The Evolution of Zoning since the 1980s:  
The Persistence of Localism

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§1 Introduction

The “evolution” in the title pulls together three themes in this essay. One is an assessment of where the practice of zoning has gone since I published my first book, The Economics of Zoning Laws in 1985. The major pressures for zoning to change have come from above: The courts and the federal and state governments. It has not been a grass-roots movement. I conclude that most of this activity has made zoning more restrictive than it would otherwise have been. Zoning has remained resolutely local despite (or perhaps because of) political and legal movements seeking to change it. The second theme is how my views about the American practice of land-use regulation has changed over the last twenty-five years. This has less to do with changes in zoning itself and more with my subsequent scholarship, almost all of which has concerned the economic role of local government in the United States. I have come to see zoning as a critical part of the process of local government, and local government as an essential part of a federal system.

The third theme is a gingerly advanced proposition about local government in general, though the focus is land-use regulation. I will suggest that zoning’s historical development—evolution may be too fraught a term—should be regarded as being comparable to that of the common law and thus be taken more seriously by scholars than it normally is. My specific example is the development of zoning in Los Angeles that led to the puzzling court decision, Hadacheck v. Los Angeles, 239 U.S. 394 (1915), which permitted the city to expel a previously-established brickyard from a subsequently-developed residential area without compensation. The fulcrum issue is why most zoning allows nonconforming uses to continue despite that decision. To add to Dick Babcock’s oral dictum that “nobody loves zoning but the people” I would add “and nobody but the people can change zoning.”

This essay is both postscript and prologue. It is in part an assessment of what was happened to zoning and a prospectus for a revision of Economics of Zoning Laws that I hope to undertake in the next few years. It falls under the conference’s rubric of “Public Rights in Private Land.” Zoning fills that category in a particular way. I designate as “zoning” almost all local land-use regulation, including subdivision regulations, historic preservation, and public master-planning for location of infrastructure. Although different political actors make these decisions, all of them respond to the same underlying local political forces. Many state and national regulations affect the private use of land, but they will largely be overlooked except as they affect zoning.

I would justify this more narrow focus by zoning’s general importance. Zoning is the land use regulation that affects almost all Americans, and it is, if revealed political preference is any guide, the local government function they are least inclined to give up. Municipalities have incorporated just to control their zoning (Miller 1981, Fischel 2001). National regulations concerning wilderness, endangered species, and water pollution certainly affect land use, but they are usually of only episodic concern to most people. Indeed one of the puzzles to be explained here is why American land-use regulation has remained so steadfastly local despite the many political movements that would seem to undermine its parochial governance.

§2 “Rationality” Made Economics of Zoning Laws Different

I was bicycling from our sabbatical home to campus in Santa Barbara in 2005 when I noticed the birds on the roadway. Numerous nuts from ornamental trees were strewn on the road, and several birds were pecking at them in an effort to break their hard shells and get the nutmeat. But the shells were hard, and most birds had to be content with the remains of nuts crushed by
passing vehicles. A resourceful crow took another approach. It grabbed a fallen nut in its beak, flew to some height above the roadway, and dropped the nut. The nut would break, and the crow could then eat its meat. It was clearly deliberate activity, and I admired the bird’s cleverness.

But crows are too clever by half. Other crows simply waited for the nut to fall from the sky and crack open. They rushed to grab the nutmeat before the flying crow could return to earth and reap the fruits of its effort. I observed this over several days and noticed that the crows that lifted the nuts into the air were aware of their predicament, and they tried to adjust the elevation of their flights to avoid what I later learned was called “kleptoparasitism.” Great word. The working crows lowered the height of their drops so they were still close enough to the ground to retrieve the broken nuts before the klepto-crows could get it. The problem was that a low flight, from which retrieval was more feasible, was less likely to result in a broken nutshell. (The science on this is Cristola and Switzerb [1999].)

The crows’ more fundamental problem was a lack of property rights and other legal rules by which effort can be rewarded. They needed a system of territory in which each crow could have exclusive access to its work. (A system meats and bounds?) Perhaps the first-year course on property in law school should begin with this account of the functions of property instead of the chestnuts about the purloined fox (Pierson v. Post, 2 Am. Dec. 264 [N.Y. 1805]) or the defeated Indians (Johnson v. M’Intosh, 21 U.S. 543 [1823]).

My Aesopian use of this anecdote is to expand the idea of the evolution of property rights beyond the usual common-law account, which regards the rules as having emerged from the trial-and-error experience of ordinary people trying to deal with everyday problems. The modern “property right” is municipal zoning. Zoning extends to local voters (or whoever is decisive in local politics) the right to control other people’s property within a jurisdiction as well as their own. This is not a new idea. I devoted an entire book to it a quarter of a century ago (Fischel 1985), and it was not even my own idea back then—Robert Nelson (1977) had come up with it earlier.

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

The first theory I would call the goody-two-shoes theory: Zoning authorities—the source of whose authority was not inquired after—adopted regulations that would internalize externalities so as to correct market failures in the real estate market. Local authorities were regarded in this mix of normative and positive modeling as folks who sought to maximize social welfare. This view stems largely from the tradition of Arthur Pigou (1920), commonly regarded as the founder of welfare economics, but his most severe critic, Ronald Coase (1960, p. 17), actually offered an offhanded endorsement of zoning in the presence of high transaction costs. Coase may have subsequently changed his mind about zoning as a result of the work of Bernard Siegan (1972), whose investigation of Houston, Texas, the only large American city without zoning, was encouraged by Coase. In any case, it was not hard to persuade economists that this model did not
yield useful behavioral insights. Neither the motivation of authorities nor the outcome of the process seemed to jibe with reality.

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

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

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

My 1985 book on zoning was a measured success. I judge this by citations and by the current scarcity of the foregoing economic models (two-shoes and bloody-minded) against which I railed. Not as many papers assume from the outset that zoning is a welfare-maximizing institution, and at least a few ask what the economic motivation for a zoning regime might be. (Two recent stabs at it are Hilber and Nicould [2009] and Rothwell [2009]; older approaches are Bogart [1993] and Rolleston [1987].) Probably more important to the success of Economics of Zoning Laws is that local zoning has proven so durable despite the many criticisms of its shortcomings and the development of political movements that threatened to displace it.

§3 Local Zoning Has Resisted Pressure to Change

The most striking quality about zoning is that it is still local. Its durability in this respect threatens to bury the lead about “evolution,” so let me note that changes in zoning will be discussed presently and that the localness of zoning is itself an evolutionary puzzle. After all, many formerly local activities such as road building, public health, care for the poor, school finance, prosecution of corruption, and water quality regulation (even drinking water regulation), have been largely pre-empted by the state and federal government. In their book about larger city local governments, Frug and Barron (2008) address the many ways in which local government
authority has been circumscribed by the state government, but zoning (with the exception of Boston) is the power that from their description remains almost entirely in the local sphere.

The biggest threat to local zoning was the federalization of environmental law in the 1970s. Informed observers forecast that state and national laws would take over zoning (Edwin Mills 1979, p. 520), and a federal study headed by Laurence Rockefeller (Reilly 1973) encouraged a larger and (implicitly) preemptive state and federal role. Planners eagerly anticipated that their professional status and incomes would be enhanced as national land-use planning took over most of the functions of local zoning (Popper 1988).

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

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

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

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

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

Two problems seem to beset these goals. One is that in most metropolitan areas, numerous governments must be brought on board to agree with the goals. If only one or two adopt a growth boundaries, development that is excluded from the municipality in the “rural” zone simply jumps to another municipality. This appears to be what happened with Boulder, Colorado, which has an effective urban growth boundary out to its city limits, but which has no control over nearby municipalities, which have grown inordinately as a result (Pollock 1998).

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

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

§4 Housing Price Inflation Pressured Zoning (and Vice Versa)

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

The economic rationalization for this brake on local redistribution of wealth is grounded in the Tiebout (1956) model. From this perspective, the exclusive community is but one of many municipalities or school districts from which footloose households can choose (Hamilton 1975). If one cannot afford a home in Richdale and attend its fine schools, a more modest dwelling is available in lower-wealth but high-tax-and-spending Strivertown. Households with low demand for public schools would choose a low-tax, low-spending district. (The reason that the two-thirds of all households who have not children at home do not all choose such communities is, I have argued, their appreciation of the local social capital that public schools create [Fischel 2009].) With enough municipal and school district variety, people end up getting the housing and public services (schools and police department) that they are willing to pay for, and local property taxes are no more than a fee for service. Zoning is seen as a mechanism to insure that developers do not “cheat” on the system and build homes that do not pay their own way.

I wrote a brief comment on the empirical relation of zoning to property taxation (Fischel 1992), and this and subsequent work has pushed me into the somewhat unexpected role of the leading academic proponent of the benefit view of the property tax (Nechyba 2001). It turns out that almost all economists agree that if zoning operates as a nuanced and effective fiscal gatekeeper for municipal development, property taxes, the mainstay of local finance, are not really taxes at all (Zodrow 2007). They serve simply as a price for local public services and have none of the inefficiency qualities that most taxes have. Indeed, local property taxation in this framework promotes “Ricardian equivalence,” making current voters as aware of the burdens of public debt as they are of current taxes even if they plan to move away (Hatfield 2010).

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

Two movements have attacked the apparent fiscal segregation that zoning creates. One is the “open suburbs” campaign. Its two most famous successes have been the Mount Laurel judicial decisions in New Jersey and the legislatively-adopted “anti-snob zoning” laws of Massachusetts (Hughes and Van Doren 1990). New Jersey’s courts viewed local exclusion as a constitutional infirmity, and it eventually adopted a highly controversial remedy. Builders who could demonstrate that their proposals would add to the stock of low income housing in communities deemed by the court to be inadequate on this account could get a “builders’ remedy.” The derelict community would be ordered by the court to rezone the land in question to accommodate both the builder’s request for market rate housing and a quota of low-income housing. The extra market-rate housing permits were in effect a subsidy to make it possible to build the otherwise uneconomical low-income housing. A similar program was developed in Massachusetts. Towns and cities whose affordable housing was below ten percent of the total stock are ripe for a “40-B” development, named for the statute that authorized the requirement. Builders can, as in New Jersey, obtain an entitlement to build more than locally-allowed housing if they earmark a significant fraction of it for low income residents. This often involves protracted negotiations and litigation, but builders do get permits under the law (Fisher 2007).

The success of these programs is best measured by their durability. Both are more than thirty years old at this writing. It is not clear that they have produced more low-income housing than would have been available otherwise. Aside from simply crowding out some market-rate housing that would have filtered down from older stock (Sinai and Waldfogel 2002), the problem I see with both programs is that they rely on percentages for success. A town that finally meets its Mount Laurel or 40B goals will be unmolested by the court (in New Jersey) or the state (in Massachusetts) as long as its percentage of low income units to total units does not decline. This acts as an incentive for towns to restrict further growth altogether (Schmidt and Paulsen 2009). The disincentives to grow may account for the immense popularity of open-space preservation in both states. In the 1998-2003 period, the two states led the nation in voter initiatives to purchase farmland-development rights (Kotchen and Powers 2006). More than forty percent of all open-space initiatives in nation between 1997 and 2004 took place in New Jersey and Massachusetts (Banzhaf et al. 2006). It might be understandable that these two urban, eastern states value farmland preservation more than, say, Nebraska or Texas, but it does not explain why they lead other urban and eastern states by such a wide margin. My hypothesis is that growth avoidance has been made much stronger by the effectiveness of the Mount Laurel and 40B programs.

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

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

What is new in the last two decades is the amount and quality of the evidence that links land use regulation with high and rising housing prices. A topic used to be a back-office activity for grad students without better prospects has now engaged some of the best minds in the economics profession. Edward Glaeser at Harvard is one of the leading scholars to have discovered the link between zoning regulations (especially those that constrain overall density) and general housing affordability (Glaeser and Ward 2009; Glaeser, Gyourko, and Saiz 2008; Glaeser, Gyourko and Saks 2006). Much of this research has been advanced by economists at the University of Pennsylvania, who have taken the brave step of accumulating their own data on local zoning and lent it to many other researchers (Gyourko, Saiz, and Summers 2008). Among their more robust and puzzling findings is that zoning constraints appear to matter most in metropolitan areas on the Atlantic and Pacific coasts. Cities in the Midwest and South do have zoning, but it appears not to constrain development nearly to the extent that it does in the Northeast and the West Coast. (Much of the West Coast inflation followed the California Supreme Court’s many rulings that were hostile to development in the early 1970s [diMento et al. 1980; Fischel 1995, chap. 6], but why the court took this particular tack is not clear.) Explaining this disparity is an ongoing effort that is related to the more profound issue of why cities in these areas have generally become more attractive to employers and residents in the past three decades.

§5 Regulatory Takings Came and Went

The rise in scholarly interest in zoning’s macroeconomic (in the sense of affecting large areas) effects has been paralleled by the property rights movement, whose most notable scholarly work was Takings by Richard Epstein (1985). While Epstein himself has drawn few formal connections between just compensation and housing prices, I did make that connection in my 1985 book as well as in later works. The problem as I (and Bob Ellickson [1977]) saw it was that local governments (and the voters who elected them) were making decisions about the use of other people’s property without having to face the economic consequences of doing so. Without having to face any budgetary outlay (or an immediate opportunity cost) to expand the scope of regulation, local voters are inclined to excessively substitute zoning for other public outlays to enhance the value of their property. It is sometimes efficient to substitute regulation for spending, as Gilbert White (1986) pointed out in the context of flood control in his 1945
dissertation. The economic problem arises when one input to local public welfare, zoning, is underpriced relative to other inputs, such as purchases of land for parks.

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

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

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

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

The Supreme Court seemed to be pushing the takings litigation down to the state courts. They have been unwilling to grasp that nettle. Indeed, several of the U.S Court’s rulings can be thought of as attempts to keep the state courts from abandoning altogether the damages remedy for regulatory takings (Fischel 1995, chap. 1). State legislatures have actually appeared to be slightly more receptive to takings than their courts. A spate of state legislation that required compensation for regulatory takings appeared in the 1990s, but it has not had an appreciable
effect on zoning. Florida’s adopted a carefully-crafted regulatory takings bill in 1995 (as
described by its drafters, Powell, Rhodes and Stengle 1995). It seems to have had sufficiently
little effect that it was not even mentioned in the Lincoln Institute study of that state’s growth
management program. The more robust schemes that libertarian and pro-development groups
have proposed in state plebiscites since about 1990s have largely failed. The exception that
proves the rule was Oregon’s Measure 37, which in 2004 required compensation for many land-
use regulations, and which was subsequently amended by an initiative in 2007 (Measure 49) that
pulled out almost all of its remedial teeth (Berger 2009).

I have speculated elsewhere on the reasons for the failure of regulatory takings to do much to
rein in local zoning (Fischel 2004b). My main reason was the inability to agree upon a normative
baseline from which compensation would not be paid. What minimum lot size would pass
muster? Is the income tax system a taking? How about jury service? Deregulation of electric
utility markets? Without a consensus, the enterprising power of the American attorneys would
open a flood of cases that would make the asbestos litigation look tame and uncomplicated. My
other cautionary experience was teaching a law and economics course for more than ten years in
which I had students examine closely regulatory takings cases of their choosing. They had to
actually talk with the participants—I insisted they get both sides—and find out what happened
before and after the decision.

The revealing aspect of the years of reports was how few of my students would come out on
the side of the plaintiff landowners. Often I was also convinced by their more searching
examination that just compensation was not warranted. But almost as often my students simply
thought that the public benefits of the regulation in question were sufficiently important, and the
private losses sufficiently minor, that compensation would not have met the Michelman (1967)
fairness and efficiency criteria, which I was at pains to have taught them along with the Coase
(1960) theorem and Epstein’s (1985) four questions. Dartmouth economics majors may not be
representative of their cohort at large, but if they had any systematic biases, I would have
expected them to fall towards the development-minded landowner. I feel as if I have been in one
of those psychological experiments where everyone turns the wrong way in the elevator, and you
start to think the wrong way is the right way.

My gradual retreat from the regulatory takings doctrine led me to wonder what process might
take its place. In recent years I have become intrigued by the retro due process doctrine of the
Pennsylvania Supreme Court. The court routinely issues orders to communities to adopt
“curative amendments” for zoning rules that it deems outside the pale of proper regulation.
Although there is much complaining about abuse of the curative amendments (Rowan 2007), at
least one economic study found that it had more benign effects on housing market diversity in
Pennsylvania than neighboring New Jersey’s self-consciously redistributive zoning reforms
(Mitchell 2004).

The problem with the Pennsylvania approach is that it is almost universally disdained by the
planning bar. Urban economists likewise have some difficulties with its guiding principle, which
is that every community should have land zoned for every use. The municipal specialization that
lies at the heart of the Tiebout model would seem not to be allowed in Pennsylvania. And a study
of diversity within communities by Pack and Pack (1977) found that the state’s municipalities
indeed displayed an internal heterogeneity that seems inconsistent with the predictions of the
Tiebout model. Nonetheless, I remain intrigued by the longstanding ability of the Pennsylvania
courts to make localities pay attention to land uses and densities that local residents would be
reluctant to accept without a judicial prod.
§6 Contract Zoning versus Environmental Justice

A possible “top down” influence on zoning could explain the decline in the hostility to financial rewards for modifying zoning. One of the explanations for the difficulty in changing zoning to accommodate new development that I offered in Economics of Zoning Laws was the legal transaction costs of purchasing development rights. “Zoning for sale” was a put-down of many proposals by developers to ease their way through the zoning obstacle course. Courts abetted this hostility with doctrines that undercut what was called “contract zoning.”

Hostility to contract zoning seems to have abated considerably in the last quarter century. Communities seem willing to put dollar amounts—sometime excessively large, but then, as the old joke goes, all you’re talking about is price—on rezonings. Courts have increasingly tolerated obvious end runs around the supposed ban on contract zoning (Serkin 2007). At least some of the greater tolerance for cash exchanges has been the rise of tradable emission permits. Buying and selling “the right to pollute” was once disdained by environmentalists. Now it is eagerly embraced by many such organizations. The fungibility of public environmental entitlements seems to have trickled down to everyday zoning controversies. “Zoning for sale” is no longer a trump card for people opposed to neighborhood change.

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

I have always been a bit skeptical of the endowment effect. Most of the evidence for it comes from psychological experiments that lack the rich contextual world in which exchange normally takes place. People do, after all, regularly sell their homes and move elsewhere, despite indubitable affections for their neighborhood. So I was rather pleased in the Homevoter Hypothesis to come up with what seems to me a more coherent explanation for reluctance to trade, homeowner risk aversion (Fischel 2001). The inability of most homeowners to insure against neighborhood decline and the concentration of their wealth in their homes seems to offer a better explanation for why American suburban voters are wary of apparently value-enhancing transactions that would promote the higher-density development desired both by profit-minded developers and public-spirited promoters of smart growth.

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

Because of ordinary income effects, low-income communities would be more likely to give more weight to the gains from industry than the loss of local environmental amenities. As long as people are less mobile than industry (and I think they are), an efficient outcome will result in more (not all) disamenable industries being located in lower-income communities. Most evidence does indicate that higher-income communities are indeed more leery of commercial and industrial development (Fox 1981). Lower-income communities either developed around pre-existing industry or were more inclined to allow it to come into their communities (Been and Gupta 1997). Environmental-justice advocates may take the lesser resistance to industrial development to be political ineptitude or corruption by local officials, but there seems to be little systematic evidence pointing in those directions.

The more charged issue is whether African-Americans have been systematically discriminated against in land-use policies. Since African-American communities tend to have lower incomes, the evidence for this is complicated by an identification problem. It is further complicated by the fact that disfranchisement of blacks certainly did make them more vulnerable to dumping of disamenable land uses in their neighborhoods (Hinds and Ordway 1986). But since voting rights have been restored, the argument seems to have lost its punch, and the evidence that African-American communities suffer more environmental injuries than otherwise similar non-minority neighborhoods is almost nonexistent. Nonetheless, there continue to be special reviews of industrial location on this account, and this should count as an additional (perhaps desirable) transaction cost for locating problematic land uses.

§7 School Finance and Property Taxation

Another change of the last three decades that should have undermined—or at least changed—local zoning is the school finance equalization movement (Hanushek and Lindseth 2009). As I described in a previous section, much of zoning’s suburban appeal was that it made it possible to exclude housing development that did not “pay its own way” for community services. Zoning kept developers from building modest dwelling that would pay little in property taxes but generate large expenses for education. Communities that spent more than average on schools used zoning to make sure that their school funding would not be undermined by low-cost development.

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

The effects of this radical change in local public finance did not seem to make suburban zoning any less exclusionary. It did affect some location decisions. Some high-income families
seem to have moved to cities whose schools they otherwise would have disdained, since suburban schools held less of an advantage to them (Aronson 1999). But most of these high-income families either had no children in school or sent their children to the burgeoning private schools in the urban districts. By far the most distinctive changes in California schools have been the high (by national standards) average class size and the diminished participation in the public school system by high-income families (Brunner and Sonstelie 2006). But there is no evidence that California communities have been any more welcoming to low-income housing (or any other controversial developments). The chief trend is appears to be inducing new development to pay its own way with land-use exactions and pay for facilities with “Mello-Roos” bonds, none of which appear to be more welcoming of development (Dresch and Sheffrin 1997). The notion that local property taxation for education is the basis for exclusionary zoning is not supported by California’s experience or, as far as I know, that of any other state.

This is not to say that school finance equalization programs have not changed location decisions. Aside from the back-to-the-city movement mentioned above, one interesting result emerged from the Texas “top ten percent” plan (Cortes and Friedson 2010). In response to court decisions that undid affirmative action in Texas state universities, the legislature adopted a facially neutral plan. Students in the top ten percent of their class in any public high school would gain automatic admission. Thus the best students in the worst high schools had a much improved opportunity to attend state universities, and students in the best high schools faced a reduced chance. This resulted in some redistribution of population. Families with children started moving into poorer high school districts, apparently in the hope that their kids would have a better chance to get into college. This in turn raised housing values in those districts, though it did not appear to reduce home values in the better districts. A similar capitalization effect occurred in Minnesota as a result of its cross-district enrollment programs (Reback 2005). Homes in poorer districts began to appreciate faster than in richer districts, since families could to a large extent ignore the district line and purchase the cheaper homes and still send their children to better schools outside the district.

Whether any of the better school districts in Minnesota and Texas became more welcoming to low-income housing is a subject yet to be addressed in the zoning literature. However, a study of New Hampshire communities before and after a school-finance equalization program was put into effect found substantial effects from property tax reductions (Lutz 2009). Communities outside of the Boston Urbanized Area (which extends into southern New Hampshire) whose taxes were reduced as a result built significantly more homes as a result of property tax reductions. But towns closer to Boston but still in New Hampshire that were more “fully developed” did not experience more development. Instead, the tax reduction was capitalized in the form of higher housing prices for existing homes. The communities farther from Boston appear to have had more undeveloped land that was already zoned for housing, and so the capitalization effect (higher home prices) was mitigated by new construction.

§8 Google Earth, Crime, and Covenants

Another change in the past three decades has been the capacity to get information about land-use. The development of Geographic Information Systems has enhanced the ability of both practicing planners and scholars to learn about patterns of development. Real estate values and U.S. Census information are now easily obtainable. Details of local zoning ordinances and controversies are eminently searchable and accessible to scholars far away from the communities in question. Estimating the effects of various kinds of borders—municipal, school districts, and zoning—on home value is now an undergraduate exercise, and my own students have confirmed...
and sometimes altered my views about the effects of zoning. My information about zoning practice does not come exclusively from Hanover, New Hampshire, and Santa Barbara, California.

As a result of such information it is now more difficult to justify restrictive zoning policies on the basis of geographic fables. A federal study in the early 1980s seriously advanced the idea that urban development was proceeding at such a rapid rate that America was in danger of running out of farmland (National Agricultural Land Study 1981). This was seized upon by many communities as a rationale for adopting extremely large minimum lot sizes in their rural areas. (In fact, the movement for agricultural land preservation had started in the 1970s.) It was also a justification for some proposed statewide plans to preserve rural farmland both by purchase and by regulation. I had published a study that contested the running-out-of-farmland data (Fischel 1982), and within a few years the USDA disavowed the original alarmist data (Heimlich et al. 1991). But what surely makes it most difficult to maintain the “running out” story is Google Earth and similar satellite photography, which demonstrate to even the casual observer that urban development is such a small fraction of the total land area that it is difficult to sustain the original alarmist view about running out of farmland. Besides this, remote sensing methods have been used to get accurate data on the amount of urbanization in North America and in the rest of the world. All of these studies show a steadily urbanizing and suburbanizing world that is nonetheless a tiny fraction of the world’s stock of arable land (Burchfield et al. 2006; Angel, Sheppard, and Civco 2005).

Despite these setbacks, farmland preservation has not disappeared from the land-use picture. It is still in the interest of many suburban residents to be able to prevent development of nearby farmland. The expressed rationale for doing so, however, is less often anxiety about depletion of a national resource than about a local resource. An entire movement dedicated to consuming locally-grown food has been pressed into the service of farmland preservation. I do not think that the “locavore” movement was conceived with this service in mind. My view is that such movements are generated more or less randomly. Some become politically salient, however, because they are congruent with a policy that people want to adopt for other reasons but for which they lack an acceptable rationale. In short, I believe that, while “ideas have consequences,” it is equally true that consequences have ideas. When one idea, such as “America is running out of farmland,” becomes untenable as a basis for preventing development on nearby farmland, substitute ideas, such as “eat local” or “minimize your food miles” are naturally enlisted to take its place.

A more recent trend that potentially affects zoning is the remarkable decline in American crime rates. Anxiety about crime was, it seemed to me, an important explanation for suburbanization and exclusionary zoning (Fischel 1985, chap. 12). Crime rates rose considerably during the 1960s and 1970s, and at least some opposition to further suburban development was predicated on the possibility that low-income housing development made local crime more likely. As with school-finance equalization, the decline in urban crime seems to have been a discernable factor in reducing the flow of middle-class residents to suburbs (Ellen et al., 2010). It is too early to tell if this will make suburban residents more inclined to accept low-income housing or otherwise loosen zoning constraints. Complicating any such study is the possibility that lower crime and not-so-bad schools in central cities may make poorer people less inclined to want to move to the suburbs.

The last trend that has become more prominent since 1985 is the development of residential private governments (RPGs). They are associations of homeowners that are governed by legal
covenants and an association that is almost always designed by a developer of multi-unit housing projects. They are universal in apartment condominiums, but they are also widespread in single-family developments. The most obvious physical manifestation of RPGs are gated communities, but this understates their influence. Almost a third of new residential construction in the United States between 1970 and 2000 are governed by such private arrangements (Nelson 2003).

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

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

A separate trend in private land use regulation is the growth of conservation easements (Pidot 2005). Federal and state tax laws make it attractive for owners of large (and some not-so-large) undeveloped parcels to donate them to conservation organizations. This would hardly be of much public concern except that the tax subsidies appear to be very generous (largely because of uncontested appraisals) so that the opportunity cost of private “large lot zoning” would seem almost as low as it is for municipalities. The other potentially distorting aspect of conservation easements is that federal tax rules require that donated land must remain undeveloped indefinitely. This was done primarily to prevent owners from simply avoiding taxes on speculative land investments. But its effect in growing areas is to effectively remove large patches of developable land from the available stock, potentially making suburban infill development more costly.

§9 Zoning Board Misrule Is Overstated

In this section, I turn from reviewing objective events or movements that could have changed zoning to changes in my own perspectives about zoning. I lead with the most personal perspective, my experience on a zoning board. Before I had completed my 1985 book, I had hoped to get some practical experience on zoning by serving on my local zoning board. Zoning boards, I must warn economists, are not the agencies that formulate or administer the laws. Zoning laws and, more importantly, the many changes in the laws, are passed only by elected officials or, in an increasing number of jurisdictions, the voters themselves in formal plebiscites (Nguyen 2007). Zoning boards are adjuncts of the regulatory process designed to hear appeals from administrative rulings and to grant usually-minor exceptions to the literal application of
zoning laws. But being on a board is a good way to see zoning’s application up front, and I was eager to get that experience.

Here is how not to get on the zoning board. The Hanover selectmen (city council) had advertised a position on the zoning board and invited residents to apply. (There is much turnover on zoning boards, so openings occur frequently on a board of five regular and five alternate members.) I wrote in my letter that I was eager to serve and mentioned prominently my scholarly work on zoning and local government and the book I was in the process of writing about it.

Silence. More silence. When I inquired after a few months, I found that another applicant, who lacked any background in zoning, had been chosen. A few years later, I found that one of my son’s elementary school teachers had been elected to the selectboard. I mentioned to her that I was interested in being on the zoning board, not saying anything about my scholarship. She knew a bit about me and especially liked my wife and son, so I got the appointment.

My advice for scholars of zoning who want to be on the zoning board is, look like regular people. And my further advice is, once you get on the board, behave like regular people. I served on the board from 1987 to 1997, the last five years as the chair, and I never mentioned (or had cause to mention) my academic interest in zoning. As far as I could tell, none of my fellow members of the board knew that I had published a book on the subject, though I will note that this was before people could idly Google people’s names to get such information. Success as a zoning board member comes from a willingness to pay attention to details, listen carefully to people, and treat them respectfully even when they do not seem entirely forthcoming. One of my accomplishments as chair was that the board was never sued by a disappointed applicant or by an opponent of a project that we approved. The selectmen were grateful.

Two reflections about zoning boards might be useful to scholars. The first is that all board members are put on edge by lawyers. This includes the several lawyers who served on the board during my tenure. Having an attorney make the presentation while the applicant sits in the back of the room (or worse, fails to attend at all) makes board members assume that something is fishy about the proposal. Less articulate but sincere presentation by principals (or, for elaborate projects, their engineers and architects) are cut more slack than their polished and practiced legal agents.

The other reflection is how much actually visiting the site in question matters. Our board would hear applicants and then, in the week between the hearing and the deliberation session, travel individually to the location of the proposed project and tramp around the lot and the neighborhood. (Though its resident population is only 10,000, Hanover is a busy employment center, and its land area is the size of Boston, so locations were often unfamiliar.) Site visits could change our views of the case enormously. An applicant showed charming pictures of his antique-car hobby and sought a variance only to park some storage trailers. A visit revealed that he actually harbored a private junkyard. (Neighbors had not previously complained because the junkyard had been there before their homes were built, and the owner was a nice guy.) A barn that was proposed within a wetland setback turned out to be as high and dry as any location in Hanover. (Wetland definitions do not actually require water to be evident.)

I mention the importance of local knowledge because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. Among the earlier and better known critiques was titled, “The Zoning Board of Adjustment: A Case Study in Misrule” (Dukeminier and Stapleton 1962). A more recent study was by an attorney who statistically examined variance decisions in five New Hampshire towns, one of which was Hanover, during the years
1987-1992, when I was on the zoning board. His chief finding, reported in high dudgeon, was that variances are disproportionately granted if abutters do not object (Kent 1993, cited with similar studies in Ellickson and Been 2000, pp. 330-31). To which most board members would say, privately and with palms up, “Nu? Who knows better whether the variance will have an adverse effect?” The practice illustrates the recurrence of an early, grass-roots approach to land-use regulation, which required nonconforming uses to obtain permission of local property owners. The practice was struck down as unlawful delegation of the police power in several early cases such as Eubank v. City of Richmond, 226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Mr. Kent, the New Hampshire critic of zoning boards (and himself a New Hampshire lawyer), neglected to point out that four of the five towns in his sample have administrative officers who could discourage applicants with weak cases (Hanover’s certainly did), but none of the other “misrule-by-variance” studies worries much about selection bias, either. Kent also reported (accurately) that during the period he examined, the New Hampshire Supreme Court overturned all of the ten towns whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, a 2001 decision, Simplex v. Newington, 145 N.H. 727, changed the court’s previous zoning variance criteria, on which Kent had relied as the source of proper variances, to a less exacting standard that more closely reflected actual practice.

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

This is not to say that zoning boards are faultless. Some members can be, in my experience, petty busybodies or inclined to promote a political agenda. (My guess is that the selectboard originally suspected me of being in the latter category.) Though I never had reason to suspect corruption, I sometimes thought that favoritism and score-settling flavored some members’ votes. But even the least sophisticated zoning boards have an asset that is almost never available to appellate judges or to statistical analysts: They know at least the neighborhood and usually the specific site from personal experience. Critics need to take that into account.

§10 The Common Law Meets Zoning

The second new perspective that I have acquired since 1985 is historical, as is implied by the term “evolution” in the title of this essay. Economics of Zoning Laws had almost no historical analysis. For my purposes, zoning just appeared in the 1920s as a result of state legislation (following model acts developed by the U.S. Commerce Department) and Supreme Court rulings...
that upheld zoning against legal attack. Just why zoning appeared only in the early twentieth century, spread rapidly to both cities and suburbs, and took the form of residential (as opposed to business) protection was not addressed. I attempted to remedy my oversight in an article addressing the economic history of zoning (Fischel 2004a). I review it here because it allows me to test my view that local government is part of a self-ordering process that might be called evolutionary. (My major work on the evolutionary aspect of local government was my most recent book, Making the Grade [Fischel 2009], which concluded that the spread of public education in America and its surprisingly uniform pedagogy was the product of independent school districts whose residents paid attention to education’s effect on their property values.)

Zoning’s development is the product of a decentralized trial and error process among the 25,000 or so jurisdictions that do zoning. My emphasis is on the people who were affected by zoning, the general electorate, rather than the professional planners, lawyers, jurists, and public officials who are at the center of most histories of zoning. An evolutionary approach also evinces my skepticism of path dependence as an explanation for zoning’s ascendency. Regardless of what caused Justice Sutherland to change his mind (apparently) and sustain zoning in Euclid v. Ambler, 272 U.S. 365 (1926), zoning would have turned out about the same way. The U.S. Commerce Department’s standard acts were, in my view, no more than markers of a well-developed movement. Zoning does not exist in its present form because of the planners who were at the head of the parade. They proposed, but the voters disposed.

The reason for expounding zoning’s evolution here is to establish it as movement analogous to the development of the common law. Many scholars regard the common law as a more legitimate development of law because it comes up from the people rather than down from the sovereign. Common-law judges were not literally “the people,” of course. They owed their positions to a sovereign. Their everyday decisions, however, were not scripted by a central political agenda. The disputes they had to resolve were the concerns to everyday life: What constitutes a nuisance? Can I be excused from performing this contract? Are we bound by a previously established covenant?

The answers that individual judges gave were subject to a Darwinian test (Goodman 1978). The surviving rules, in this somewhat optimistic account, displaced those that did not promote a Kaldor-Hicks notion of efficiency. A judge who ruled that drivers were liable for collisions coming at them from the rear of the vehicle was apt to be overruled, or just ignored, by subsequent litigation. Contemporary studies of “spontaneous order” rules—my favorite is the nearly-universal but informal protocol for organizing and playing pick-up basketball—reinforce the idea that better rules emerge from the bottom-up process of trial and error and often unconscious imitation of successful norms (Ellickson 1991).

Zoning would not, according to most historical accounts, to fit the bottom-up story. One oft-told account has zoning emerging in New York City (Toll 1969). Fifth-Avenue merchants were upset that their territory was being invaded by small manufacturing firms that employed unskilled workers, and they (the firms and the workers) were scaring off the carriage trade on which the merchants depended. Zoning was said to have been intended to confine the unwashed manufacturing firms to their downtown Manhattan digs.

A more common if less colorful account has zoning emerging from social-scientific elites who sought to rationalize American cities and impose an order on them in the name of good government and the improvement of public spaces (Cappel 1991; Nelson 1977). This account situates zoning within a matrix of technocratic management that was developing early in the
twentieth century. The emerging planning profession, real-estate industry leaders, and local officials promoted zoning with grand promises that zoning would greatly enhance property values. The capstone of this story invokes Herbert Hoover’s Commerce Department, which drafted model zoning and planning ordinances in the 1920s (Knack and Meck 1996), and the US Supreme Court, which somewhat unexpectedly blessed zoning in the 1926 case of Euclid v. Ambler. State courts had been divided on the constitutionality of zoning, but nearly all fell into line after the word from on high in Euclid. (New Jersey’s court continued to strike down zoning laws after Euclid, but, as reviewed in Lumund v. Rutherford, 73 A.2d 545, 549 [N.J. 1950], voters soon adopted a constitutional amendment that overturned the decisions.)

§11 Intraurban Trolleys Isolated Home and Work

My account of the origins and spread of zoning was more bottom-up (Fischel 2004a). I saw it as a popular response to threats to homeownership that resulted from a new technology, the over-the-road, self-propelled motor vehicle that began having important economic effects on cities in the decade 1900-1910. It was not just about the passenger automobile. The motor truck and the bus were major players, too. Their revolutionary technology was not so much about motors and speed—railroads and boats had such qualities—as about their lack of a predictable pathway. Trucks, jitneys, and passenger cars could go almost anywhere. Railroads and streetcars were confined to tracks, and tracks were not ubiquitous in the same way that roads are. Once industrial and apartment dwellers were liberated from the tracks and the harbor, developers could utilize the low-cost land in suburban residential areas.

The social invention that preceded the motor-vehicle revolution was the owner-occupied home. Homes in the nineteenth century were not specialized in the way we now think of them. For most workers, their home neighborhood was a place of business as well as a place of retreat after business was done. The most obvious reason for this was that most people worked on farms, and the grange was a place of business as well as residence.

Residents of towns and cities also lived close to their place of work. Even if they commuted (mainly on foot), work was not far away and seldom politically isolated in another municipal jurisdiction (Von Hoffman 1996). One of my great-grandfathers was a baker in Phillipsburg, New Jersey, circa 1900. He lived with his wife and five daughters above his shop, and his employees lived nearby simply because it took too long to get to work in a pedestrian and equine transportation system. This proximity made for mixed feelings about local development. The prospect of a new warehouse in the neighborhood would have an adverse effect on residential amenities: More noisy traffic, potentially dangerous materials, increased risk of fire. But the new warehouse could also bring in more customers for the bakery and perhaps serve as a convenient place to store inventories. A proposal to systematically segregate commerce and industry from residences would not generate much enthusiasm. Even the employees of Jacob Ottenbacher’s “steam bakery” who lived in the area would feel the same way. The warehouse’s inroads on their residential amenities was at least partially offset by the prospect of higher wages from more profitable businesses.

The intraurban transportation system that preceded the motor vehicle was the street-railroad. The technology that made the railroad acceptable within high density urban areas was electric power for the trolleys. As streetcars became widespread in the late nineteenth century, it was possible for workers to live farther than walking distance from their place of business. This resulted in the spread of a new norm of housing, the free-standing, urban home (Warner 1962).
Home could now be a refuge from business, a refuge that was no longer figurative. It was enforced by distance and the time it took to traverse that distance.

But how to keep businesses and other incompatible uses from moving, Birnam Wood-like, to the home? This was mainly controlled by the location of railroad lines. Major railroads were not so much a problem. They sought central locations around which manufacturing and other industries clustered in order to keep their shipping costs down. Confining the intra-city commuter railroads and trolley lines was more difficult, but because they were subject to public regulation (mainly because they required rights of way on public streets), residents and developers who might not want the street railroads too near their homes could express their opposition to elected officials (Cheape 1980). It was a delicate political dance for developers of residential neighborhoods in larger cities. They needed the street railroad to enable their customers to get to work. Some developers actually built their own suburban lines, but most did not want the tracks immediately adjacent to their properties because of the potential nuisance.

Regardless of whether developers got the balance between access and isolation that they sought, intracity rail routes were fixed for a long time after they were built. Homebuyers who wanted to avoid the noise and pollution of the rail and trolley lines could simply buy a few blocks from the tracks and be confident that the line would stay put. This also helped the buyers of single-family homes isolate themselves from multistory apartment houses. Tenement developers almost invariably sought locations near transit nodes, as most of their tenants were too poor to afford livery service to get to the train. In this environment, the occasional nonresidential or apartment developer who ventured into a suburban neighborhood could be handled by ad hoc legal means or informal pressures. Even if these methods did not always succeed (as von Hoffman [1996] demonstrated in his study of Jamaica Plain in Boston), the risk of wholesale invasion of residential neighborhoods was tolerably low in the streetcar area.

§12 Footloose Motor Vehicles Upset the Suburban Equilibrium

The risk of nonresidential invasion shifted dramatically and quickly with Ford’s introduction of the low-cost motor vehicle in 1909. The personal automobile, which we associate today with suburbanization, did indeed allow developers of single-family homes to build in more remote areas, creating (initially) even more distance between home and work and the associated disamenities of city life. What moderns often fail to appreciate is that the same vehicle, the Model T and its variants, could be readily modified to carry multiple passengers (the jitney bus) and heavy freight. Loads that were formerly confined to fixed rail routes were now made footloose (Moses and Williamson 1967). The lower-cost lots that formerly were optimally developed as single-family homes were now accessible to developers of apartments and to businesses for offices, warehouses, and retail establishments.

Changed conditions shifted the demand for public regulation of land-use. The informal and ad hoc measures of neighborhood control described by Cappel (1991) no longer sufficed to stem the tide of heterogeneous uses in residential areas. Prospective buyers of homes in a pristine neighborhood had to contend with the prospect of uncontrolled change. Along with many others, Frederic Law Olmstead expressed dismay that his pastoral suburban developments were degraded by subsequent construction of incompatible uses (Fogelson 2005, p. 28). Developers realized that their prospective customers were reluctant to buy homes without additional security against subsequent adverse neighborhood change. Developers had been experimenting with private covenants to do this, but the law of covenants was less than accommodating and, more
important, prospective buyers of homes worried as much about development of nearby parcels, not subject to their covenants, that would impinge on their new neighborhood’s ambiance.

The answer to this was community-wide zoning. As Marc Weiss (1987) points out, Los Angeles area developers, among others, actually lobbied for zoning in order to make their developments more marketable. Zoning (first called “districting” in most ordinances) was not a foreign tool, though many planners had admired the Prussian system of land-use regulation that was developing in the 1870s. Ad hoc land use regulation was widely accepted in the United States. The difference was that zoning encompassed the entire community, not just parts of it.

The California developers suggested to their fellow Californian, Herbert Hoover, that a standard enabling act would make zoning easier to defend in court. Thus what looked like a purely top-down action—the U.S. Commerce Department’s promulgation of the standard zoning and planning laws—was actually a response to a bottom-up concern by prospective homebuyer (on whose behalf developers were lobbying) to a new set of urban conditions. The “demand side”—which I label as the “bottom up” force—was at least as important in the development of zoning as the “supply side” of regulation, the professional planners and their political allies.

Theories of political economy that seek to explain state and national legislation correctly note that producer interests are more easily organized than consumer interests. Producers of dairy products have a stronger voice in statehouses and in Congress than consumers of dairy products. The National Association of Homebuilders has its headquarters within blocks of the White House; the national association of home buyers is nonexistent. (A realty-referral group for “buyer brokers” goes by something like that name, but it is an imperfect substitute for buyers’ interests.)

As in politics, so in the writing of industrial history. The history of planning is a history of heroic planners and public officials whose domain is national. The demanders of well-planned communities are taken for granted. Even if an historian wanted to trace the demand for well-regulated communities, she would be flummoxed by the fact that most homeowners do not even know any of their neighbors before they actually buy a home. And even when the demand side (homeowners) does get organized, the supply-side often as not derides them as NIMBYs and other meddlers in the public sector. So histories of planning are almost all about planners and their professional allies.

But this should not blind present-day observers to the crucial role of the prospective homebuyers in the development of zoning. Planned communities and planning were abroad for centuries before zoning came to pass in the 1910-20 decade. Planning in America was not just for the famous Washington, DC or William Penn’s “greene country town” of Philadelphia. The marvelous collection of plans and commentary by John Reps (1965) demonstrates that entrepreneurial land developers spread city plans across the entire continent. They did not, of course, include too many details about land use, but their plans were clearly forward looking and designed to anticipate transportation issues and the location of important public facilities.

Planners had for years called for public land-use regulation, yet they got nowhere. Demand for zoning had not yet shifted into place. Nor was demand nudged much by the planning suppliers. The “city beautiful” movement that coalesced with the Chicago world’s fair of 1893 gained considerable currency but resulted in little movement towards zoning. Veiller (1916) actually disowned the movement in a speech he gave on the eve of the adoption of New York City’s first zoning ordinance (though he may have been discouraging the idea that Chicago was a
leader). Planners made no headway on zoning until the public was eager to have the protections it afforded.

§13 How to Check Hadacheck

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

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

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

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

Hadacheck has long intrigued me for two reasons. One was that it seemed to involve a zoning controversy in Los Angeles that arose several years before New York’s supposedly first-
in-the-nation zoning ordinance of 1916. Los Angeles was not yet a huge city—in 1910 its population was only about 320,000, compared to New York’s nearly 5 million at the same time—but it was growing rapidly because of internal migration, especially from the Midwest. Indeed, the major industry in Los Angeles at the time was residential development. Why had Los Angeles not been regarded as the mother of American zoning?

Kolnick’s answer to this is that the zoning to which Hadacheck was subject was not comprehensive or citywide. Indeed, the word zoning was not used. Neighborhoods would petition the city to be placed in an exclusive residential district either because business had invaded the area or because residences were (as in Hadacheck’s case) now invading areas where industries had come first. The city government became especially responsive to these requests after its first experience with a voter initiative, which was a novelty at the time. But the process was actually done piecemeal. What we now call zoning was merely called “districting,” and the entire city was not covered with districts. Indeed, the city itself was rapidly growing in area (by annexation) as well as population, so comprehensive zoning would have been especially difficult to undertake. New York’s title for first in the nation in 1916 was based on the comprehensiveness of its zoning map, which designated the entire city for some zone or another. Los Angeles did not get around to that until 1921.

The more pressing question for my present purpose is why the Hadacheck precedent had not led to a general rule that allowed nonconforming uses to be expelled without compensation. One reason Hadacheck is not a clear guide is that it looked like a nuisance case. If that was all it was, then the fact that his brickyard had to move despite its precedence would not be especially unusual. First in time does not establish an entitlement to continue a nuisance. As Richard Epstein (1985, p. 120) succinctly analyzed it, Hadacheck had been granted an implied but temporary easement by neighboring landowners to conduct a nuisance that did no damage as long as the land nearby was vacant. Once neighboring landowners developed their property for residential use, the brickyard was obliged to leave.

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

Ex parte Quong Wo, 161 Cal. 220 (1911) involved the creation by local petition of a residence district near downtown Los Angeles, on Flower near Seventh Street. Quong’s was one of more than a dozen Chinese hand laundries (no power machinery was employed) that were affected by the 1911 ordinance. They had long been interspersed with homes and other commercial buildings, as indicated on the map constructed by Kolnick (2008, p. 218). Quong Wo had operated in the area for more than 14 years but was ordered to close his business. He declined and was arrested (as Hadacheck was in a later case) and appealed his conviction to the California Supreme Court, which upheld the ordinance and the conviction. Chinese laundries would not have met almost any traditional definition of nuisances, and several of Quong Wo’s neighbors testified that it was inoffensive (Kolnick 2008, p 219). Prejudice against Chinese, which surely informed earlier cases, was declining in Los Angeles as the city’s population grew
as a result of non-Chinese immigrants from other states. The California court in this instance
seems to have simply treated this as a test of the breadth of municipal discretion on the police
to and did not mention nuisance issues at all.

The third case (second in time) was Ex parte Montgomery, 163 Cal. 457 (1912). It involved a
lumber yard located at North Avenue 61 and North Figueroa Street. It was also required to
discontinue operations as a result of a newly-adopted residential district. It was possible that
some nuisance-like activities occurred in lumberyards at the time, but they surely could have
been abated without requiring that the use be entirely removed. The more remarkable aspect of
Montgomery’s specific circumstance was that the lumber yard was adjacent to a railroad (the
Santa Fe), across which was a commercial neighborhood. The California Supreme Court
specifically noted that a lumberyard was not a per se nuisance but then added that it might be
considered a hazard to residential property because it harbored flammable materials. Well, yes,
just like almost every other parcel in Los Angeles.

§14 Politics and People Overruled Hadacheck

One would think that the court losses by Hadacheck and the other two would be the end of it.
The planners had their way, and the highest courts of the state and the nation gave
uncompensated removal of nonconforming uses their unqualified support. Indeed, Illinois courts
in the 1920s briefly declared that “grandfathering” was illegal (Schwieterman, Caspall, and
Heron 2006). But of course anyone familiar with zoning law knows that this was not the end of
the story. In fact, Mr. Hadacheck would nowadays likely prevail, though his brick making might
be scaled back by environmental laws. Nonconforming uses are now handled with kid
gloves. Some states regard their status as constitutionally protected (Serkin 2009, p. 1223). Others have
statutes that support them. Some of the more nuisance-like nonconformers were given a term of
years to operate under so-called “amortization statutes,” reflecting the public unease with simply
terminating them.

Yet Hadacheck is still good law (diMento et al. 1980, p. 901). It has never been reversed, at
least not explicitly. The explanation for the de facto reversal is twofold. One was popular
revulsion to the law. According to Marc Weiss (1987) as well as Kathy Kolnick, Hadacheck’s
case and the other two were causes célèbre. It just did not seem fair that a long-established
business could be eliminated by the stroke of a pen. The same popular feeling emerges as
modern “right to farm” laws (Adelaja and Friedman 1999). Such laws protect pre-existing laws
against nuisance suits (and sometimes zoning changes) that arise when residential neighborhoods
are built around farms. The new neighbors find the smells and sounds of agriculture are not to
their liking, but the “right to farm” laws stay their hands. This is despite common law principles
that disfavor the “moving to the nuisance” defense that right-to-farm supports. It is also despite
the writings of economists, who disparage the “first-in-time” principle as a general rule. It
creates incentives for landowners to opportunistically plant what they know will be
problematical uses in advance of the regulations or to lazily ignore neighborhood changes that
they should anticipate (Wittman 1980).

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

The impetus for the industrial districts was the fear that the city would be unable to attract industry. As Kolnick (2008, p. 254) observed, “Though the California state and federal courts had declared it constitutional to require what were considered as nuisance businesses to be removed from residence districts, an anti-industry reputation was one the city council and civic organizations were at pains to avoid.” City council members were aware that nearby cities were attracting industry with promises of exclusive districts. El Segundo brought in a refinery and established worker housing nearby, apparently able to persuade the refiner that it would not be chased out in the manner of Hadacheck.

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

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

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

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

Most state courts as well as many commentators continue to regard grandfathering previous uses as strictly a matter of noblesse oblige or political necessity on the part of local jurisdictions. Many have accepted the concept of an “amortization period” during which nonconforming uses is granted a reprieve from discontinuance. But even amortization periods have gone out of fashion (Serkin 2009). This seems to be a case in which the leaders of zoning called for a practice that the public was unwilling to accept, even though the courts either endorsed the
practice or tolerated it. For this reason, the continuing practice of grandfathering nonconforming uses supports what I call the “demand side” or “bottom-up” theory of zoning’s development. I am not arguing that courts have no effect on local government behavior. I have elsewhere claimed that Buchanan v. Warley was indeed important in that it undermined the ability of local governments to perpetuate racial segregation (Fischel 1998). That a less-than-perfect substitute for racial zoning, the private racial covenant, continued to be available may have helped Southern cities accept Buchanan and the various subterfuges that were regularly struck down by both federal and state courts.

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

§15 Conclusion

Zoning has remained the premier function of local governments everywhere in the United States. The political and technical trends that would at first blush seem destined to undermine it have either strengthened it (although in the direction of more restrictiveness) or, like invaders of China, been absorbed by the indigenous regulatory culture. This is a reflection, I submit, of the grass roots appeal of local land use regulation. This appeal is not new. I suggested in the latter sections of this essay that bottom-up forces substantially modified the force of zoning on previously existing, nonconforming uses. Although most professional advocates for zoning urged (and continue to urge) the discontinuance of nonconforming uses, and court decisions seldom stood in their way, public sentiment has generally favored their continuance. This sentiment has gradually solidified into what appears to be a popular legal entitlement. While there are serious arguments against recognizing such entitlements, their development might be taken by scholars as an indicator of the ongoing evolution of property rights.
§16 References


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