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REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS. By *William A. Fischel.* Cambridge: Harvard University Press. 1995. Pp. xi, 415. $45.

Moderation, Aristotle assures us, is a cardinal virtue that allows individuals to organize their lives for happiness and self-sufficiency.[1] Thus when "proper pride" is the mean, "empty vanity" and "undue humility" are Aristotle's two extremes to be avoided; and when liberality is the mean, prodigality and meanness become his extremes.[2] In a more modern vein we prefer enterprise to both greed or indifference. So sensible. Yet it is far from clear that Aristotle's steady middle-course plan for personal character development supplies an accurate guide to the soundness of academic or legal positions, especially on matters so controversial as the proper role for government in the regulation of private property. Here the ostensible security of the middle position may be an illusion. Some corner solution may, but need not, be preferable to a compromise position that has all the sounds of sweet reasonableness about it, but nonetheless fails to achieve a set of optimal social results.

It is just that "vice of moderation" that leads me to part company with many of the key substantive conclusions in William Fischel's[3] excellent recent book *Regulatory Takings.* Fischel journeys far and wide over one of the pivotal questions of our time: What are the permissible limitations on government regulation of private property? I shall devote this review to that question. But in approaching Fischel's work, I shall proceed by indirection, so as not to confront a highly theoretical question solely as an abstract matter. Fischel's great forte is his ability to combine the insights of a trained economist with the nose of a superb investigative reporter. To highlight my disagreement with his conclusions, I want to pay my respects to Fischel by using his illustrations to make my points, while adding to the mix a few pointed anecdotes of my own. Accordingly, I have divided this review into two parts. Part I deals

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1. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 33-36 (D.P. Chase trans., 1937).

2. *See id.* at 37-40.

3. Professor of Economics, Dartmouth College.

with Fischel's various historical and sociological researches, both to give the reader some flavor for his book and also to set the stage for my evaluation of his overview of constitutional law. Part II addresses the perennial question of how far the courts should intervene to protect property owners from government regulation. To get into that question Fischel uses Frank Michelman's 1967 "undying classic" just-compensation article[4] and my own book, *Takings*,[5] as his foils. The examples outlined in Part I become the basis for an examination of our three positions. I conclude, unsurprisingly perhaps, that the new evidence only fortifies the soundness of my original, if extreme, position — unrepentant to the end!

I. Anecdotes with a Purpose

All too often today, economists become mired in abstract theory or trapped by detailed econometric demonstrations. Fischel's readable book avoids both of these unfortunate extremes and concentrates with intelligence and balance on the institutional arrangements at stake in particular cases, with an eye to explaining long-standing practices by sensible, mid-level economic theory. Even readers who might reject all of his speculations will be reminded of how institutional texture can help shape our understanding of complex legal and social arrangements just by reading how he works the phones and walks the landscape.

In the first chapter, Fischel gathers the true scoop of *Pennsylvania Coal Co. v. Mahon*,[6] the granddaddy of modern takings cases. That case concerned the constitutionality of the Kohler Act,[7] which required mineowners to provide subjacent support for surface owners even when their deeds unambiguously required surface owners to bear the risk of subsidence. Doctrinally, *Pennsylvania Coal* arose because the legislation retransferred the surface owners' surrendered "support estates" from the mineowners to the surface owners, without compensation. Justice Holmes struck down the statutory transfer on the ground that the regulation went "too far" to be a valid exercise of the police power.[8] Holmes thus announced a takings standard that, from that time forward, has confounded friend and foe alike.

Although many academics have attempted to decipher the precise meaning of Holmes's delphic language, Fischel here follows a

4. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

5. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

6. 260 U.S. 393 (1922).

7. *See* 260 U.S. at 412.

8. *See* 260 U.S. at 414-15.

different tack. He has pieced together the entire story behind *Pennsylvania Coal* by indefatigable investigation: tirelessly making phone calls to the surviving relatives of the original principals; reading the texts of George E. Stevenson, a consulting mechanical engineer knowledgeable in the construction and operation of mines in the Scranton area between 1897 and 1930;[9] sifting through Scranton newspapers published in the 1920s; unearthing the anthracite coal production techniques in Pennsylvania in use from the late 1890s to 1950; and uncovering the political machinations that led to the passage of the Kohler Act.

It proves, moreover, a story with a punchline. Fischel makes the useful observation that technology did not exacerbate the problem of subsidence —in other words, residences falling into the mines below — but tended to moderate it. Starting around 1891 (p. 27), coal engineers found a way to take the slag and waste from previous production and to insert it into mines to support the surface and the structures on it. This technical innovation made it possible to extract more coal from the mines without precipitating a conflict with surface owners. More importantly, it probably did more good for overall industrial development and community relationships than any legal rule designed to allocate the far greater losses under the older, inferior technology. The lesson, which has doubtless been played out countless times since then, should remind us of an important truth too easily forgotten in this age when economists and lawyers struggle to design contract rules for optimal risk and loss allocation: it is better to prevent the loss practically than to manipulate liability rules to create incentives for optimal care. Improved technology helps reduce the risk levels and the destruction of natural resources by allowing the recycling and reuse of materials previously thought exhausted.

Fischel's account of *Pennsylvania Coal* does more than show the beneficial interaction between law and technology; it also captures the legal and social dynamics of the time. The problem of subsidence had been addressed by the voluntary arrangements of most — the qualification will be important — coal companies and surface owners before the passage of the Kohler Act. Viewed in isolation from its social context, the conflict between the surface owner and the mineowner could look like a two-party bilateral monopoly extraction game, but clearly much more was at work. The relevant coal deposits were quite literally spread out all over Scranton; the men who worked the mines lived in the houses atop the mines and had, therefore, an interest on both sides of these transactions. Their employers, the mineowners, knew and understood the local

9. *See* p. 26 (citing GEORGE E. STEVENSON, REFLECTIONS OF AN ANTHRACITE ENGINEER (1931)).

social dynamic. So although they secured contractual protection against liability for the repair of the surface from mining subsidence, they routinely fixed the surface premises, no questions asked, once subsidence took place. It was simply a matter of good public relations, as a former chief engineer of Pennsylvania Coal Company — and one of Fischel's well-placed sources — told Fischel in 1993 (pp. 38, 43). Sal Nardozzi, a mining engineer for the state of Pennsylvania during the 1960s, duly confirmed this version of history (p. 43). The breakdown in the relationships took place because a single insolvent company, People's Coal, reneged on all its agreements. So the Kohler Act emerged to plug the gap in the earlier social arrangements.

As Fischel points out, the adopted system proved more complicated than one might expect. This was because the Kohler Act was paired with another statute, The Fowler Act,[10] which imposed a tax on the anthracite coal extracted by companies that sought relief from the obligations of the Kohler Act (p. 33) and whose proceeds were to be devoted to the repair of subsidence. Any firm that complied with the Kohler Act did not have to pay the Fowler tax. Once the Supreme Court struck down the Kohler Act in *Pennsylvania Coal,* no one needed any relief from it. The situation returned to the status quo ante. Armed with their victory, the coal companies continued to make routine repairs of subsidence damage just as they did before the Kohler Act was passed. The social glue that kept miners and surface owners together was just too strong. The parallels to the informal norms that governed cattle trespass in Shasta County, as outlined in Robert Ellickson's book *Order Without Law*[11] are evident, and Fischel does not overlook them (pp. 45-47).

Fischel might have pressed one question further: If the mine-owners were resolved to repair surface damage anyhow, then why did they fight the statute? The instinctive answer is, there is no reason at all, since opposition to the statute costs money, but successful legal action will not save any expenditure on repairs. But the pattern of legal opposition and social compliance is a common one, and there are good reasons for it. To explain, let me resort to an anecdote of my own that has strongly influenced my view about legal obligations. When my wife and I moved to Chicago in 1972 we rented a two-bedroom apartment in a new high-rise that was then only partly rented. As a young law professor I did something that I might not do today: I read the lease. In doing so, I discovered that the landlord assumed no obligations for repairs of damage

10. *See* 260 U.S. at 400.

11. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

that took place inside the units. But I also noted that the building had a full-time maintenance staff at the beck and call of the tenants. I asked the rental agent to explain the difference between the tough talk in the lease and the prompt service in the building — even then I knew it was better than the reverse situation of a promise of service with no maintenance staff.

Her answer made perfectly good sense. The building owners knew that reputation matters in attracting and keeping tenants in a building, but they drafted the lease such that they could have control, without judicial intervention, of any bad-apple tenant whom they distrusted. Should they have to demonstrate to an independent third party that they were in compliance with some "for cause" norm for withholding repair services, they could easily fail. The private knowledge that they had about the behavior of tenants, the conditions of the units, and the source of the damage easily could be lost in translation, and they would lose control over their own operations. Furthermore, if good tenants left because bad tenants stayed, then the whole building could fall into disarray. Knowing that the landlord had the tools to protect us from neighboring tenants who might otherwise make life unpleasant, my wife and I eagerly signed the lease, and the two years we lived there repaid our confidence. The legal risk that the landlord might deny its obligation to repair never came to pass, and the building prospered until it was converted into condominiums over twenty years later.

That same lesson applied in the mines. The creation of a legal duty enforced by public inspectors could alter the balance of power between the coal company and the surface owner in ways that could reduce the overall effectiveness of the informal system of repairs. An obligation to repair does not indicate when, where, and how repairs have to be made. Put the law on the surface owners' side and the repairs that are demanded could become too perfect relative to their costs. Parties struggle to keep legal control when they obey social norms cutting in the opposite direction. Their legal dominance limits the extent of their risk and controls the costs of their operations. The conversion of a social norm to a legal norm does not therefore necessarily represent a movement to rectify some imperfection; sometimes, it eliminates a small imperfection and replaces it with a larger one. The law does not automatically fulfill social expectations by converting them to legal obligations: it may transform them for the worse. Although Fischel does not draw the conclusion as forcibly as he should, he offers still more evidence that the local knowledge of private repeat players often yields better practical solutions than the heavy-handed legal regimes that displace them.

The discussion of *Pennsylvania Coal,* occupying the first forty-seven pages of the book, represents Fischel's most sustained investigation for this book. But *Regulatory Takings* contains many other smaller illustrations of his overall ingenuity in tracing out the implications of general legal decision. Here I shall mention just a few of those, most of which I hope to show have a real point.

A. *Cedar and Apple Trees*

Miller v. Schoene,[12] one of the major classics of takings law decided shortly after *Pennsylvania Coal,* raised the classical Coasean question of inconsistent uses by neighbors. In the Piedmont section of Virginia, both red cedar trees and apple trees can thrive. But the red cedars also play host to a "rust" fungus that in a later stage of its life is capable of destroying the apple trees. The state law allowed ten neighbors to petition the state entomologist to examine local red cedars for rust infection and to destroy the infected trees.[13] The owners of the red cedars received no compensation for their pains.

Fischel, setting out this history with his usual clarity, notes that the value of the apple trees usually exceeded that of the cedars (p. 152). While the apples grew a commercial crop, the cedars were usually a scrub tree of no particular value, and hardly worth more as trees than as cut timbers. According to Fischel, the basic legislation therefore possessed credibility because it looked like a typical antinuisance statute, not dissimilar to a law that required individual owners "to mow their lots to suppress ragweed" (p. 153). Since the value of the apple trees exceeded that of the cedar trees, and since that was generally known, why not dispense with the requirement of compensation given the overall efficiency gains of the statute? The costs of settlement were greater than any demoralization costs that might have been felt by the owners of the cedar trees and their sympathizers — the critical point in Fischel's examination of Michelman's views on the compensation question.

B. *Beachfront Management*

One of the key issues in *Lucas v. South Carolina Coastal Council*[14] was whether land owned by David Lucas became worthless once he was prohibited from building on it. Not content to rest on the trial judge's findings to that effect, Fischel walked the premises and checked the legal record and found that the only possible uses of the premises — camping and tenting — were also prohib-

12. 276 U.S. 272 (1928).

13. *See* 276 U.S. at 277-78.

14. 503 U.S. 1003 (1992).

ited by restrictive covenant. The claim of worthlessness was in fact correct (p. 60).

He recounts the history of *Lucas* following remand to the South Carolina courts. Because the wipeout was complete and the nuisance exception for regulation was not available, the court forced the state to purchase the land (p. 61). What it did next contains the lesson about the incentives created when state actions carry an obligation to compensate. Faced with the need to raise money for the land, the state decided to sell it off. One neighbor was prepared to pay $315,000 for one of the parcels to protect his view — itself a revelation as to the values of views to neighbors — but the state turned that down to sell it to someone else who was prepared to pay $392,500 to use the lot for development (p. 61). When the cash was to come out of its till, the state was not prepared to keep the land vacant for $77,500. Why then should it have been allowed to wipe out David Lucas altogether?

C. *Large Lot Zoning*

As exhibit four, consider *Agins v. City of Tiburon,*[15] a case in which the Court allowed the City of Tiburon to impose a five-acre minimum lot-size restriction on a choice piece of waterfront property. The restriction sprang up after an outsider purchased the land with the intention of dividing it into lots conformable to others in the neighborhood, on the order of four houses per acre. Fischel's conversation with the feisty Gideon Kanner — long active in the property rights movement — revealed that Agins would have abandoned his challenge of the zoning ordinance had it permitted him to build a single house per acre (p. 53). But the local officials evidently understood that they had the whip hand, for their position was eventually sustained in the California and United States Supreme Courts.

D. *Lateral Easements and Unconstitutional Conditions*

In *Nollan v. California Coastal Commission,*[16] the Court held that the State of California could not condition a building permit on the willingness of the landowner to surrender to the Coastal Commission a lateral easement, parallel to the beach, across the front of his property. The easement did not have an essential nexus to any legitimate purpose of the state, such as preserving views of the beach for the public at large. Again, Fischel journeyed to the site. In so doing, he discovered that the Nollans' house did not block views of the Pacific Ocean from the Pacific Coast Highway, but that

15. 598 P.2d 25 (Cal. 1979), *affd.,* 447 U.S. 255 (1980).

16. 483 U.S. 825 (1987).

the view from a nearby street was blocked by a six-foot fence on private property whose use was not challenged in the case. The Commission apparently did not care as much about views as Justice Scalia's hypothetical suggested.[17]

Nollan is important for another reason as well. The question in *Nollan* was a variation of the problem of unconstitutional conditions. *Nollan* conceded — wrongly, in my view — that the state could have rebuffed the Nollans' request to rip down an old shack and replace it with a modern home similar to those built by their neighbors. *Nollan* also conceded that the state could allow that construction without conditions attached. Justice Scalia dug in his heels and said that the condition requiring the lateral easement was void and that the building permit had to be granted.[18] Justice Scalia's justification was not entirely clear, but one might argue that he wished to police the boundary under current law between compensable takings of possessory interests and the largely noncompensable takings of rights of use or disposition. Thus, he had to prevent the state from initiating swaps of one type of interest for the other, lest the structural distinction created by standard takings doctrine fall into disarray.

The critics of that position said that what helped Nollan well could hurt other landowners, for in the next case the Coastal Commission just might refuse to deal. For example, I speculated that the Commission might decide to allow the structure to be built if the only alternative was to leave the lot in its current shape.[19] My instinct was that the Commission would value the increased tax revenues that could be collected from its construction.[20] However, Fischel's conversations with Gideon Kanner and Robert Best, both active in the field, indicated that my uncharacteristic optimism lacks foundation (p. 346). The Commission is as tough as it always has been and perhaps tougher, for now it knows that compromise could yield the *Nollan* outcome. On this score at least, Fischel's prediction outperformed my own.

The question then arises, why is Fischel right? Here Fischel's own view of the differential responsiveness of government at different levels helps to explain the phenomenon (pp. 276-77). The increased revenues from the property tax go to the local governments, not to the Commission. The gain is external to the Commission. When a local option to administer the statute exists, as it does in Michigan, matters could be different.[21] These local

17. *See* 483 U.S. at 836.

18. *See* 483 U.S. at 837.

19. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 183 (1993).

20. *See id.*

21. *See* MICH. COMP. LAWS ANN. § 324.902 (Supp. 1995).

officials can obtain the revenues from increased development and therefore should be more willing to grant approvals when given genuine discretion (which, in my experience, is the case). The point illustrates another danger from Coastal Commissions. Only a single set of concerns lies within the scope of their jurisdiction, so they ignore important social benefits that fall outside their ken. In this case at least, a form of local administration of a statewide regulation will do better than its statewide administration, even if the legal norms do not vary.

E. *Rent Control*

Let me give one more example. Fischel notes that rent-control statutes often work to the benefit of sitting tenants who can use their muscle in local elections to advance their own political interests. At the same time, he points out a subtle connection between the rise of rent control in California and the passage of Proposition 13, which freezes property taxes at existing levels until a property is sold in the marketplace, at which time it becomes revalued at its true market level. The passage of Proposition 13 meant that local governments were less concerned with the property values within their boundaries because they could not increase the amount of the tax (pp. 303, 307). The upshot was that there was less resistance to measures that would reduce aggregate property values because the consequences would largely fall elsewhere. Hence, the local opposition to rent control should weaken after Proposition 13, allowing for the observed spread of rent control.

The use of rent control has additional consequences. For example, Fischel discusses the politics behind the local ordinances upheld in *Yee v. City of Escondido*.[22] These ordinances set the rents that owners of mobile-home pads could charge to renters.[23] The reduced value of the pads led to an increased value of the complementary resource, the mobile home. Therefore, as long as the mobile-home owner remained in possession, he could capture that gain in use. Once he departed the premises, that benefit would be lost to either the landlord or to some subsequent tenant. The present mobile-home owners, however, had more political clout than the owners of the mobile-home parks, and therefore could secure the passage of laws, upheld in *Yee,* that allowed the purchaser of a mobile home to succeed to the seller's rights under the lease. The system proved in one sense more efficient than a rule that did not allow the mobile-home owner to transfer property rights, for it encouraged alienation when the new mobile-home owner valued the

22. 503 U.S. 519 (1992).

23. *See* 503 U.S. at 521.

land more than the old one. By the same token, it made more explicit the expropriation of the landlord's proprietary interest. Judge Kozinski had held this rent-control scheme unconstitutional as a possessory taking,[24] only to be rebuffed by the Supreme Court in *Yee*. Fischel notes sadly that in cases like this the Constitution should have served to protect the landlord's investment against the excesses of majoritarian politics (p. 324).

F. *California Housing Costs*

California also became the subject of Fischel's informative investigation of the relationship between judicial behavior and the high cost of housing in California after 1970. Fischel presents a table showing that the ratio of housing costs to annual income through the United States hovered around 2 to 1 from about 1960 to 1990, while in California that ratio moved from near the national average to 4.8 to 1 by 1990 (p. 239). He then examines a wide range of independent explanations — scarcity of land, increases in costs of production, and influx of population — and concludes that all fail. Huge portions of land were available for development throughout the state; the cost of construction did not deviate much from the national averages; and the influx of population fell, in part because of the high cost of housing, as the ratio of home cost to income rose (pp. 225-26, 237-39). He ultimately concludes that the rise resulted from the unremitting judicial hostility of the California Supreme Court to developers (pp. 226-32). That hostility manifested itself in two ways. In *Friends of Mammoth v. Board of Supervisors*,[25] the court overread the state environmental protection statutes to require an environmental impact statement for any private development, thereby allowing private groups to slow down the process. It also denied any claims for compensation filed by individual property owners against developers. In addition, in *Agins* it prohibited interim damages even when a restriction was struck down as a taking, allowing the aggrieved landowner only injunctive relief; a decision that was overruled in *First English*.[26] Finally, it tended to side with neighbors even when state agencies wanted to grant variances or permits to landowners.[27] Its heavy thumb on the scales raised the cost of development and reduced the supply, creating the affordable housing crunch.

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24. *See* Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987).

25. 502 P.2d 1049 (Cal. 1972).

26. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

27. *See, e.g.*, Topanga Assn. for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal. 1974). Fischel does not cite the case, but it supports his opinion.

II. Assessing the Rival Theories

By example and discussion, Fischel gives us a strong flavor of the patterns of land-use regulation throughout the United States. The question thus becomes how constitutional theory ought respond to his survey. Fischel attempts to overview the doctrinal structure of modern takings law, but this proves by and large the weakest aspect of his book. An economist by training, he lacks the patience required to wade through the byways and ambiguity of legal doctrine and tends instead to resort to capsule summaries of the law which, while hardly wrong, lack nuance and refinement. Even his headings consistently emit a didactic tone: " 'Public Use' is a Minor Limitation on Takings," "*Lochner v. New York* Epitomized Economic Due Process," or "Judicial Review Presents the Countermajoritarian Problem" (pp. 71, 109, 118). In short, the explication of legal doctrine is not the chief virtue of this book.

Fischel, however, manages to do a more than commendable job dealing with the academic theories of eminent domain. In large measure, he seeks to define his own position in opposition to Frank Michelman's great essay on just compensation[28] and my position set out in *Takings*.[29] His criticisms seem both fair and tempered, and they lead him to an eclectic view that steers a middle course between too much and too little judicial review. Throughout his discussion, Fischel addresses two chief worries. First, he fears that constitutional intervention entrusts too much power to judges and is therefore unacceptable in democratic societies. At the same time, he is enough a realist to recognize the defects of the local political process that he outlined so well. He, therefore, tends to favor some heightened form of judicial review when the assets in question are tied to a specific jurisdiction, and when the political process in those jurisdictions is skewed in a way that renders minorities and outsiders incapable of defending themselves in the democratic arena (pp. 327-29). By this standard, the actions of small local townships — where these vices are evident — receive the highest level of judicial scrutiny, and the actions of the federal government — which represents in a Madisonian sense the collective wisdom of the extended republic — receive the lowest. States fall into an intermediate category, but in general he accords them high levels of deference like the national government (p. 328). Large cities such as New York or Los Angeles fit into another intermediate category in which they receive higher scrutiny than national or state governments, but not quite that of local governments (p. 329).

28. *See* Michelman, *supra* note 4.

29. *See* Epstein, *supra* note 5.

Fischel thus tries to achieve an efficient level of regulation through a mixture of political and judicial controls. More accurately, he is acutely aware of institutional imperfections and seeks to come as close to the elusive ideal as possible. In reaching this position he starts with a fine explication of the Michelman position, the basics of which are as follows (pp. 141-59). In dealing with any government project, Michelman identifies four relevant variables. First, there are the benefits of the project in question *(B)* and their associated economic costs *(C)*. For these purposes we put aside the ambiguities in definition and valuation and note that those projects that merit completion when $B\text{-}C > 0$.

The question then arises whether the losers of such government process should receive compensation. To answer that question Michelman introduces the next two quantities: demoralization costs *(D)* and settlement costs *(S)*. Demoralization costs equal "the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered."[30] It amounts to a cost borne of sympathy with the position of the uncompensated loser, but ironically it does not extend to any sympathy with individuals who are upset that the property was taken *with* compensation. Finally, settlement cost is the cost of hammering out and enforcing compensation agreements. As Fischel rightly notes, under Michelman's famous formula the government should not undertake a project when $B\text{-}C < \min (D,S)$, that is, when no net benefit results from the project even after the government seeks to minimize its impact by choosing the smaller of D or S (p. 146). Rather, it says that when the government does the project, it should pay compensation if $B\text{-}C > S$, and $S < D$ (p. 146). It also says that the government owes no compensation if $B\text{-}C > D$, and $D < S$, that is, when the project is worth undertaking, but the compensation costs more than it achieves (p. 146). This interpretation led Fischel to support the Supreme Court's decision in *Miller*.

Surprisingly, Michelman did not apply his general formula to the full range of takings cases; instead, he concentrated on some difficult cases involving fast lands near navigable waters.[31] It is instructive nevertheless to see how that formula plays out in the context of general land use regulation of the sort that preoccupies Fischel, of which rent control and zoning restrictions seem common examples. First, the strongest case for not proceeding is when $C > B$, so that there is no net benefit. All forms of rent control that

30. Michelman, *supra* note 4, at 1214.

31. *See, e.g.*, United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); United States v. Twin City Power Co., 350 U.S. 222 (1956). For my views, see Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L. REV. 643, 651-56 (1996).

distort competitive markets beyond recognition fall into that category, as Fischel would agree. So, too, do those forms of land use regulations designed to suppress economic competition by neighbors or, as in *Lucas,* to produce huge private losses for small social gains. The Michelman formula is striking in that it somehow assumes that the decision has been made that these projects will not be undertaken without supplying any mechanism to secure this desired outcome. By concentrating so heavily on the relationship between D and S, it tends to assume that the issue of compensation arises only when $B > C$, and it fails to provide a filter to see that this condition is satisfied by the projects undertaken.

This approach misses one key function of a just-compensation test: making sure that only projects that satisfy this minimum condition $(B > C)$ get off the ground. That can be done only if one respects the proposition that *any form of government regulation that moves us from a competitive to a monopoly situation is per se a compensable taking.* This test produces the desired result; the state will have to raise the funds, and, as in *Lucas,* it will find no takers for the tax payment. Who will pay more in order to get less? The project therefore will die a natural death. The weeding out of these bad projects is so fundamental that any analysis that concentrates on the correct treatment of compensation for positive sum projects undertaken by the state pales into insignificance beside it. Compensation then could be ordered when D appears smaller than S, a result whose error costs, even when positive at all, are likely to be small. Thus, once we link the Michelman formula to the standard theories of welfare economics, it tolerates far more mischievous government intervention than Michelman himself had acknowledged.

Indeed the whole enterprise starts to call for the invalidation of the entire panoply of New Deal statutes as unconstitutional.[32] Thus, in principle, takings are not limited to cases of physical occupation, but cover all situations in which the government restricts use or limits the rights of disposition of the owners. The government could justify such a limitation by showing that it prevents some nuisance-like behavior of the individual owner, but when it lacks such a justification the state must compensate the losers, even if it divides the surplus of its actions, B-C, among the public at large. Necessary cash may be raised by taxes collected from the individuals benefited by the project in question. In some instances the compensation comes in-kind, that is, the benefits generated by the projects are transferred to the individuals burdened by it. The inquiry here turns roughly empirical and yields the following result: when the distribution of benefits and burdens fall equally, the

32. *See* EPSTEIN, *supra* note 5, at 281.

political process will tend to deliver good results. If I can gain only by bearing an equal fraction of the costs, then my judgment will be incentive-compatible with the welfare of the overall system. I will take ten if I have to pay eight, but not pay ten in order to get eight. Since in the simplest cases my position is identical with that of all others, then all persons get ten and pay eight when I, or some majority of which I am a member, make the decision in question. In constitutional theory, the disproportionate-impact test, so often cited as an intuitive test of fairness, captures this very point.[33] The point also corresponds with the views advanced by Robert Ellickson that the state cannot enjoin normal uses, that is, those customarily and widely distributed in society, by one set of individuals while allowing others, especially those who have arrived in a given community first in time, to engage in them.[34] The local government that imposes five-acre restrictions on latecomers cannot survive if its voting owners happily reside on half-acre plots.

One can go further and note the consequences of applying this comprehensive account of takings to the cases mentioned earlier in this review. *Pennsylvania Coal* comes out the same way, but not because of any intuition that some regulations "go too far" and some do not. All regulations are takings, and the length to which they "go" influences only the amount of compensation owing for their loss. In this case, the transfer by statutory command of the support estate from the miners to the landowners surely constitutes a taking, and one that should be nullified since the state paid no compensation. This outcome simply depends on the settled-upon property rights system and not on any unprincipled distinction between physical and regulatory taking, which fails to explain how the support estate should be classified. While it might be said that great dislocations could result under this approach, in point of fact they did not. The power of the local voluntary social conventions, whose effectiveness is strengthened if protected against mischievous government attack, prevents their occurrence. Wherein lies the peril of that decision, or indeed of any that rejects any effort to reassign to *A*, by force of law, rights that he has conveyed to *B?*

Next we return to *Miller.* Here Fischel offers two inconsistent explanations. First, the Michelman argument: $B\text{-}C > 0$, and $S > D$, thus, compensation is not required (p. 146). However, that result countenances the taking of the fee simple in land when the project is sound; it also assumes that the supporters of the present owners will not be upset because of the noble cause for which the land was

33. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

34. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. CHI. L. REV. 681 (1973).

taken. Yet surely the Michelman formula does not apply to physical takings; why then give it special weight for regulatory takings?

Alternatively, Fischel suggests that the cedar trees could be regarded as a nuisance, like the ragweed (p. 153). But here too I find a difference worth some notice. The ragweed spreads by ordinary wind, and thus the causation is surely proximate. The cedar tree, on the other hand, emits no substance. It is at best a habitat for a pest. It is a close question whether this situation involves a nuisance. All the same, the classification of the hard borderline case presents less cause for concern than does the proposition, made in *Miller,* that the nuisance issue does not matter anyhow and that it is sufficient if the state compares the value of the red cedars with the apple trees. Yet just that line was taken by Justice Stone when he wrote that "we need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute."[35] But if one need not do so, then what decides the compensation question? If it is whether the value of apple trees exceeds the value of the cedars, then we arrive at the same problem as before: in ordinary takings cases no one could condemn one parcel of land for nothing just because it was worth less than another, so why here? In addition, if the law of nuisance determines whether a private owner may obtain a judicial order for the destruction of the cedar trees, why encourage the enormous discontinuity between public and private law that Justice Stone's reading of *Miller* invites? Fischel therefore stands on his strongest ground when he declares the nuisance analogy sufficient to carry the day. Once he takes that position, he follows my analysis of the case to the letter.[36]

With regard to *Lucas,* the difficult question is why the case was brought at all. The total denial of the use of right was surely compensable, given the absence of any nuisance. The mystery of *Lucas* lies in the unexplained reluctance of Justice Scalia to apply the antinuisance paradigm to use restrictions that did not amount to total takings. Once the Court confirms its compensation rule: "Take all, pay full value; take 99 percent, and pay nothing at all," one may easily predict what strategy states will adopt. Always allow some minimal use; always give further procedural options; and then *"if all else fails, merely amend the regulation and start all over again"* (p. 365). Fischel offers this piece of timeless, if cynical, advice to local governments whose regulations have been struck down (p. 365). Lest anyone think that the waiting game will not work, the Bleak House saga in *Williamson County v. Hamilton Bank*[37] — a

35. Miller v. Schoene, 276 U.S. 272, 280 (1928).

36. *See* EPSTEIN, *supra* note 5, at 112-21.

37. 473 U.S. 172 (1985).

case that Fischel could have discussed with profit but did not — illustrates how, in a world of shifting substantive standards, delay tactics can be an art form, all with the blessing of the Court. So why the judicial deference to government actions?

Agins tells the same story. The normal-use test dooms the five-acre zoning restriction to constitutional perdition unless the townspeople prove willing to purchase the land from its present owner. One cannot dispute that result under any concern with normal patterns of use given its disproportionate impact. The issues in *Nollan,* however, appear a bit more complex. Again, my prediction seems to have failed: the Coastal Commission digs in its heels. What about the remedy? Make it justify the initial restrictions that the state wants to impose on new construction. In *Nollan,* houses were built up to the left and the right, so the restriction flunks both the normal-use and the disproportionate-impact tests. Going further, the construction of a single-family home has never been held a nuisance at common law, even by judges willing to stretch tort law. Thus, we can reduce the perils of the bargaining process by denying the state the platform on which to launch its case. If the compensation path remains available for both lateral easement and beachfront homes, then why not prevent the state from bundling the easement into the permit process?

How about rent control of mobile-home pads and the unremitting hostility toward development in California? Little hope lies in asking the California courts to declare their own state law decisions unconstitutional on federal grounds, but Fischel contends that even judicial decisions that eradicate traditional rights could trigger just compensation obligations under the federal constitution.[38] Surely, therefore, it is conceivable to him that the state may strike down a set of policies that he regards as mischievous or worse.

Where then does the difference lie? Here Fischel's argument rests on his belief that a democratic process cannot tolerate autocratic judges — but the payoff is not there. Even in a world of constitutional deference, someone has to interpret the statutes and regulations that make up an indisputable part of the legal corpus. When courts mangle these beyond recognition, the will of the legislature is subverted, often with disastrous consequences. All theories of judicial interpretation require responsible action by judges, even in statutory settings. Questions of judicial competence persist, even in a world of judicial restraint. The concern that judges will behave badly pervades all constitutional regimes. Worse still for Fischel's thesis, he seems quite convinced that the California court exacerbated the problem in local housing markets by denying plau-

38. *See* pp. 331-32 (endorsing Barton H. Thompson, Jr., *Judicial Takings,* 76 VA. L. REV. 1449 (1990)).

sible developer claims. Thus, judicial restraint also has its real costs, and error is everywhere. In a world with judges, the best hope is to develop a legal culture that responds to the problems of democratic power and political process. The issue is not a choice between judicial restraint and judicial activism. Rather, it is the optimal use of judicial intelligence when faced with hard social problems and difficult constitutional texts.

Fischel's approach does not escape this problem. Under his basic approach, the greater the exit rights, the less the direct supervision. Yet, he fails to explain how a system of judicial restraint can generate a constitutional right to exit in the first place, a point of no small importance given that state legislatures have, for example, taken to imposing stern prohibitions against insurance companies that no longer wish to do business within their states.[39] Unless that right can be secured under the Constitution, then a single stroke of the pen can neutralize the distinction between mobile and immobile capital to the detriment of us all.

Likewise, his system requires, without any clear explanation, that judges take different stances to legislation passed by different levels of government. To be sure, local politics may tend to be more skewed than state and national politics. Yet that is not always the case. The administration of the DNR regulations in Michigan provides a strong counterexample: the local governments with comprehensive responsibilities perform better than state officials with limited responsibilities most of the time. Matters are further confounded by the fact that it is easier to use the exit right, assuming that it is secured, against local governments than against state and national ones. It is also easy to find restrictive legislation at the state level that ties the hands of local authorities otherwise anxious to promote real estate development. The Michigan DNR possesses that characteristic, as does the South Carolina Coastal Council. In addition, the federal government can place stringent restrictions on land-use controls that may incite intensive local opposition. The Endangered Species Act[40] and the federal regulation of wetlands[41] are two obvious examples. So which way does the balance cut?

What then should be done with the differences between levels of governments? The invocation of multiple standards of review increases the number of opportunities for judicial discretion — and judicial confusion. Furthermore, they appear unnecessary. Rather than try to fashion such different standards, it seems preferable to

39. *See, e.g.*, N.J. STAT. ANN. § 17:33B (1990), *sustained in* State Farm Mutual Auto. Ins. Co. v. New Jersey, 590 A.2d 191 (N.J. 1991). *See generally* EPSTEIN, *supra* note 19, at 202-05.

40. 16 U.S.C. §§ 1531-44 (1988).

41. *See* North American Wetlands Conservation Act, 16 U.S.C.A. §§ 4401-14 (Supp. 1995).

stick with a uniform standard. If, as Fischel contends, local governments do misbehave more frequently and with more telling effect than do state or national governments, then the courts will more frequently invalidate their rules and ordinances. If they do not, then the courts will not. Either way, the question of whether an ordinance lives or dies should turn on what it says. It should not depend on who enacts it, nor on theories about how different branches of governments behave. The questions of what the law provides, whether it has a uniform impact, and whether there is police power justification must be answered under a uniform standard of adjudication.

So it is back to Aristotle. Just why is all this so extreme? The uniform application of the takings clause to regulation offers a rational and measured response to the problem of governance better than those that Fischel proposes. A set of sensible tests leads to just the outcomes that he wants in all the cases that we have considered. Better sound than moderate.

The final irony is this. A strict reading of the Takings Clause generates of itself a moderate position. On the one Aristotelian extreme lies an absolutist rule that never allows the state to take property, even for public use, without the individual consent of its owner. At the other extreme lies a rule that permits the state to take or regulate property without compensation so long as it believes (or says) that the taking is for the public good. The first position runs the risk of massive holdouts; the second runs the risk of expropriation. The better path lies in between. Give the Takings Clause with its just compensation requirement its ordinary meaning and by that simple step alone we shall move far down the road to establishing the sound balance between government power and private rights. It is just this message that Fischel's fine and informative book should have hammered home, but did not.