

**STATE EXECUTIVE/LEGISLATIVE AND
JUDICIAL ACTIVITIES AND THE STRENGTH OF
LOCAL REGULATION OF RESIDENTIAL
HOUSING**

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State Executive/Legislative and Judicial Activities and the Strength of Local Regulation of Residential Housing

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Land use regulations for residential housing are widespread in the United States and may be a major factor accounting for why many believe there is a “land shortage” in the larger coastal markets. Unfortunately, there is a paucity of rigorously-based knowledge of the origins and effects of local land use regulation, primarily because land use regulations are largely under local control—and so are the data describing them. To help address this deficit, the Zell/Lurie Real Estate Center at the Wharton School of the University of Pennsylvania embarked on a national survey of residential land use regulations.

This paper focuses on one key element in understanding the variation in the strength of local regulations—the relationship between state activity in housing regulation and the strength of land use controls at the local level. Specifically, we address two questions: (1) What is the variation across the fifty states in the activity of the executive/legislative branches and in the judicial posture towards local control over land use? (2) What impact do the variations have on the degree of regulatory control at the municipality level, where significant authority over land use regulations resides?

To explore this relationship, we correlate our calibration of executive/legislative and judicial activities with the Wharton Residential Land Use Regulation Index (WRLURI). We conclude that (1) the variation in both activities across the fifty states is substantial; (2) the executive/legislative activity in land use control has a significant link with local control

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decisions—the more active the state level actors are, the more controls are exercised in the states' municipalities; and (3) the variation in the judicial deference to local control has no significant link.

In sum, state leadership in land use control has an important role in determining the rationality of land use regulation in a state, even though much control resides with localities. This conclusion implies that the views of the people in the whole state can affect the efficiency of land use regulations throughout the state—allowing, for example, the development of a regionalized approach to efficient choices on open space requirements and density limits.

This paper is divided into four parts. In Section I, a summary table of the findings of our fifty state profiles on the activity of the executive/legislative and judicial branches of state government in land uses control is described and presented. Section II presents our empirical findings on the relationships between the state executive/legislative activity and the degree of land use regulatory control exercised at the local level. Section III presents our findings on the relationship between the deference state land use jurisprudence affords to municipal regulation and the degree of land use regulatory control exercised at the local level. The final section, Section IV, considers the policy implications of the empirical findings.

I. State Profiles of Executive/Legislative Activity and Judicial Posture Towards Local Land Use Regulation¹

As part of the large national study of residential land use regulation undertaken by the Zell/Lurie Real Estate Center at the Wharton School at the University of Pennsylvania, we developed fifty state profiles describing the legislative and judicial climate in which land use regulations take place in the individual jurisdiction in the state. The executive/legislative environment is assessed

¹ See the complete set of profiles, David D. Foster and Anita A. Summers, *Current State Legislative and Judicial Profiles on Land use Regulations in the U.S.*, Working Paper #512, Zell/Lurie Real Estate Center, Wharton School, University of Pennsylvania, Sept. 25, 2005.

on the basis of the level of activity, over the last ten years in both branches. The judicial environment is assessed on the basis of the standard applied by state appellate courts in evaluating four types of municipal land use regulations. The information was compiled from reviews of executive orders on state websites, analyses by the American Planning Association, case law, relevant articles in journals, publications by various environmental pressure groups, state commission reports, and telephone conversations with state officials.²

A. *Calibration of Findings in the State Profiles*

Table 1 presents a summary of our findings, state by state. The first three columns indicate whether the overall locus of authority for land use regulation in the state is dominantly local, dominantly state, or mixed of state and local. There are only six states—Hawaii, Oregon, Rhode Island, Vermont, Washington and Wisconsin—where the state is the dominant force in regulating land. Seventeen have very strong home rule provisions that result in a clear dominance of local control. The remaining twenty-seven states have a mixed state/local locus.

The next set of columns, headed Executive and Legislative Activity, are descriptive of the level of activity in the executive and legislative branches over the past ten years that is directed toward greater statewide land use restrictions. A state is scored 1 if there has been little recent activity, 2 if there has been moderate activity, and 3 if there has been a high level of activity. The assessment is fairly equally divided. Eighteen states have a 1, sixteen have a 2 and sixteen have a 3. Information on commissions, department studies, the governor's actions, and actual new legislation were combined to obtain these ratings.

The next set of columns, headed Judicial Posture, describe the standard applied by state appellate courts in judging four types of municipal land use regulations—impact fees and

² All sources are listed in *Id.*

Table 1: Current State Legislative and Judicial Profile on Land Use Regulations in the U.S.

State		Relative Locus of Govt. Authority			Executive and Legislative Activity				Judicial Posture														
		State	Local ¹	Mixed	Rating ²	Executive		Legislative		Rating ³	Impact Fees			Fair Share Requirement			Building Moratoria			Spot Zoning			
						Study	Action	Study	Action		Local Deference	Restricts Local	Mixed	Local Deference ⁴	Restricts Local	Mixed	Local Deference	Restricts Local	Mixed	Local Deference	Restricts Local	Mixed	
1	Alabama		√		1			√		3	√			√			√			√			
2	Alaska		√		1					0	---	---	---	√			---	---	---	√			
3	Arizona			√	3	√	√	√	√	3	√			√			---	---	---	√			
4	Arkansas		√		1					1		√		√			---	---	---			√	
5	California			√	3	√	√	√	√	3	√				√		√			√			
6	Colorado			√	3	√	√	√	√	2			√			√			√				√
7	Connecticut			√	2	√		√	√	2		√			√				√		√		
8	Delaware			√	3	√	√	√	√	3	√			√			√			√			
9	Florida			√	2	√				2	√			√			√						√
10	Georgia			√	3	√	√	√	√	0	---	---	---	√			---	---	---	---	---	---	---
11	Hawaii	√			1		√	√		0	---	---	---	5			---	---	---	5		---	---
12	Idaho		√		1		√	√	√	3	√			√			---	---	---	√			
13	Illinois			√	2	√	√	√		2		√		√			√			√			
14	Indiana		√		1	√		√		3	---	---	---	√						√			
15	Iowa		√		1					2		√		√			---	---	---	√			
16	Kansas		√		1					3	√			√			---	---	---	√			
17	Kentucky		√		2	√				2			√	√			√						√
18	Louisiana		√		1					2	---	---	---	√			---	---	---				√
19	Maine			√	3	√	√			3	√					√	√						√
20	Maryland			√	3	√	√			2		√		√			√						√
21	Massachusetts			√	3	√	√			2		√				√	√						√
22	Michigan			√	3	√	√			2			√			√	---	---	---				√
23	Minnesota			√	3	√	√			2	---	---	---	√					√				√
24	Mississippi		√		1					2	---	---	---	√			---	---	---				√
25	Missouri		√		1	√				3	√			√			---	---	---	√			

--- Insufficient case law to determine judicial posture
 1. Local refers to municipality or county
 2. 1 = little recent activity; 2 = moderate activity; 3 = high level of activity
 3. 0 = Insufficient case law to make a determination; 1 = restricts municipal land use regulation; 2 = neither highly restrictive nor highly supportive of municipal regulation; 3 = supportive of municipal regulation
 4. If there are no significant decisions that restrict local authority, the judicial holdings on "Fair Share" are classified as "Local Deference"
 5. Because locus of land-use regulation authority is the state, judicial posture does not apply to deference or restriction of local authority
 6. Legislature has empowered regional authorities to enact coordinated land-use regulations

Table 1: Current State Legislative and Judicial Profile on Land Use Regulations in the U.S. (continued)

State		Relative Locus of Govt. Authority			Executive and Legislative Activity						Judicial Posture												
		State	Local ¹	Mixed	Rating ²	Executive		Legislative		Rating ³	Impact Fees			Fair Share Requirement			Building Moratoria			Spot Zoning			
						Study	Action	Study	Action		Local Deference	Restricts Local	Mixed	Local Deference ⁴	Restricts Local	Mixed	Local Deference	Restricts Local	Mixed	Local Deference	Restricts Local	Mixed	
26	Montana			√	1	√		√		2	---	---	---		√		√				√		√
27	Nebraska			√	1					3	---	---	---	√			---	---	---	√			
28	Nevada			√ ⁶	2			√	√	2			√	√			√						√
29	New Hampshire			√	3	√	√	√	√	3	√					√			√				√
30	New Jersey			√	3	√	√	√	√	1		√			√			√			√		
31	New Mexico			√	2			√	√	2	---	---	---	√					√		√		
32	New York			√	2	√	√	√	√	2				√			√						√
33	North Carolina			√	2	√	√	√		2		√				√	√					√	
34	North Dakota		√		1			√		2	---	---	---	√			---	---	---				√
35	Ohio			√	2	√	√	√		1	√			√				√				√	
36	Oklahoma		√		1					0		√		√			---	---	---				√
37	Oregon	√			2	√	√	√	√	2	---	---	---	√			√					√	
38	Pennsylvania		√		3	√	√	√	√	1	√				√			√				√	
39	Rhode Island	√			3	√	√	√	√	2	√			√			---	---	---	√			
40	South Carolina			√	2	√	√	√	√	3		√		√				√			√		
41	South Dakota		√		1					3	√			√			---	---	---	√			
42	Tennessee			√	2	√	√	√	√	3	---	---	---	√			---	---	---	√			
43	Texas			√	2			√	√	2	√			√			√						
44	Utah			√	2			√	√	3			√	√			---	---	---	√			
45	Vermont	√			2	√	√	√	√	3	√			√			---	---	---	√			
46	Virginia			√	2			√	√	2		√		√				√			√		
47	Washington	√			3			√	√	2			√	√			√				√		
48	West Virginia				1					2	---	---	---	√					√		√		
49	Wisconsin	√			3	√	√	√	√	3	√			√			√				√		
50	Wyoming				1	√	√			3	√			√			√			---			

— Insufficient case law to determine judicial posture
 1. Local refers to municipality or county
 2. 1 = little recent activity; 2 = moderate activity; 3 = high level of activity
 3. 0 = Insufficient case law to make a determination; 1 = restricts municipal land use regulation; 2 = neither highly restrictive nor highly supportive of municipal regulation; 3 = supportive of municipal regulation
 4. If there are no significant decisions that restrict local authority, the judicial holdings on “Fair Share” are classified as “Local Deference”
 5. Because locus of land-use regulation authority is the state, judicial posture does not apply to deference or restriction of local authority
 6. Legislature has empowered regional authorities to enact coordinated land-use regulations

1	Alabama	Little legislative, executive or judicial activity; strong local authority.
2	Alaska	Vast land availability, very low population density, large state and federal land ownership resulting in little land-use regulation.
3	Arizona	Growing momentum, but continued resistance, to legislative action; strong judicial deference to local authority.
4	Arkansas	Very little executive, legislative or judicial activity.
5	California	Exceptional codification by state of land-use regulation; judicial interpretation largely deferential to local authority.
6	Colorado	Recent executive and legislative trend to more state control; mixed judicial holdings.
7	Connecticut	Recent executive and legislative trend to more statewide planning restrictions; judiciary restrictive on local authority.
8	Delaware	Active in past 10 years in creating new statewide land-use restrictions; strong judicial deference to local authority.
9	Florida	Growth management relatively restrictive, but little executive or legislative action in past 20 years; judiciary deferential to local authority.
10	Georgia	State active, but directed at strengthening local authority; limited case law.
11	Hawaii	Unique in the extent of state authority over land-use regulation; nearly non-existent case law.
12	Idaho	Land-use regulation largely done by local governments; judiciary deferential to local authority.
13	Illinois	Significant executive action, little legislative action; mixed judicial holdings.
14	Indiana	Little significant executive or legislative activity in statewide land-use reform; judiciary strongly deferential to local authority.
15	Iowa	Little significant activity in statewide land-use reform; mixed judicial holdings.
16	Kansas	Little significant activity in statewide land-use reform; judiciary strongly deferential to local authority.
17	Kentucky	Increased attention to executive and legislative studies, few enactments; mixed judicial holdings.
18	Louisiana	Inactive in executive and legislative branches; limited case law.
19	Maine	Significant executive and legislative activity; judiciary deferential to local authority.
20	Maryland	Unusually active in executive and legislative branches; mixed judicial holdings.
21	Massachusetts	Legislative and executive activity has continued to increase over the past 10 years; mixed judicial holdings.
22	Michigan	Significant legislative and executive activity in past 3 years; mixed judicial holdings.
23	Minnesota	Active executive and legislative branches, directed at increasing local authority; mixed judicial holdings.
24	Mississippi	Unusually inactive executive and legislative branches; mixed judicial holdings.
25	Missouri	Unusually inactive executive and legislative branches; judiciary highly deferential to local authority.

26	Montana	Relatively inactive executive and legislative branches; mixed judicial holdings.
27	Nebraska	Unusually inactive executive and legislative branches; judiciary highly deferential to local authority.
28	Nevada	Unique use of regional planning authorities for land-use regulation; judiciary largely deferential to local authority.
29	New Hampshire	Unusually active executive and legislative branches; judiciary largely deferential to local authority.
30	New Jersey	Only state where executive, legislative and judicial branches are restrictive of local authority.
31	New Mexico	Very modest legislative activity since 1993-95 planning code reforms; judiciary generally deferential to local authority.
32	New York	Significant executive action, little legislative enactment; mixed judicial holdings.
33	North Carolina	Recent executive and legislative studies, but little reform; mixed judicial holdings.
34	North Dakota	Relatively inactive executive and legislative branches; limited case law.
35	Ohio	Recent executive action, little legislative enactment; restrictive judicial holdings.
36	Oklahoma	Unusually inactive in executive and legislative branches; insufficient case law.
37	Oregon	Moderate legislative action directed at reducing role of state; judicial deference to local authority where statutes exist, restrictive otherwise.
38	Pennsylvania	Relatively active executive and legislative branches directed at increasing power of local authority; judiciary holdings restrictive.
39	Rhode Island	History of legislative and executive activity; somewhat limited case law.
40	South Carolina	Moderate executive action, little legislative enactment; judicial holdings largely deferential to local authority.
41	South Dakota	Unusually inactive executive and legislative branches; limited case law.
42	Tennessee	Recent, but not current, moderate executive and legislative activity; judiciary largely deferential to local authority.
43	Texas	History of strong local control, but recent trend towards state control; mixed judicial holdings.
44	Utah	Legislature active in developing a state framework; judiciary largely deferential to local authority.
45	Vermont	History of strong state control, moderately active executive and legislative branches; judiciary largely deferential to local authority.
46	Virginia	Moderate legislative activity; mixed judicial holdings.
47	Washington	Legislature passed exceptionally comprehensive land-use regulations in 1990; mixed judicial holdings.
48	West Virginia	Relatively inactive legislative and executive branches; mixed judicial holdings.
49	Wisconsin	Recent legislative and executive activity; judiciary largely deferential to local authority.
50	Wyoming	Unusually inactive legislative and executive branches; judiciary largely deferential to local authority.

exactions, fair share development requirements, building moratoria, and spot or exclusionary zoning. The state score here reflects the degree of deference to municipal courts, with a score of 1 implying that the jurisprudence in the state is highly restrictive regarding its localities' use of these particular municipal land use tools. A typical example of a state receiving a score of one involves the application of a relatively high standard for local governments to meet in implementing three or four of the evaluated land use regulations. In these states, it is typical to see a high incidence of judicial rejection or limitation of specific municipal regulatory action. A score of two is given if the courts have been neither highly restrictive nor highly supportive of municipal regulation. A typical example is a state in which a high standard is applied to one or two of the land use regulation categories, and the courts have a mixed record in upholding municipal regulation. A score of three is given if the courts have been strongly supportive of municipal regulation.³

B. *Summary Observations*

There are a few interesting observations to be made from the ratings, and from some simple correlations of the data with the population growth, income, and education levels of the population in the state:

- The level of intensity of executive legislative activity in land use regulation is about equally divided among the three ratings. Sixteen are very active, eighteen have had little recent activity, and sixteen have had a moderate level.
- Of the 46 states for which we have a solid basis for rating the judicial posture, slightly more than half (24) fall in the middle category of being neither highly supportive nor highly

³ In four states (Alaska, Georgia, Hawaii and Oklahoma) there was insufficient case law to make a determination. That situation arose either because there was a statutory framework that makes the appeal of a trial court decision unlikely, or because there were relatively few municipal land use regulations in the first place. A zero was assigned to those states in the table. For some of the statistical analysis, a rating of 2 was assigned to these four states. There was a significant difference in the results with and without the four states.

restrictive of municipal-level land use regulation; a substantial number (18) are very supportive; and only four (Arkansas, New Jersey, Ohio and Pennsylvania) are relatively highly restrictive on local controls.

- Simple correlations between the level of state executive/legislative activity and some socioeconomic characteristics of the state clearly reveal that the states that are most active are the ones that have had larger population growth between 1980 and 1990 ($r = +.48$), have had larger population growth between 1990 and 2000 ($r = +.31$), have higher median income ($r = +.47$), and have a higher proportion of college graduates ($r = +.52$).
- Simple correlations between the judicial rankings and the same socioeconomic characteristics reveal no strongly significant relationships.
- Geographically, states with very high levels of executive/legislative activity have a high concentration in the Northeast; states with little activity have a heavy concentration in the Midwest and Southeast.
- No clear geographic concentration emerges in the judicial rating on deference to municipalities.

In sum, states that are growing in population, richer, and have a more educated population are the states that have been particularly energetic in the past ten years in studying and legislating issues related to local land use regulation. There is, of course, some geographical concentration of these characteristics. It would appear that states with those characteristics have more incentive to control the development of land for some combination of environmental concerns, protection of valuable housing assets, and awareness of the need to respond to the public good dimensions of land use decisions. The state judicial posture towards deference to local control shows no clear set

of associated characteristics. Probably, it is the long ago history of the development of the state constitutions and the slow development of a body of state case law in the area of property rights that are the major determinants of the current judicial profile of a state. It would appear that, as we might expect, the chief executive and legislatures respond to current pressures of the voters, and the judiciary responds to relatively fixed constitutions and precedents.

II. Local Land Use Regulatory Control and State Executive/Legislative Activity in Land Use Issues

If the legislative and executive branches of a state government are actively engaged with issues of land usage throughout the state, do the local jurisdictions exercise more or less regulatory control? Several hypotheses seem reasonable. A state government may be more active because the communities in the state are more active. It may be more active because the local communities are inactive and need to be catalyzed. But pressure may be in the opposite direction—local communities may be more or less active because the state is more or less active. We are not able to tease out which way the causation flows, but we are able to determine whether or not state and local land use activity operate in the same directions.

We do this by comparing the numerical measure of state action described in the previous section with an index of regulatory control developed at the Zell/Lurie Real Estate Center at the Wharton School of the University of Pennsylvania—the Wharton Residential Land use Regulation Index (WRLURI). The index is described in Section A; the comparisons across the country of the WRLURI with the measure of state activity are in Section B.

A. *The Wharton Residential Land Use Regulation Index*⁴

In 2005, we conducted a nationwide survey of local land use control environments, asking a series of questions that focused on processes and outcomes. The questions asked can be divided into three categories. The first set provided information on the general characteristics of the regulatory process—how many, and which, entities are involved in the process and have to approve zoning and rezoning requests? Which are the most important factors influencing the process (budgetary concerns for example)? The second set of questions pertained to the rules of residential land use regulation – are there binding limits on new construction? affordable housing requirements? open space dedications? required payments for infrastructure? minimum lot size requirements? The third set asked about outcomes of the regulatory process—increases in lot development costs over the past ten years? review time and changes in review time?

The survey instrumental was mailed out to 6,896 municipalities across the country, using a mailing list obtained from the International City Manager Association. The overall response rate was 38%, with 2,649 surveys returned, representing 60% of the population surveyed.⁵

The survey data were supplemented by Census data on socioeconomic characteristics of the local communities, measures of community pressure on environmental and open space-related ballot initiatives, and the state activity and judicial posture measures.

All these data were used to develop a series of eleven subindexes that capture the stringency of local regulatory environments. The local project approval index, the supply restrictions index,

⁴ A detailed description of the data and index methodology is in Joseph Gyourko, Albert Saiz and Anita A. Summers, *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, Working Paper #558, Zell/Lurie Real Estate Center, Wharton School, University of Pennsylvania, Oct. 22, 2006. Forthcoming, URBAN STUDIES.

⁵ The response rate was highest in the larger cities, but there are large samples for all but the communities with fewer than 2,500 residents.

the density restrictions index, and the approval delay index are examples of these subindexes. Factor analysis was used to combine them into the WRLURI—a single, aggregate measure of regulatory constraint. The index is constructed so that the community with the average regulatory climate in the nation has a value of zero. Communities with WRLURI values below zero are less regulated than the national averages; those with WRLURI values above zero are more regulated than average. This index is standardized so that a community with a $WRLURI = +1$ is one standard deviation above the national mean. Values across the nation range from +3.0 and above (very strong control) to -3.0 and below (very weak control).

B. Association of the WRLURI and the Measure of State Land Use Activity

Is more regulatory control at the level of municipalities correlated with more legislative/executive activity at the level of the state? The overall correlation coefficient between the two measures is +.52 if each municipality in a state is assigned the same state activity ratings, and +.63 if we average the WRLURI ratings in each state (yielding fifty observations, rather than 2,612 observations). We present two tables that provide more detailed texture on this relationship.

Table 2 presents the mean score of state executive/legislative activity in the fifty states in relation to the mean of the regulatory control index of all the municipalities with that score. In the second column the state activity averages 1.0 (relatively inactive) for the communities with relatively low levels of regulatory control (between -3 and -2.01); but it averages 2.8 (very active) for communities with relatively high levels of regulatory control (between +2.01 and +3). More stringent levels of regulation at the local level are associated with more attention to land use issues at the state level.

Table 2: State Executive/Legislative Activity and Local Regulatory Control (6 categories)

WRLURI	<u>Exec/Leg Rating</u>		No. of Observations
	Mean	St. Dev.	
< -2.00	1.00	—	6
-2.00 to -1.01	1.50	0.58	413
-1.00 to 0	2.17	0.72	1015
+0.01 to +1.00	2.54	0.57	783
+1.01 to +2.00	2.73	0.48	295
> +2.00	2.87	0.37	101

Table 3 affirms this finding by examining the same data broken into deciles of the regulatory index, so that the numbers of observations in each WRLURI range is essentially equal. With one minor exception (between the 70th and 80th percentiles) there is a steady pattern of positive association between increases in the WRLURI and the activity rating at the state level.

Table 3: State Executive/Legislative Activity and Local Regulatory Control (deciles)

WRLURI Percentile	<u>Exec/Leg Rating</u>		No. of Observations
	Mean	St. Dev.	
10th	1.40	0.54	261
20th	1.73	0.67	261
30th	2.00	0.71	261
40th	2.18	0.71	262
50th	2.33	0.66	262
60th	2.46	0.63	262
70th	2.56	0.58	261
80th	2.51	0.56	261
90th	2.65	0.53	261
100th	2.81	0.41	261

Clearly, energetic action at the state level on land use policy is found in states whose local communities have enacted land use regulations that are more stringent. There is a consistency, as one would expect in a democracy, between the local set of voter preferences and the preferences expressed by the Governor and state legislators.

III. Local Land Use Regulatory Control and State Court Judicial Posture on Land Use Issues

State courts respond to a wide spectrum of land use issues, four of which enter into the determination of our rating on the degree of deference to local control. If the courts are very deferential to local determination of land use controls, is the strength of regulation in the municipalities strong or weak? We present tables documenting the absence of any clear association between the state judiciary and the intensity of local actions.

In Table 4, the mean score of the state judiciary posture of the extent of deference to municipal control in the fifty states is aligned with the mean WRLURI of all the municipalities with that score. In the second column all but the last entry (1.94 for highly regulated communities) range between 2.10 and 2.33. There are no statistically significant differences over the entire range.

Table 4: State Judiciary Posture and Local Regulatory Control (6 categories)

WRLURI	Judicial Rating		No. of Observations
	Mean	St. Dev.	
< -2.00	2.33	0.52	6
-2.00 to -1.01	2.31	0.65	413
-1.00 to 0	2.10	0.65	1015
+ .01 to +1.00	2.10	0.68	783
+1.01 to 2.00	2.13	0.75	295
> 2.00	1.94	0.63	101

Table 5 affirms that finding by examining the same data organized into deciles of WRLURI, so that the number of observations in each WRLURI is essentially equal. There is no significant pattern of association between the state judiciary posture towards municipal control and the regulatory intensity of the local jurisdictions in that state.

Table 5: State Judiciary Posture and Local Regulatory Control (deciles)

WRLURI Percentile	Judicial Rating		No. of Observations
	Mean	St. Dev.	
10th	2.38	0.64	261
20th	2.18	0.64	261
30th	2.14	0.64	261
40th	2.09	0.65	262
50th	2.08	0.65	262
60th	2.08	0.68	262
70th	2.08	0.69	261
80th	2.12	0.67	261
90th	2.13	0.70	261
100th	2.04	0.73	261

A final confirmation of this finding is that the correlation coefficient between the two measures is $-.09$ if each municipality in a state is assigned the same judicial posture rating, and $-.12$ if we average the WRLURI ratings in each state first.

These findings are consistent with the nature of the judicial system (particularly with respect to property law, which is deeply grounded in historical precedent). Positions on issues evolve slowly, and can often only happen from the top (State Supreme Courts). Very few cases make it this far, and, when they do, they may be addressing an issue that has been with us for some time. Ahead, state common law on land-use may yet catch up with the state and local activity that has occurred over the last decade.

With respect to land use regulation, this evidence indicates that the judicial decisions on the degree of deference to local control on impact fees and exactions, fair share development requirements, building moratoria, and spot or exclusionary zoning are independent of the strength of local land use regulations.⁶

IV. Summary and Policy Implications

We assembled an extensive set of information on the land use activity of the three branches of state governments—executive, legislative, and judicial. (The close interactions of the first two required us to treat them together.) The executive/legislative branches were calibrated on the basis of their level of activity in land use policy; the judicial branch was calibrated on the basis of its jurisprudential deference to local control in the area of land use regulation. These measures were then examined in relation to the results of another research effort—an index measuring the strength of local land use regulations in local communities, the Wharton Residential Land Use Regulation Index.

Our analysis documents the strong linkage between executive/legislative activity and the strength of local regulations—the more intense the state activity, the more intense the local activity. The actions of the judiciary, however, appear to be quite independent of the local actions.

The confirmation of the linkage of the strength of local regulatory controls to actions of state government indicates the importance of assessing and clarifying what the role of state governments should be—an assessment to be made by the citizens of each state. There are some useful insights that can be brought to this assessment. Ultimately, the extent of the state's role is an issue of the extent to which social benefits are greater than social costs.

⁶ The difference between the findings on the state activity with these judicial posture findings is confirmed by the fact that the correlation between the executive/legislative activity and judicial posture ratings is a non-significant +.07.

First, we know from some other research in our land use regulation project⁷ that there is a strong positive correlation between the degree of regulation in a community and recent increases in land development costs indicating that regulation is raising costs. Ultimately, this gets reflected in housing prices. While higher housing prices clearly benefit sellers, they can have serious social costs. By influencing affordability, these costs can affect both what people buy and where they are able to live.

Second, there are, of course, public and private gains to land use regulation. For example, lower density and open space are valuable environmental goods that many value, and it is the creation and preservation of such attributes that underpins at least some of the demand for more land use regulation. Another likely motivation for stricter regulation is the protection of capital gains on housing by current owners. Reduced supply can raise the probability of future price gains and reduce the probability of future price drops. However, this conveys no social gain as the current owner's gain is exactly offset by the next owner's loss from paying a higher price.

Third, the cost-benefit issue is made even more complex when one tries to think about other costs such as those associated with community and pollution. If heavy regulation in one place leads to leapfrog development, commuting and pollution-related costs could rise. However, smart growth advocates have argued that regulation can be designed to deal with these issues, while increasing environmental amenities that benefit the entire community.

The number of costs and benefits that have a public good dimension make it clear that the state is highly likely to have an important role in regulating local regulation. This is so because a market failure occurs—neither private interests nor individual communities should be expected to fully take account of what is in the interests of the broader region when making decisions about local land use regulation. When a specific locality decides to increase local regulation, for example,

⁷ *Id.* at 4.

it does so, presumably, to help its existing residents—even if the action might impose costs on other communities, or on the broader region, by adding commuting costs and more car-generated pollution.

It is a higher level of government, the state in this case—since effective regional governments generally do not exist—that needs to take on the role of ensuring that social costs and benefits, not just private ones, are taken into account. In some cases, the proper role might be for it to provide incentives to localities to allow more new construction that is seen to be in the region's interest. In others, it may be to do the opposite, if private interest on the construction side is acting in a way that reduces environmental amenities that have value to those outside the given locale. The state courts may, as the momentum towards greater regulation increases, react to overstepping some as yet undrawn boundary by taking a more proactive approach to limiting the powers of the regulators.

Ultimately, politics exists to deal with issues such as this. Voters have choices to consider. There are tradeoffs to be made between public and private interests—between protecting the environment, increasing housing affordability, strengthening the role of the state in determining land use and protecting individual property rights and local control over land use.