Tale*, 23 NAT'L TAX J. 117 (1970) (arguing that if benefits are measured by willingness to pay, suburban Detroit will receive welfare gains at the expense of Detroit).

83. *See* Ellickson, *Suburban Growth Controls*, *supra* note 65, at 400.

84. *See* SCHNEIDER, *supra* note 15, at 29 (observing that "[i]n order to extract a fiscal dividend, present residents of a community will try to limit entry to individuals with incomes higher than theirs"); GLAESER & GYOURKO, *supra* note 77, at 7 (zoning and other land use controls are responsible for high housing costs). Glaeser and Gyourko advocate loosening current zoning laws, but recognize that it is politically difficult because current homeowners

The asserted power to exclude is a government entitlement with significant distributional repercussions, and one which the Supreme Court has implicitly adopted without challenge since upholding a standard zoning ordinance in *Village of Euclid v. Ambler Realty Co.* in 1926.[85] The Court has rejected subsequent equal protection challenges to zoning, declaring that "a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."[86] In *Warth v. Seldin*,[87] the most direct challenge to exclusionary zoning, the Court held that low- and moderate-income urban residents seeking housing in a neighboring exclusive suburb had no standing to challenge the suburb's exclusionary zoning ordinance, because they did not own property there. Two education cases, *Rodriguez*,[88] noted above, and *Milliken v. Bradley*,[89] reinforced the jurisdictional wall between high- and low-cost geographies by drawing significant protective lines around the suburbs — the first by rejecting a federal equal protection-based school funding equalization claim; the second by striking down a cross-jurisdictional integration remedy that would have permitted busing across the city/suburb border.

Fischel praises localities' legal power to exclude. The advantage of local government over state government, argues Fischel, is that local government can set prices for entry (p. 54). By contrast, the Supreme Court has repeatedly held that states do not have the power to condition entry into the jurisdiction on an individual's ability (or inability) to pay. States, the Court declared most recently in *Saenz v. Roe*[90] — which struck down a California residency requirement that paid welfare benefits to newcomers for one year at the amount they would have been paid in their state of origin — "do not have any right to select their citizens."[91] Local governments, on the other hand, have gotten a "free pass" to do so, as Fischel himself observes (p. 54).

There is a significant disjuncture between the Supreme Court's holding in *Worth* that low-income residents do not have standing to challenge their complete exclusion from a neighboring locality and its holding in *Saenz* that low-income residents have a fundamental right to enter California that cannot be burdened even minimally by a

in high house value areas would "lose substantially" the added property value those laws generate. *Id.* at 22.

85. 272 U.S. 365 (1926).

86. Vill. of Belle Terre v. Borass, 416 U.S. 1, 9 (1974).

87. 422 U.S. 490 (1975).

88. 411 U.S. 1 (1973).

89. 418 U.S. 717 (1974).

90. 526 U.S. 489 (1999).

91. *Saenz*, 526 U.S. at 511.

year's welfare payment differential.[92] The Supreme Court, it appears, has granted local boundaries a heightened status — one that tends to reflect and reinforce the suburbanite's sense of collective jurisdictional ownership. This sense of entitlement contributes to a suburban myopia, which Fischel seems to share at times. The suburbanite often does not see the complex web of state and federal funds that makes her lifestyle possible, including the federal mortgage-interest tax deduction that makes her home significantly cheaper to buy and the federal highway funds that make her commute possible.[93] The suburbanite bristles at the idea that she should pay entrance fees (in the form of commuter taxes) to contribute to the upkeep of city services, though she feels perfectly comfortable crossing jurisdictional lines to take advantage of employment and cultural opportunities there.[94] And the suburbanite often behaves as if property value increases that are a product of the state-given power to incorporate and zone are "earned" and not "taken," but contrary state attempts to distribute localized property taxes to poorer neighbors are "taken" and not "earned."

In a political economy of privatized local government, homeownership is considered a right, and homeownership where "yards are wide and people few" — as the Supreme Court stated in *Village of Belle Terre* — a constitutional value. Exclusion has hardened into a political and constitutional entitlement, successfully defended through the rhetoric of local autonomy and freedom of choice.

VI. REFORMING LOCAL GOVERNMENT

Despite Fischel's praise for decentralized, property-based local government, he too is concerned about the homeowner's destructive incentives. After celebrating the structure of home-values-based local government, Fischel advocates a set of reforms in his last chapter that could have been preceded by a *critique* of the homevoter's political economy. Fischel's reforms include home-value insurance to encourage NIMBY voters to accept unwanted land uses (pp. 268-70), property-tax exemptions for the elderly (p. 263), and a "costly" state-funded "public school supplement" that would subsidize the education

92. *See* Schragger, *supra* note 81, at 468-69. Challenges to exclusionary zoning grounded in a constitutional right to travel were asserted in the 1970s, *see* Ellickson, *Suburban Growth Controls*, *supra* note 65, at 470 n.247, but have since been abandoned.

93. The combined tax expenditures related to homeownership added up to around $103 billion in 2001. *See* Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 631 n.61 (2002) (collecting data). For an argument that federal and state governments have subsidized suburban development through roadway expenditures costing billions of dollars, see Oliver Pollard III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L.J. 1529, 1532-35 (2002).

94. For a discussion of the rationale for "commuter taxes" in the context of the Washington, D.C. area, see Robert P. Strauss, *The Income of Central City and Suburban Immigrants: A Case Study of the Washington D.C. Metropolitan Area*, 51 NAT'L TAX J. 493 (1998).

of poorer students (pp. 279-80). Fischel also recommends state and regional review of local land-use decisions, admitting that "[t]here is something to be said, then, for having some monitoring of local decisions by a state or metropolitan body" (p. 282). And he advocates a more robust role for courts in policing exclusionary zoning regimes through substantive due process and regulatory takings doctrines.[95]

Fischel's newfound respect for state and federal judges, whom he attacked earlier in the book for their forays into school funding equalization, nicely illustrates the unresolved tensions in his theory. There is something incongruous about embracing a majoritarian, decentralized political economy that requires fiscal zoning and then deputizing unelected judges to police — much more aggressively than they do now — the limits of that political economy. Perhaps Fischel's substantive commitment to individual property rights trumps his commitment to localism. Fischel has always advocated a pro-development regulatory takings doctrine and in past works has targeted local governments as particularly egregious infringers of individual property rights.[96]

One possibility is that Fischel's embrace of local government is opportunistic. As Joan Williams has argued, localism has historically been deployed in pursuit of substantive political programs and is defined and limited by those programs, whatever their political flavor.[97] Fischel might not be bothered by this observation: he would likely admit that he favors local government only insofar as it gets him to the policy outcomes — including, quite predominantly, the protection of private property — that he desires. Decrying his use (or disuse) of localism when it suits him may not be a criticism that stings.

Fischel's "tough love" reforms, however, raise a more serious question about the coherence of a political economy that is based on — and which incentivizes — exclusion. Fischel is quite prepared to jettison local, democratic decisionmaking in order to ameliorate the homevoter's tendency to engage in inefficient or "bad" exclusion.[98] Why not instead challenge the underlying political economy that creates the fiscal incentive to exclude in the first place?

---

95. Pp. 282-85; *see also* WILLIAM A. FISCHEL, REGULATORY TAKINGS 325-68 (1995).

96. *See* FISCHEL, *supra* note 95, at 138-39; 292-94. Fischel has been accused of "localism bashing" in the past. *See* Carol Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131 (1996) (reviewing FISCHEL, *supra*). He asserts that his "present book might be viewed as a defensive response to . . . [Rose's] comment." P. x.

97. *See* Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 83-87.

98. The line between "good" and "bad" exclusion is a difficult one to draw. When deciding how much exclusion is too much, Fischel seems to take both efficiency and distributional concerns into account, writing "When enough . . . [local governments zone for excessively low-density residential uses], it contributes to metropolitan area sprawl and deters lower-income households from finding homes in the suburbs." P. 229.

In fact, though Fischel's reforms — many of which make sense — seem to skirt the carefully calibrated system of homevoter incentives, on closer inspection their combined effect substantially undermines the link between home values and public services that is the centerpiece of the homevoter's political economy. Consider, for example, Fischel's proposal for home-value insurance to deter "inefficient NIMBYism" (p. 269). This insurance would be used to compensate homeowners for any loss of appreciation in house values caused by an incoming development (or incoming racial minorities), and it seems a sensible way to reduce the homevoter's risk-aversion to unwanted but regionally necessary land uses. One problem with such insurance is that it has not been proven to work.[99] But even if it did, home-value insurance seems contrary to the incentive structure Fischel has taken such pains to elaborate. The obvious and intended effect of the insurance — eliminating the fear of reductions in property values — undermines the very incentive motivating "good" or "efficient NIMBYism" — fear of reductions in property values. Home-value insurance seems to miss the point. If it is true that homevoters exclude too much because their primary asset is their homes, then why not consider policies that encourage diversification? For example, one might want to reduce Americans' overinvestment in housing by eliminating the tax incentives that privilege home ownership over other forms of tenure.

More obviously, a good policymaker might want to reject the local property tax as the dominant source of local funding in an effort to decouple house values from local service provision altogether.[100] Fischel's state-funded education "supplement" (which he calls a "Tiebout voucher" (p. 279)) certainly implies significant statewide funding of education. When combined with his proposal for state and judicial oversight of local land use decisions, Fischel's localism looks increasingly like something the most die-hard proponent of regionalism could love. Once localities' land use decisions are subject to reasonable limitations and significant state funds are directed into educating poorer students, few would argue that localities should not exercise other traditional police powers, though one can legitimately ask how much remains for them to do.

The lesson I draw from the homevoter hypothesis is one that Fischel might find perverse, but it follows from his own reformist

99. Fischel acknowledges that "such insurance is difficult to write." P. 269; *see* Bell & Parchomovsky, *supra* note 37, at 2005-09 (observing that home equity insurance has had mixed success in stemming white flight and that it is "a less-than-ideal remedy to the problem of dynamic resegregation").

100. Richard Ford has suggested this in an effort to combat racial segregation. *See* Ford, *supra* note 30, at 1849-57. Others have challenged reliance on the local property tax as well. *See* Poindexter, *supra* note 10, at 648-56.

agenda: our current localism and the fiscal inequities that accompany it can only be tempered by some form of state- or regionwide input. The conception of the atomistic, self-sufficient suburban political actor does not track life in diffuse metropolitan regions with overlapping jurisdictions and redundant lines of authority and fiscal responsibility.[101] And there is a growing consensus that competition for tax base and the search for developable land ever farther from jobs and urban centers is a costly and mutually destructive enterprise resulting in sprawling landscapes, failing infrastructure, and gargantuan commutes. A different model of government and politics is necessary to take into account the interdependencies of regional actors and the social costs of local behavior.

Whether this new model comes in the form of public authorities with power over regionwide infrastructure development or redistribution,[102] regional legislatures that serve as sites for a more expansive politics,[103] or institutionalized reforms that encourage interlocal cooperation[104] or remedy interlocal spillover effects,[105] most observers of American local government agree that the social costs of the existing suburbanized mode of providing essential public services are too high. Indeed, Fischel's suggestions for reform illustrate nicely that the spectrum of scholarly debate over the appropriate limitations on local power is much narrower than at first it might appear.

CONCLUSION

In the end, Fischel is not so much opposed to reforming local government as he is committed to the background ideal of a market model of local services. This commitment has a strikingly utopian quality. Despite recognizing some flaws at the margins, Fischel tells an upbeat, positive story about the state of local governance in the United States. Indeed, readers who skip the final chapter will have the distinctly Panglossian sense that "everything is as it should be."

101. *See generally* Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

102. *See* Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000) (advocating regionwide governments in an effort to equalize the distribution of resources).

103. *See* Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002) (advocating regional legislatures to create a region-wide politics as a supplement to local politics).

104. *See* Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001) (advocating contracting to resolve persistent interlocal spillover effects and suggesting that changes in organizational structure can foster more interlocal bargaining).

105. *See* Ellickson, *Suburban Growth Controls*, *supra* note 65 (proposing that cities affected by exclusionary zoning be permitted to sue neighboring suburbs for damages).

Fischel, however, gives us hints throughout the text that something more than a hardheadedness about human motivations and a faith in markets animates his glowing portrait of American local government. Fischel is also something of a romantic, an admirer — as he writes — of the "pluck" of those who set out to create their own governments, and a believer in the "uniquely American process of bottom-up, local self-governance" (p. 260). This belief in local "pluck" and an obstinate faith in the rationality of residential property owners produces the "homevoter" — the new American freeholder, reimagined as a crusading corporate shareholder in the market for good government.

This resurgence of the freeholder as the engine of good government should not come as a complete surprise: the conventional political wisdom that only property owners could be trusted with self-government lasted well into the twentieth century.[106] In Fischel's hands, this civic republican ideal has a more corporate and instrumental feel: homeowners are analogized to shareholders and local governments are analogized to private, profitmaking corporations. The twenty-first-century freeholder participates in local government in order to defend and enhance shareholder value.

This conception of American self-reliance and market self-sufficiency is attractive. The result of treating local government as a market good is that consent is perfect (at least at the point of purchase). Moving into (or exiting) a jurisdiction is the public analogue of purchasing a good on the private market; the citizen-consumer who buys in a particular jurisdiction has affirmed that this is the service bundle she wants at the price she is willing to pay. Privatized local government is the perfect Lockean government: sealed not by the primordial social contract, but by the ubiquitous real estate contract.

It bears remembering, however, that our current structure of fragmented local government is not the end-product of some idealized market process, but rather the historically contingent result of the deployment of legal and political power. Fischel proceeds from an understanding of the homevoter as a self-interested, wealth-maximizing rational actor and then describes a government designed to leverage her singular interest in the value of her home. But the homevoter is not born fully formed — she is made by particular economic, sociological, legal, and historical forces. Reinforcing the link

106. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 684-85 (1966) (Harlan, J., dissenting).

> It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id.

between property values and local government encourages the selfish, property-protecting instincts of the suburban homeowner who is locked into a set of choices by the current economics of home ownership. She forswears fiscal and public goods zoning at great financial risk and embraces a socioeconomically and racially integrated community at her peril. These legal/economic constraints contribute to a path dependent housing market, driven by the limitations of existing zoning and planning regulations, and reinforced by the romanticized portrayal of suburban homeownership.

The result is that government services are increasingly available only to those who can afford them, and that those who lose out in the property value game — renters, families searching for affordable housing, the urban poor, the fixed income — are increasingly isolated. That there are losers — that the benefits of local autonomy, understood as local ownership, tend to accrue to those who already have resources — is unsurprising considering the political history of suburbanized local power in the last half of the twentieth century. When seen from this vantage, the resulting portrait of American local government looks far more troubling.