WHAT'S FEDERALISM GOT TO DO WITH REGULATORY TAKINGS?

By

Michael M. Berger[1]

INTRODUCTION

Don't get me wrong; some of my best friends are Federalists. It just brings me up short when someone proposes to apply the concept of federalism — namely, deference to state control[2] — to issues of fundamental right without first establishing and acknowledging the existence of a uniform federal baseline of constitutional protection,[3] something Professor Michelman has called "a national constitutional norm of regard for a specified class of individual rights."[4] I especially get this feeling when some of those proposing such deference concede that "state courts have had a somewhat checkered record" in protecting the rights of property owners.[5] As someone who has practiced constitutional property law in California for the last half century, I may be jaundiced (or, perhaps, simply beaten up), but (at least as applied to California) that "checkered"

---

[1] Partner, Manatt, Phelps & Phillips and co-Chair of its Appellate Practice Group. Quondam adjunct faculty, teaching takings, land use litigation, and appellate practice at University of Southern California, Washington University in St. Louis, University of Miami, and Loyola of Los Angeles Law School during the last 45 years. Brigham-Kanner Prize winner in 2014. I have argued four takings cases in the U.S. Supreme Court and participated as amicus curiae in many of the important takings cases since 1980. I would like to thank James Burling, Robert Thomas, and Professors David Shapiro, Gideon Kanner, and Janet Madden, who provided helpful reviews and comments while this piece was being written.

[2] Acknowledging, of course, as Professor Fallon put it, that "[t]here is no agreed-upon definition of constitutional federalism," Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429, 440 (2002) (hereinafter, Fallon, *"Conservative" Paths*), whether to defer to state control is the concern of this paper.

[3] See, e.g., John Echeverria, Horne v. Department of Agriculture: *An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 Envtl. L. Rep. News & Analysis 10735 (2013) (hereinafter Echeverria, *Horne*); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion under* Williamson County, 26 Ecology L.Q. 1 (1999); Eric A. Lindberg, *Multijurisdictionality and Federalism: Assessing* San Remo Hotel's *Effect on Regulatory Takings*, 57 UCLA L. Rev. 1819 (2010) (urging that "the values of federalism outweigh concerns that jurisdiction stripping equates to rights stripping"); Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 Lewis & Clark L. Rev. 1381 (2012); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 206 (2004) (hereinafter Sterk, *Federalist Dimension*). Examining these commentaries and others, Professor Rose distinguishes between the academic literature of takings law, which "fairly drips with federalism" and modern judicial output, which "ha[s] not even bothered to give these federalism concerns the back of their hand." Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 U.C.L.A. L. Rev. 1681, 1683, 1694 (2007) (hereinafter Rose, *Federalism*). Interestingly, however, from the standpoint of property lawyers, the Supreme Court's expansion of federalism in other fields has been accompanied by a "toughened judicial scrutiny of governmental action under the Takings Clause." Fallon, *"Conservative" Paths*, 69 U. Chi. L. Rev. at 460.

[4] Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 306 (1993) (hereinafter Michelman, *Federalism*).

[5] E.g. Sterk, *Federalist Dimension*, 114 Yale L.J. at 206. More generally, as one commentator noted, "leaving such decisions to the states . . . has served more to inhibit individual liberty than to advance it." Comment, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?* 10 U. Pa. J. Const. L. 643, 645 (2008) (hereinafter, Comment *Failure of Federalism*).

conclusion is vastly understated.[6] The idea of handing over complete control of constitutional protection to the tender mercies of courts that can thumb their judicial noses at the United States Supreme Court as easily as California has[7] makes my blood run cold.[8] And why should others be trusted not to jump on the California band wagon (as California continuously shows what can be gotten away with), even though others may be more rational now?[9] As if to prove my point, Professor Sterk has opined that, after the Supreme Court decided *First English*, holding that the 5th Amendment mandated compensation as the remedy for a regulatory taking as a matter of overriding federal law (thus overruling California's contrary conclusion), "a number of state courts have developed doctrines designed to eviscerate the damages remedy."[10] If nothing else, such state court mutinies demonstrate the need for more Supreme Court intervention and a clearer system of uniformly applied standards.[11]

---

[6] The California judiciary's hostility to property owners has been an open secret for many years. See, e.g., WILLIAM FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 218 (Harvard U. Press 1995) ("The California Supreme Court in the late 1960s and early 1970s actively reduced the development rights of landowners" to the point where "the California court stopped development at every turn" (*id*. at 227); David L. Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 Urban Law. 723, 724 (1981) ("We all know the California courts won't let landowners/developers build anything!"); RICHARD BABCOCK & CHARLES SIEMON, THE ZONING GAME REVISITED 293 (1985) (wondering why a developer would "sue a California community when it would cost a lot less and save much time if he simply slit his throat") (hereinafter BABCOCK & SIEMON, ZONING REVISITED). Professor Sterk cavalierly suggests that anyone who buys land in California simply "assumes the risk" of hostile treatment. Sterk, *Federalist Dimension*, 114 Yale L.J. at 265. I could go on, but I suspect that, by now, you see what passes for constitutional property law on the left coast. For extended discussion of the California Supreme Court's war on property rights, see Gideon Kanner & Michael M. Berger, *The Nasty, Brutish and Short Life of* Agins v. City of Tiburon, 50 Urb. Law. __, __-__ (forthcoming 2018) (hereinafter Kanner & Berger, *Agins*).

[7] See *Id*. at __-__; First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 311 (1987) ("[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment"); Nollan v. California Coastal Commn., 483 U.S. 825, 837 (1987) ("Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts.")

[8] It seems fair to focus on California, as land use litigation qualifies as a spectator sport there. Pound for pound, there is more of it there than anywhere else. That is doubtlessly a by-product of a judiciary that permits government regulators free rein to do as they please. Two knowledgeable commentators (whose viewpoint is generally supportive of regulators) observed, for example, that, "[i]n California, the courts have elevated governmental arrogance to a fine art." BABCOCK & SIEMON, ZONING REVISITED 263. Nationally, Professor Rose believes that takings jurisprudence "vacillates between letting legislatures do what they like, on the one hand, and disdainfully dismissing legislative action on the other." Rose, *Federalism*, 54 U.C.L.A.L. Rev. at 1684. Nonetheless, she believes that "disdain has the momentum" (*ibid.*) because of "a rising distrust of governmental initiatives, no matter what the level of government or type of legislative body from which they emerge" (*Id.* at 1696).

[9] Many of California's hare-brained ideas eventually roll downhill to other states. See "California Prays to the Sun God," Wall St. J., May 12-13, 2018, p. A12 ("California is often where bad ideas spring to life these days, and they're worth highlighting lest they catch on in saner precincts." [Article focused on new California mandate to install solar panels on all new homes at a time when housing is already priced out of reach of ordinary citizens.]).

[10] Sterk, *Federal Dimension*, 114 Yale L.J. at 246 (citing cases from New Hampshire, New Jersey, and even California — showing that California has failed to accept the lessons from the U.S. Supreme Court).

[11] See DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 52 (Northwestern U. Press 1995) (hereinafter SHAPIRO, FEDERALISM) (noting that on "a more practical level, the states do not appear to have served as a bulwark of individual and group rights and interests").

I

THE U.S. CONSTITUTION PROVIDES A FLOOR OF PROTECTION. STATES CANNOT PROVIDE LESS

A central point of our Constitution in general — and its Bill of Rights, in particular — is to provide a baseline of protection to all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection.[12] So, let's get to the bottom line of this article at the outset. If there is a role for federalism, it lies in providing a mechanism for the states to provide *more* protection to individuals than the U.S. Constitution mandates. Period.[13] In the Supreme Court's words, "the Constitution divides authority between federal and state governments for the protection of individuals."[14] More specifically:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, *and property*, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[15]

Professor Akhil Amar summarizes it simply: "the federal Constitution stands as a secure political safety net—*a floor below which state law may not fall*."[16] As Justice Joseph Story

---

[12] Joslin Mfg. Corp. v. City of Providence, 262 U.S. 668, 676-77 (1932) (state "powerless to diminish" rights, but may increase them); Mills v. Rogers, 457 U.S. 291, 300 (1982) (U.S. Constitution provides "minimum" protection to which all are entltled); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 B.Y.U.L. Rev. 329, 330 ("the constitutional division of authority can rightfully claim to protect the governed from governmental overreaching and arbitrariness") (hereinafter Lee, *Federalism*).

[13] When I began writing this piece, I had no idea how vast the literature on federalism was. The depth of my ignorance was confirmed when I read David Shapiro's work from the mid-1990's concluding that he "found that the extent of published material germane to these issues is vast and . . . growing at what seems an exponential rate." SHAPIRO, FEDERALISM 6. If Professor Shapiro "could not hope to read all of the relevant literature in one lifetime . . ." *Ibid.*, I must conclude there is no hope for me, given the even greater bulk of material that has built up in the intervening decades. Hopefully, I have managed to hit at least some of the high spots.

[14] New York v. United States, 505 U.S. 144, 181 (1992).

[15] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943); emphasis added. Note that "property" was included matter-of-factly in the list of protected rights. Even Kelo v. City of New London, 545 U.S. 469 (2005) noted that state courts, under state constitutions, could restrict the state and local power of eminent domain further than the Fifth Amendment. See also Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government . . . .); additional authorities cited *infra*, n. 32.

[16] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988); emphasis added; Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 Vand. L. Rev. 1229, 1230 (1994) ("Rightly understood, 'federalism' should protect citizens and limit government abuse . . . .") (hereinafter Amar, *Five Views*). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1139-41 (1991) (noting that the purpose of the Bill of Rights could be best understood as protecting the people from unresponsive or corrupt governmental officials). See also Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 Notre Dame Law. 765, 784 (1973) (hereinafter Kanner, *Condemnation Blight*): "it seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from

explained, the prime reason why the Supreme Court is our ultimate constitutional arbiter is "the importance, and even necessity of *uniformity of decisions throughout the whole United States*, upon all subjects within the purview of the constitution."[17] Any conflicting state law is simply "without effect."[18] In other words, as the Supreme Court classically held in *Marbury v. Madison*,[19] it is the Supreme Court's job to see that other organs of government remain true to the Constitution,[20] so that, as Professors Fallon and Meltzer classically expressed it, we have a constitutional structure "adequate to keep government generally within the bounds of law."[21] That job would include protecting the rights of property owners from the depredations of state and local government.[22]

---

governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa." Other learned commentators concur. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Corn. L. Rev. 1549, 1558 (2003) ("Federal takings guarantees set a constitutionally guaranteed floor, not a constitutionally mandated ceiling"); *id*. at 1559 ("states can develop state takings law to bring *more* clarity and fairness to the takings protections in their states"; emphasis added); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.6(c) at 19 (5th ed. 1995) (hereinafter NOWAK & ROTUNDA) ("State courts are always free to grant individuals *more rights* than those guaranteed by the Constitution, provided [they] do[] so on the basis of state law"; emphasis added); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491, 496 (1977) ("State constitutions too, are a font of individual liberties, their protections often extending beyond those required by . . . Federal law" even when state protections are "identically phrased") (hereinafter Brennan, *State Constitutions*).

[17] Martin v. Hunter's Lessee, 14 U.S. [1 Wheat.] 304, 347-48 (1816); emphasis added. Of course, as Professor Michelman put it, "giving federal judges the last word on the meanings of laws emanating from state authorities . . . seems to be a gross contravention of Our Federalism." Michelman, *Federalism*, 34 Wm. & Mary L. Rev. at 305. And so it is, which is why the federalism concept has lost its authority, at least in this sphere. As one observer put it, federalism "lacks a coherent vision of when national authority or state authority should be exercised, as well as a clear understanding of the true worth of federalism." Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 324 (1997).

[18] Maryland v. Louisiana, 451 U.S. 725, 746 (1981; Sibron v. New York, 392 U.S. 40, 60-61 (1968).

[19] 5 U.S. [1 Cr.] 137, 177 (1803).

[20] See Lopez v. United States, 514 U.S. 549, 616, n. 7 (1995) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text"); Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 Vand. L. Rev. 1019, 1037 (1988) ("Since the time of *Marbury v. Madison*, the rule of the Supreme Court has been to measure congressional action against the yardstick of the Constitution").

[21] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1778-79 (1991).

[22] The Founders saw the protection of individual property rights as "the first object of government." THE FEDERALIST No. 10 at 78-79, 84 (Clinton Rossiter ed., 1961); RICHARD EPSTEIN, TAKINGS—PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (1985); James Madison, *Property*, Nat. Gazette, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 267-268 (Univ. Press of Va. 1983); See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988) ("Protection of private property was a nearly unanimous intention among the founding generation"); Mark W. Smith, *A Congressional Call to Arms: The Time Has Come For Congress to Enforce the Fifth Amendment's Takings Clause,* 49 Okla L. Rev. 295, 298 (1996) (hereinafter Smith, *Call to Arms*). See generally EDWARD J. LARSON, THE RETURN OF GEORGE WASHINGTON (William Morrow 2014), in which the Pulitzer Prize winning historian examines the period between Washington's resignation of his commission at the end of the revolution through his first inauguration. The concerns expressed by Washington and his contemporaries about squatters and other threats to property rights, along with the excesses of some of the more radical democracies established in some of the states, surely propelled the adoption of the system of government established by the Constitution.

A critical inquiry is whether it succeeded. In other words, how did the division of authority between national and state governments work in the protection of individual rights? Professor Shapiro has this somber summary:

> "it is hard to quarrel with the conclusion that the historical record, viewed in its entirety, fails to support the existence of state autonomy as a critical means of protecting against abuse of governmental power. On the contrary, national power has had to be continually invoked in order to protect our freedom against state infringement."[23]

So, what's federalism got to do with regulatory takings? Frankly, not much.

"Federalism" is not some magic bullet or sacred incantation that can automatically sweep before it anything that conflicts with its core concepts. Quite the contrary. Those who created this republic — including those who believed most fervently in the idea of federalism — knew that a strong, unified central government was essential if this nation were to succeed. Remember, those people had just lived through an effort at trying to establish a country with a weak center and strong extremities through the ill-fated Articles of Confederation,[24] and understood too well the centrifugal dangers in concentrating power on the periphery.[25] As Judge Don Willett of the Fifth Circuit put it recently:

> "The infant nation was floundering. The United States were anything but. America's first governing document, the Articles of Confederation, had created a 'league of friendship' among states, but the former colonies hadn't coalesced into a country. A constitutional reboot was crucial."[26]

A keen observer of this era of our history may have been understated in concluding that, "[b]y 1787, a new generation of Americans, having experienced firsthand the defects of state sovereignty under the Articles of Confederation . . . challenged the small republic argument on the ground that a large republic could better protect liberty."[27] Much of the work of solidifying

---

[23] SHAPIRO, FEDERALISM 56.

[24] As noted in the classic Hart & Wechsler text, "[b]y all accounts, the prevailing structure of 'national' government, the Articles of Confederation, had proved inadequate to the challenges confronting the new nation." RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 (7th ed. 2015) (hereinafter HART & WECHSLER). See Smith, *Call to Arms*, 49 Okla. L. Rev. at 299 (noting "it was . . . the failure of the Articles of Confederation to fulfill its property-protection purpose that led to the convening of the Constitutional Convention and the adoption of the Constitution"); NOWAK & ROTUNDA § 1:6 ("Because the Articles [of Confederation] deprived the central government of any real power over the individual states, a host of problems arose . . . ."); SHAPIRO, FEDERALISM 15 (noting "dissatisfaction with [the] weak central government that led to a call for a convention . . .").

[25] See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 Sup. Ct. Rev. 341, 353 (noting the difference between the Constitution and the Articles of Confederation, which expressly provided for state sovereignty); A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. Rev. 537, 543 (1999) (concluding that the "sovereign role of the states under the original Constitution reflected contemporary political reality, not conscious design").

[26] Don Willett, "Happy Constitution Day, if You Can Keep It," Wall Street J., Sept. 17, 2018.

[27] Joan Yarbrough, *Federalism and Rights in the American Founding*, in FEDERALISM AND RIGHTS 57, 60-61 (Elles Katz & Alan Tarr, eds. 1996). Intriguingly, although it has generally been the case that political

the role of the federal courts in holding the republic together, according to Professor LaCroix, came from Chief Justice Marshall and Justice Story. Their zeal stemmed from their "almost metaphysical belief in the federal judicial power as at once proceeding outward from the center and connecting the peripheries back to the center, thereby countering the omnipresent threat that the federal republic would revert to a confederation."[28]

Thus, notwithstanding that "every schoolchild learns [that] our Constitution establishes a system of dual sovereignty between the States and the Federal government,"[29] those same schoolchildren also learn that federal law is paramount when the two systems diverge. That is because the Constitution contains the provision popularly known as "the Supremacy Clause" embedded in its heart. This provision declares forcefully: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be *the supreme law of the land*; and the Judges *in every State* shall be *bound* thereby, *anything* in the Constitution or laws *of any State* to the contrary *notwithstanding*."[30] Thus, states bear a "coordinate responsibility" to give effect to all Americans' federally protected rights because the federal supremacy concept makes federal laws "as much laws in the States as laws passed by the state legislature."[31]

And then came the Fourteenth Amendment, which added substantially to that initial understanding. To the extent that the Bill of Rights may have had its origins in federalist theory, change occurred as the nation matured.[32] It is hard to ignore the fact that the Civil War

---

conservatives were the staunch supporters of federalist theory, liberals began to discover its attractiveness as the Supreme Court grew more conservative. E.g., Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 501 (1995); Shubha Ghosh, *Reconciling Property Rights and States' Rights in the Information Age: Federalism, the "Sovereign's Prerogative" and Takings After* College Savings, 31 U. Tol. L. Rev. 17, 21 (1999). Illustrative is Justice Brennan's paper on the use of state law to protect individual rights. Brennan, *State Constitutions*, 90 Harv. L. Rev. 489.

[28] Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 Law & Hist. Rev. 205, 210 (2012).

[29] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[30] U.S. Const., Art. VI, cl. 2; emphasis added. "The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). As an early opinion put it: "The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land . . . . It says to legislators, thus far ye shall go and no further." Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308, 311 (C.C.D. Pa. 1795). See SHAPIRO, FEDERALISM 22 (noting that the Constitution leaves "no doubt whatever that in the event of any conflict between federal and state authority, federal authority (if valid and properly exercised) will prevail"); Cross, *supra* n. 18 at 3 ("The primary constitutional provision on the states' relationship with the central government is found in the Supremacy Clause, which explicitly subordinates state authority.")

[31] Howlett v. Rose, 496 U.S. 356, 367 (1990). See also Justin Lipkin, *Federalism as Balance* 79 Tul. L. Rev. 93, 98 (2009) (collecting cases); Claflin v. Houseman, 93 U.S. 130, 137 (1876) (explaining that both state and federal courts must enforce "the laws of the United States.") For a state court to fail to comply with federal law would render the Supremacy Clause "without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue." Martin v. Hunter's Lessee, 14 U.S. [1 Wheat.] 304, 342 (1816).

[32] See Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. Rich. L. Rev. 485, 489 (1999) (hereinafter Lash, *Two Movements*) (affirming that "the meaning of the Bill of Rights shifted from an expression of federalism to one of individual liberty" through adoption of the Fourteenth Amendment, and arguing that incorporated rights must be understood according to their public meaning in 1868); see also, JAMES ELY, THE GUARDIAN OF EVERY OTHER RIGHT, 83-105 (3d Ed., 2008) (discussing takings law in the nineteenth century). Even strong believers in federalism have acknowledged the shift, noting that federalism "worked well enough for the first century and a half of our history." Ernest Young, *Federalism as a Constitutional Principle*, 83 U. Cin. L. Rev. 1059, 1065 (2015).

intervened, for example,[33] and the distrust of too much centralized power that had been the catalyst for the Bill of Rights morphed into a similar distrust of state governments. As Professor Shapiro summarizes:

> "The outcome of the Civil War settled on the battlefield the theoretical debates over the asserted rights of state nullification and secession — rights that, in the view of many, were plainly inconsistent with the Union as originally established. And in the wake of the Civil War, extending into the present century, a series of constitutional Amendments went even farther to solidify federal power and to reduce the 'structural' role of the states in the operation of the federal government."[34]

The decades between adoption of the Bill of Rights and the end of the Civil War showed a clear shift from the ideals of federalism to the protection of individual liberty.[35] Professor Tribe expressed this shift with typical bluntness:

> "It's an old story, after all, that Reconstruction inscribed into American constitutionalism a rather sharp break . . . between an older federalistic regard for the jurisprudential severalty and semi-sovereignty of the States and a newer liberal-universalist regard for basic human rights to be guaranteed by national power against state neglect or oppression."[36]

After the Civil War concluded, Congress was confronted with substantial evidence that freedmen and former slaves were being seriously mistreated by local courts and government agencies.[37] Thus, those who created the Fourteenth Amendment were writing against the

---

[33] See Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 Ga. L. Rev. 999, 1023 (1985) ("the American Civil War seemingly laid to rest the ideal that [different notions of right and wrong] would be officially implemented according to geographic location"); Amar, *Five Views*, 47 Vand. L. Rev. at 1231 ("At least that much was established at Appomattox . . ."). Even a staunch defender of federalism as a guarantor of power to state and local government had to concede (albeit grudgingly) that "the Framers' original rationale for federalism has arguably been superseded to a degree by the subsequent adoption of the Bill of Rights, as later supplanted by the Fourteenth Amendment, defining an extensive set of individual liberties protecting citizens from government at all levels." Echeverria, *The Costs of Koontz*, 39 Vt. L. Rev. 573, 596 (2015) (hereinafter Echeverria, *Koontz*).

[34] SHAPIRO, FEDERALISM 28.

[35] Lash, *Two Movements*, 33 U. Rich. L. Rev. at 489-98). Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. Cal. L. Rev. 539, 546 (1989) (concluding that "[b]y the end of the Civil War, Congress was prepared to work a constitutional revolution.") (hereinafter Gerhardt, *Monell*).

[36] LAURENCE TRIBE, CONSTITUTIONAL LAW 549 (2d ed. 1988) (hereinafter TRIBE, CONSTITUTIONAL LAW); see also Michelman, *Federalism,* 35 Wm. & Mary L. Rev. at 303.

[37] See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) (hereinafter AMAR, BILL OF RIGHTS). This is clear from the debates over adoption of 42 U.S.C. § 1983. See Briscoe v. Lahue, 460 U.S. 325, 363–64 (1983). Interestingly, as this article is focused on property rights, a major issue facing Congress was the widespread denial of property rights to the former slaves. Cong. Globe, 39th Cong., 1st sess. 94, 475, 588; Report of the Joint Committee, Pt. II at 243. "Equality in the enjoyment of property rights was regarded by the framers of that [14th] Amendment as an *essential precondition to the realization of other basic civil liberties* which the Amendment was intended to guarantee." Shelly v. Kraemer, 334 U.S. 1, 10 (1948); emphasis added. This concept, of course, formed the basis for Professor Ely's book, THE GUARDIAN OF EVERY OTHER RIGHT. Even Kelo v. City of New London, 545 U.S. 469 (2005), not generally viewed as particularly

backdrop of a long history of state abridgement of fundamental rights.[38] Congress, comprised of a group of legislators, naturally first sought to cure the problem with legislation. Ultimately, however, Congress "deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and [the Supreme] Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection . . . ."[39] The Congress that framed the Fourteenth Amendment thus had no doubt "that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights . . . ."[40] They expected the new amendment to add a broad, new constitutional guarantee designed to secure "the civil rights and privileges of all citizens in all parts of the republic,"[41] and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country."[42]

With state certification of its three post-war constitutional amendments, Congress had the power to move.[43] It swiftly enacted legislation that has been widely seen as applying the Bill of Rights protections directly to state and local government, as the Supreme Court itself acknowledged: "[T]he chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States."[44] Indeed, by setting a constitutional floor securing individual rights, the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States."[45] That "restructured relationship" included a full-throated application of the Bill of Rights guarantees to

---

protective of property owners' rights, says that states may place "further restrictions on [the] exercise of the takings power" (*id*. at 489), and contains a caution against government rationalizations that are merely "pretextual" rather than actual. *Id.* at 490, 491 (Kennedy, J., concurring). As usual, whenever *Kelo* is cited, a warning is needed. The decision nowhere defines what it means by "pretext," and lower courts have searched in vain for a way to enforce this limitation — or even determine what qualifies as "pretext." See Ilya Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov't L. Rev. 1, 35-36 (2011).

[38] Cong. Globe, 39th Congress, 1st Sess. App. 256 (Rep. Jehu Baker).

[39] McDonald v. City of Chicago, 561 U.S. 742, 775 (2010). The early case of Barron v. Baltimore, 32 U.S. 243 (1833) held that the Bill of Rights was applicable only to the Federal government. Backers of the Fourteenth Amendment made it clear that their purpose was to "overturn the constitutional rule that [*Barron*] had announced." Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J., dissenting).

[40] Lash, *Two Movements*, 33 U. Rich. L. Rev. at 1326. No one in either house of Congress expressed any disagreement with this central precept. AMAR, BILL OF RIGHTS at 187; Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. Chi. L. Rev. 1484, 1501 (1987) (noting that the "premise of the Fourteenth Amendment" was that the federal government, rather than the states, would be the primary insurer of individual liberties).

[41] Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress xxi (1866).

[42] Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

[43] The Fourteenth Amendment provided the constitutional basis that had been lacking before. McDonald v. City of Chicago, 561 U.S. 742, 775 (2010). As Professor Ackerman put it, the post-Civil War amendments represented a transformation of the American political order, a constitutional departure from ordinary political give-and-take. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1044 (1984).

[44] *McDonald*, 561 U.S. at 762. Moreover, their "well-circulated speeches" informed the states and the public at large that the Amendment was meant to "enforce constitutionally declared rights against the States." (*Id.* at 833; Thomas, J., concurring.)

[45] Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). The intent of the Fourteenth Amendment's framers was thus to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard). They sought, in other words, to protect all of "the personal rights guaranteed and secured by the first eight amendments to the Constitution." McDonald v. City of Chicago, 561 U.S. 742, 762, n. 9 (2010).

state and local government. As the Court repeatedly said, "this Court *decades ago abandoned* 'the notion that the Fourteenth Amendment applies to the States only a *watered-down*, subjective version of the individual guarantees of the Bill of rights."[46] Rather, they are to be enforced against the states by the same standards that protect those rights against federal encroachment.[47] One might view them as "a body of norms extruded by the Fifth and Fourteenth Amendments' protections for private property — a sort of minimum content of property law imposed upon all the States by force of the Federal Constitution."[48] That is no more than acknowledgement of our "constitutional culture" based on common understanding of the contents of the "bundle of rights" acquired along with title to land.[49] As Professor Somin explained:

> "The assumption that property rights are merely the creation of state law without any intrinsic meaning in federal constitutional law is a flawed one. In reality, the institution of private property long predates the existence of American states, or indeed modern states of any kind. The text, original meaning, and historical understanding of the Takings Clause are in large part based on natural law notions of property rights that hold that such rights have a moral basis and origin independent of state law. It is true that the Supreme Court has noted that '[p]roperty interests, of course, are not created by the Constitution" but instead 'stem from an independent source such as state-law rules.' But it has never held that state authority in this field is unlimited or that state law is the exclusive source of the definition of property rights."[50]

Note that the Supreme Court's familiar phrasing (that property rights come from sources "such as" state law) does not restrict such sources to "state law." As shown by Professor Somin, there are other sources.

Professor Sterk seems to disagree, concluding that the Supreme Court's "unusual dependency" on state law in takings cases is justified by federalism without explaining why, other than to show that the *Penn Central* standards are so vague as to provide only the most general guidance, rather than actual rules.[51]

---

[46] Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); McDonald v. Chicago, 561 U.S. 742, 744 (2010). This, of course, condenses the long road to full Bill of Rights incorporation. Slow to implement because of the Supreme Court's preference for striking down laws as violations of substantive due process, incorporation gained strength as substantive due process fell out of favor. See TRIBE, CONSTITUTIONAL LAW at 772-74; NOWAK & ROTUNDA at 361-66.

[47] Malloy, 378 U.S. at 10; McDonald, 561 U.S. at 744.

[48] Michelman, *Federalism*, 35 Wm. & Mary L. Rev. at 320; see also Amar, *Five Views*, 47 Vand. L. Rev. at 1232 (noting that "[b]oth 'states' rights' and 'national rights' exist to promote, and must ultimately yield to, citizens' rights that the Constitution creates or declares.")

[49] Lucas, 112 S. Ct. at 2899-2900. Amar, *Five Views*, 47 Vand. L. Rev. at 1244 ("Of course, the federal constitution . . . establishes a minimum baseline—a floor—that state judges must respect . . . .") See generally Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 Tex. L. Rev. 7 (2008) for an exhaustive analysis of constitutional belief in the states at the time of the 14th Amendment's adoption.

[50] Somin, *Federalism*, 2011 U. Chi. Leg. F. at 86.

[51] Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. & Mary L. Rev. 251, 289 (2006) (hereinafter Sterk, *Demise*). Reliance on *Penn Central* puts one on a slope that is not only slippery, it is dangerously one-sided with pre-ordained results. As Professor Sterk concluded with understatement, "*Penn Central* hardly

Professor Sterk seems amenable to protecting identifiable groups of individuals against predation by others, but limits the groups to those that seem to him to need and/or deserve special attention:

> "An independent uniformity-based justification for Supreme Court review would rest on the possibility that a particular state or group of states might reject the premises behind the constitutional right or value. Consider, as illustrations, abortion rights in the Bible Belt, the right to bear arms in urban states, or equal protection in the South before the civil rights movement. In each case, legislation that transgresses constitutional limits might not rest on any process failure, but simply on local disagreement with norms that otherwise enjoy national acceptance. To the extent that state courts reflect state values, state courts might not adequately safeguard constitutional rights. In instances like these, Supreme Court review might be necessary to assure uniform enforcement of federal rights. [¶] There is little reason to invoke this justification in takings cases."[52]

His reasons for not including property owners in such demonized groups ring a bit hollow. They boil down to this: "And if background state law is so hostile to the institution of property, landowners would have few investment-backed expectations worthy of protection."[53] Really?[54] Why is that hostility less worthy of dealing with than the ones he appears to prefer? It seems a question of whose ox is turning on the spit, that's all. It is picking and choosing among rights to protect and deciding in classic Orwellian fashion that some rights are more equal than others. It shows the need for a national baseline standard.[55]

When Congress enacted 42 U.S.C. § 1983, it did so in order to place a buffer — specifically, a *federal* buffer — between the people and state government and its officials, as the Supreme Court plainly held: "the central purpose of the Reconstruction-Era laws is to provide

---

serves as a blueprint for a municipality or a court seeking to conform to constitutional doctrine." Sterk, *Federalist Dimension* 114 Yale L.J. at 232. In his words, "Whenever the Court conducts a *Penn Central* analysis of a state or local regulation, the regulation stands." *Id.*, 114 Yale L.J. at 253. Even a staunch defender of local government concludes that, when one side wins all the time, there is something wrong with the rule. John D. Echeverria, *Is the Penn Central Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zon. Dig. 3 (2000). That *Penn Central* provides a less than satisfactory template has been demonstrated elsewhere. See, e.g., Gideon Kanner, *Making Laws and Sausages: A Quarter Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Civ. Rts. J. 653 (2005); Kanner & Berger, *Agins*, 50 Urb. Law. at --- (collecting authorities).

[52] Sterk, *Federalist Dimension*, 114 Yale L.J. at 236.

[53] *Ibid.* As for hanging one's hat on "investment-backed expectations" as the key, remember Hodel v. Irving, 481 U.S. 704 (1987). There, in striking down Congressional action that eliminated Native Americans' right to dispose of property upon their death, the Court ruled in favor of the property owners although neither they nor their ancestors had any "investment" in the property and, hence, no "investment-backed expectations" about their ability to use or devise it in the future. Nonetheless, the elimination of that important property right was a taking that could not be accomplished by legislative fiat. Investment is *a* key, but hardly the only one.

[54] I would like to thank Justice Breyer for demonstrating the proper usage for this technical, legal expression. See Nat'l Inst. Of Family & Life Advocates v. Becerra, 138 S.Ct. 2361, 2386 (2018) (Breyer, J., dissenting).

[55] For criticism of Professor Sterk's use of federalism in this context, see R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet to be Made*, 67 Baylor L. Rev. 567, 614 (2015) (hereinafter Radford & Thompson, *Accidental Abstention*).

compensatory relief to those deprived of their federal rights by state actors"[56] by "*interpos[ing] the federal courts* between the States and the people, as guardians of the people's federal rights."[57] As Professor Kanner put it:

> "the government can and usually does take care of itself, while individual citizens are all too often deprived of a proper measure of their rights by the government which is supposed to serve them. Hence, the courts have implemented constitutional guarantees so as to interpose a shield between the citizen and governmental harshness."[58]

To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals immediate access to the federal courts . . ."[59] Surely, Congress did not simultaneously intend to install state courts or agencies as some sort of institutional gatekeepers, with a veto power capable of blocking the entry of property owners to federal courts. The idea is too absurd to ascribe even to Congress. Professor Sterk has called "counterintuitive" the idea "that federal takings claims must be litigated in state court."[60] It is that. And more. Or, perhaps, less.

If there is a reported High Court decision in the last century that exemplifies all of the worst aspects attributed to federalism (albeit, in the fashion of Lord Voldemort, never discussed by name therein), it would be *Williamson County Reg. Plan. Agency v. Hamilton Bank*.[61] There, purportedly in the name of "ripening" federal claims for federal court litigation, the Supreme Court held that a claim raising property issues under section 1983 was not "ripe" for litigation in federal court until the plaintiff property owner had first sued in state court and lost under the state's equivalent of the 5th Amendment. That theory is wholly antithetical to the underlying basis of section 1983. Far from being "thrown open," the federal courthouse doors were slammed shut to regulatory taking victims by the *Williamson County* ripeness rule.[62]

---

[56] Felder v. Casey, 487 U.S. 131, 141 (1988).

[57] Mitchum v. Foster, 407 U.S. 225, 243 (1972); emphasis added. Professor Amar has catalogued the ways in which judicial review under the Bill of Rights during Reconstruction became a primary mode of protecting the rights of vulnerable minorities. See generally AMAR, BILL OF RIGHTS.

[58] Kanner, *Condemnation Blight*, 48 N.D. Law. at 785; see David L. Callies, Kelo v. City of New London: *Of Planning, Federalism, and a Switch in Time*, 28 U. Haw. L. Rev. 327, 343 (2006) (showing that the Bill of Rights was "designed . . . as a shield against majoritarian excesses at the expense of an otherwise defenseless minority . . . .").

[59] Patsy v. Florida Board of Regents, 457 U.S. 496, 504 (1982); emphasis added.

[60] Sterk, *Demise*, 48 Wm. & Mary L. Rev. at 300. Notwithstanding, he has expressed the view that "[F]ederalism concerns support this effective delegation of federal takings jurisprudence to state supreme courts." *Id*. at 288.

[61] 473 U.S. 172 (1985).

[62] See J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel — The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 248 (2006) (hereinafter Breemer, *Check Out*). Decided in the midst of a raging national debate over the proper remedy for regulatory takings, one that the Supreme Court had repeatedly ducked, *Williamson County* was described by Professor Sterk as "a critical mechanism for avoiding a controversial issue." Sterk, *Demise*, 48 Wm. & Mary L. Rev. at 259. Indeed it was. For an example of the scholarly substantive debate, compare Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 2 Vt. L. Rev. 193 (1984) (advocating injunctive relief only) with Michael M. Berger & Gideon Kanner,

There are two key matters to note about *Williamson County*. First, it is *not* based on federalism. Read it as many times as you like; that concept does not rear its head. Second, it *is* based on a misguided concept of ripeness. I say "misguided" because it is clear from the text of the opinion that the Court believed (or at least the words it chose plainly said) compliance with its new template would "ripen" the matter for federal court litigation. That is, it would ensure that the case was properly set up for federal courts to deal with on the merits. There is no other rational meaning for "ripeness." The clearly expressed expectation was that the merits *would* be dealt with in federal courts — albeit at a later date than the property owner desired. Anything less bleeds the concept of "ripeness" of all meaning.

Parse the words for yourselves. One thing that *Williamson County*'s words seemed chosen to make clear is that the Court was (a) deciding whether a claim was *yet* ripe for litigation in federal court and (b) noting there were things which first had to be done in state court, *after which* the federal constitutional claims *would be ripe* for federal court litigation.[63]

The Court's analytical section begins with the announced conclusion ". . . that respondent's claim is premature."[64] Please note that the word chosen was "premature," not "moribund." Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisdictionally "ripe." The *Williamson County* opinion then goes on to say that, because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is not ripe."[65] Please note again that the phrase chosen was "not ripe," rather than "dead." Absence of ripeness necessarily means that things need to — and can — be done to make the matter ripe.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the purely temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court:

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so."[66]
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation."[67]
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is premature."[68]

Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loy L.A.L. Rev. 685 (1986) (advocating compensatory relief).

63 See Breemer, *Check Out*, 32 B.C. Envtl. Aff. L. Rev. at 250.

64 Williamson County, 473 U.S. at 185; emphasis added.

65 *Id*. at 186; emphasis added.

66 *Id*. at 194; emphasis added.

67 *Id*. at 195; emphasis added.

68 *Id*. at 197; emphasis added.

Indeed, the plain message of *Williamson County* is that claims that the actions of a local government agency have violated rights protected by the due process and just compensation guarantees of the 5th and 14th Amendments do not even arise until after conclusion of the state court litigation:

> ". . . a property owner has not suffered a violation of the Just Compensation Clause *until* the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation . . . ."[69]

> "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is *not 'complete' until* the State fails to provide adequate compensation for the taking."[70]

> ". . . even if viewed as a question of due process, respondent's claim is *premature*."[71]

The opinion ends as it began, with this conclusion:

> "In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment."[72]

Thus, *Williamson County* is replete with the twin concepts of "not yet" and "not until." There is no rational way to read *Williamson County* without the realization that the Court anticipated that property owners could satisfy those requirements and render their claims ripe for federal court litigation. If the Court meant "never," it could easily and plainly have said so.[73]

In short, the only justification presented by *Williamson County* itself for sending regulatory taking litigation to state courts was to properly season the litigation, not to end it. And not to

---

69 *Id*. at 195; emphasis added.

70 *Id.* at 195; emphasis added. I cite this provision in the opinion as though it facially makes sense. However, cases abound in which property owners were compelled to wait for many years to get a court hearing, hardly making the "remedy" either "reasonable" or "adequate." See, e.g., authorities collected in Michael M. Berger, *Property, Democracy, & the Constitution*, 5 Brigham-Kanner Prop. Rts. Conf. J. 45, 85-87 (2016) (hereinafter Berger, *Property*). In the meantime, the property owner has neither the property nor its monetary equivalent, something the Constitution guarantees victims of governmental takings. E.g., Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299, 304 (1923); Phelps v. U.S., 274 U.S. 341, 344 (1927). See also United States v. Dickinson, 331 U.S. 745, 751 (1947) (holding that "the land was taken when it was taken and an obligation to pay for it then arose.") And the way that interest rates have stagnated for many years, the idea of recouping the "time value of money" through the addition of interest for all those years is literally laughable.

71 473 U.S. at 199; emphasis added.

72 *Id*. at 200; emphasis added.

73 See Radford & Thompson, *Accidental Abstention,* 67 Baylor L. Rev. at 582. Even defenders of local government agree that this is the clear import of the Supreme Court's words. E.g., Echeverria, *Horne*, 43 Envt'l L. Rep. News & Analysis at10736 (noting that *Williamson County* plainly "implies" the claim "could become ripe in the future once the plaintiff or the defendant has taken steps that ripen the claim").

serve some unrelated — and unstated — issue like federalism.[74] If that had been the point, it could likewise have been clearly stated. *Williamson County* thus stands as a "puzzling exception" to ordinary rules of federal jurisdiction.[75] Moreover, having itself created the requirement of state court litigation as a "ripening" agent, nothing prevented the Court from rounding out that requirement by excusing compliance with "full faith and credit" requirements as being wholly antithetical to the *Williamson County* ripening concept.[76]

How does this fit with the Supreme Court's general view of federal court jurisdiction? The foundational guidance was provided by Chief Justice Marshall in *Cohens v. Virginia*, in which he had the Court proclaim as forcefully as possible, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason to the constitution*."[77] Although the Court has developed methods by which it can exercise discretion to decline the exercise of jurisdiction (for example, the various abstention doctrines), these are carefully cabined. Professor Shapiro summarizes the concept this way. "Authority to act necessarily implies a correlative responsibility . . . [preferring] that a court should entertain and resolve on its merits an action within the scope of the jurisdictional grant."[78] While such discretion necessarily tempers the universality of the *Cohens* cry of "treason,"[79] the Court's recent repetition of the concept of its "virtually unflagging" obligation to hear cases within its jurisdiction[80] shows that Chief Justice Marshall's belief still holds sway.

Section 1983 is one of the most consequential laws passed by Congress.[81] It was enacted to enforce the protections intended by the 14th Amendment. Its goal was a significant restructuring of the relationship between the citizens of the states and the local and state officials in those states, with the courts of the United States acting as guarantors of federal rights.[82] In other words, the "dominant characteristic" of such actions is that "they belong in court."[83] And, by

---

74 See Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 Okla. City U. L. Rev. 869, 924 (2000) (noting that "[t]he Framers created federalism not simply or primarily to protect the states but to protect the people").

75 Sterk, *Federalist Dimension*, 114 Yale L.J. at 255.

76 See England v. Louisiana State Bd. Of Med. Examiners, 375 U.S. 411, 521-22 (1964) (allowing "reservation" of federal issue for federal court litigation following conclusion of state court litigation). Why the Court refused to allow such a pragmatic resolution in takings cases has never been satisfactorily explained.

77 Cohens v. Virginia, 19 U.S. [6 Wheat.] 264, 404 (1821). See *England* at 415 (noting "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional issues can be compelled without his consent and through no fault of his own to accept instead a State court's determination of those claims.") The Supreme Court has described the federal courts' obligation to hear and decide cases within their jurisdiction as "virtually unflagging." Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2347 (2014); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1386 (2014).

78 David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 575 (1985) (hereinafter, Shapiro, *Jurisdiction*). Although noting some room for discretion, Professor Shapiro explains that it can be neither "uncontrolled or whimsical," but must be consonant with the *Marbury* determination of a general obligation to decide cases within jurisdiction. *Id.* at 579.

79 Shapiro, *Jurisdiction*, 60 N.Y.U.L. Rev. at 570.

80 Cases cited *supra* n. 77.

81 It has been viewed as the source of authority to "make federal common law . . . ." Gerhardt, *Monell*, 62 S. Cal. L. Rev. at 557.

82 See Mitchum, 407 U.S. at 238-39.

83 Burnett v. Grattan, 468 U.S. 42, 50 (1984).

that, the Court plainly intended to focus on "belong[ing]" in *federal* court, because it emphasized that the judicial remedy exists "independent of *any other* legal or administrative relief that may be available as a matter or federal *or state law*."[84]

In the Supreme Court's stirring words:

> "We yet like to believe that *wherever the Federal courts sit*, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction simply because the rights asserted *may be adjudicated in some other forum*."[85]

To those who have found their property rights regulated into near or total oblivion since *Williamson County*, the Court's words ring hollow.[86] Those words need to have life breathed back into them by overruling *Williamson County* and once again "throw[ing] open the doors of the United States courts" for "immediate access."[87] It is possible that the Court is prepared to do just that. As this is being written, the Court granted certiorari for the sole reason of considering the validity of *Williamson County*'s mandate to try regulatory taking cases in state courts.[88]

High time. As recently as a decade or so ago, commentators noted that "recent takings jurisprudence thus appears to have abandoned citizens to the states and denied them necessary recourse with respect to challenging takings in federal court."[89] But pendula swing. A few years later, the Supreme Court issued a series of property rights decisions that all favored property owners and even, in some instances, belittled or made fun of arguments raised by governmental defenders.[90] As I have noted elsewhere, some of those pro-property rights decisions were either

---

[84] *Ibid*.; emphasis added. There is simply no way to reconcile that direct holding with the "ripeness mess" prevailing in regulatory taking cases because of the Supreme Court's demand in *Williamson County* that takings cases — and they alone among Section 1983 cases — are required to abandon their right to a federal forum in exchange for trial in state court under state law. See also McNeese v. Board of Education, 373 U.S. 668, 672 (1963) (rejecting the idea that "assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [Section 1983] . . . we have not required exhaustion of state judicial or administrative remedies . . . .").

[85] McNeese v Board of Education, 373 U.S. 668, 674, n. 6 (1963); emphasis added; quoting with approval.

[86] Criticism of *Williamson County* began almost as soon as it was published, and has continued apace. See, e.g, Michael M. Berger, *Anarchy Reigns Supreme*, 29 Wash. U.J. Urb. & Contemp. L. 39 (1985); Breemer, *Check Out*, 33 B.C. Envtl. L. Rev. at 305 ("a mistake from the start"). More recently, an influential federal appellate judge concluded that the upshot of *Williamson County* is that, "[w]ith the exception of the Supreme Court's certiorari jurisdiction, the state courts are now the exclusive protectors of private property owners against takings effected by state and local authorities." William A. Fletcher, Kelo, Lingle, and San Remo Hotel: *Takings Law Now Belongs to the States*, 46 Santa Clara L. Rev. 767, 778 (2006) (hereinafter Fletcher, *Takings Law*).

[87] Patsy, 467 U.S. at 504.

[88] Knick v. Township of Scott, No. 17-647

[89] Comment, *Failure of Federalism*, 10 U. Pa. J. Const. L. at 658; Fletcher, *Takings Law*, 46 Santa Clara L. Rev.at 776-778. Indeed, three decisions from 2005 were seen by a prominent federal appellate judge as signaling "a substantial change—entirely in the direction of relegating takings issues to the political and legal judgments of the states." *Id.* at 776.

[90] See Berger, *Property,* 5 Brigham-Kanner, Prop. Rts. Conf. J. at 96-105, noting *inter alia* Arkansas Game & Fish Commn. v. United States, 133 S.Ct. 511, 521 (2012) (giving no credence to a "sky is falling" argument regularly raised by government lawyers that their agencies will not be able to do their jobs if exposed to fiscal responsibility for the outcomes); Brandt Revocable Trust v. United States, 134 S.Ct. 1257 (2014) (criticizing the Solicitor General for raising an argument that was contra to an argument on which he had prevailed in the past);

9-0 or 8-1, showing that this shift of opinion was more than merely the conservative Justices ganging up on the liberals.[91]

II

THE CIVIL RIGHTS ACT SUPPLANTED FEDERALISM IN THIS CONTEXT

Along with the other Civil War Amendments, the Fourteenth Amendment "fundamentally altered our country's federal system."[92] Although the Court acted slowly and selectively — i.e., incorporating Bill of Rights guarantees one at a time, rather than in bulk — "almost all of the provisions of the Bill of Rights" now apply to state and local government, as well as the federal government.[93] In deciding whether to incorporate each of the Constitution's fundamental rights, the Court focused on two questions: whether the right in question "is fundamental to our scheme of ordered liberty,"[94] and whether it is "deeply rooted in this Nation's history and tradition."[95]

In enforcing the 14th Amendment, Congress enacted 42 U.S.C. § 1983,[96] simultaneously bringing to the fore the Constitution's Supremacy Clause, making it binding on the states. The validity of this federal statute has been too oft affirmed to be in doubt.[97]

So what was the point of section 1983? As Professor Gerhardt summarized it, "the Fourteenth Amendment shifted the primary responsibility for protecting civil rights from the states to the federal government, and section 1983 represented the efforts of the Forty-Second Congress to make this shift a reality."[98] A Section 1983 case sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely federal remedy"[99] with "broad and sweeping protection"[100] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their

---

Horne v. Dep't of Agriculture, 133 S.Ct. 2053 (2013) and 135 S.Ct. 2419 (2015) (denigrating government ripeness arguments).

91 Berger, *Property*, 5 Brigham-Kanner Prop. Rts. Conf. J. at 96-105.

92 McDonald v. City of Chicago, 561 U.S. 742, 254 (2010).

93 *Id.* at 764. Recently, the Court granted certiorari to determine whether one of the last remaining parts of the Bill of Rights — the Eighth Amendment's Excessive Fines Clause — is similarly incorporated. See *Tyson Timbs and a 2012 Land Rover LR2 v. State of Indiana*, no. 17-1091 (cert. granted June 18, 2018).

94 *McDonald*, 561 U.S. at 767.

95 *Id.* (Quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997).) An extensive analysis of state constitutional provisions at the time the Fourteenth Amendment was adopted appears in Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 Tex. L. Rev. 7 (2008). For an analysis of state takings clauses, see *id*. at 72. For an analysis of right of access to courts, see *id.* at 74.

96 Section 5 of that Constitutional provision granted Congress "the power to enforce, by appropriate legislation, the provisions of this article."

97 Indeed, the Supreme Court long ago "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause." McDonald, 561 U.S. at 764-65.

98 Gerhardt, *Monell*, 62 S. Cal. L. Rev. at 562.

99 Mitchum v. Foster, 407 U.S. 225, 239 (1972).

100 Lynch v. Household Fin. Corp., 405 U.S. 538, 543 (1972); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969).

federally protected rights are abridged.[101] The statute must be broadly and liberally construed to achieve its goals.[102] Its "goals" have been straightforwardly stated: "to provide compensatory relief to those deprived of their federal rights by state actors"[103] by "interpose[ing] the federal courts between the States and the people, as guardians of the people's federal rights."[104]

One might say, in other words, that the whole point of Section 1983 was to grant federal courts the authority and duty to provide protection of federal rights.[105] In Professor Shapiro's words, "the post-Civil War legislation of which this statute was a part dramatically altered the relations between the states and the federal government . . . by giving the federal courts authority they did not previously possess."[106] Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability."[107] Properly so. The purpose of Congress "is the ultimate touchstone" of analyzing the relationship between state legislation and Section 1983.[108] Anything "incompatible with the compensatory goals of the federal legislation . . ."[109] cannot stand. The question, in other words, is whether state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[110] Allowing states to erect any obstacles to federal court access violates this precept. I recognize that, in some cases, the federal courts have created doctrines that restrict their own jurisdiction,[111] but that raises a different question. Even allowing for the validity of such self-imposed limitations, none permits the states to create restrictions on their own.

Some apologists for local government believe that the courts need to take into account the impact of the costs of liability on government before too readily compensating citizens for injuries inflicted. Characteristic of this group is John Echeverria, who asserted that, if the Supreme Court paid more attention to the costs to be imposed on local government, it "might well" reach a "different outcome."[112] That, of course, is contrary to settled Supreme Court holdings that "costs cannot outweigh the constitutional right,"[113] and that "one who causes a loss should bear the loss."[114] It is also contrary to the Supreme Court's recent rejection of government "sky is falling" arguments in *Arkansas Game & Fish*.[115]

---

101 Burnett v. Grattan, 468 U.S. 42, 50, 55 (1984).

102 Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989); Lake Country Estates v. Tahoe Reg. Plan. Agency, 440 U.S. 391, 399-400 (1979). See Gerhardt, *Monell*, 62 S. Cal. L. Rev. at 548.

103 *Felder v. Casey*, 487 U.S. 131, 141 (1988).

104 Mitchum, 407 U.S. at 243.

105 Gerhardt, *Monell*, 62 S. Cal. L. Rev. at 613 (discussing the Supreme Court's policy in Monell v. Department of Social Services, 436 U.S. 658 (1978), that struck a balance between the accountability of municipalities in federal court for their constitutional violations and the degree to which they are subject to federal court supervision)

106 Shapiro, *Jurisdiction*, 60 N.Y.U.L. Rev. at 584.

107 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981).

108 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quotation marks omitted).

109 Felder, 487 U.S. at 143.

110 Perez v. Campbell, 402 U.S. 637, 649 (1971).

111 E.g., the various forms of "abstention."

112 Echeverria, *Koontz*, 39 Vt. L. Rev. 573.

113 Fuentes v. Shevin, 407 U.S. 67, 90, n. 22 (1972).

114 Owen v. City of Independence, 445 U.S. 622, 654 (1980).

115 See supra, n. 90.

A state law, regardless of its intent, cannot "thwart the congressional remedy"[116] or subvert Congress' clear goals in following its mandate to enforce the rights created and protected by the 14th Amendment. The courts have not hesitated to strike down state policies that do so.[117] That is why the Court warned expressly that the rights of property owners need to be protected by the judiciary against the "cleverness and imagination" of state government word games.[118]

This theory of protecting *federal* rights in *federal* courts dates to the founding of the Republic (i.e., it predates adoption of either the 14th Amendment or Section 1983), and makes clear why *Williamson County* is historically and doctrinally mistaken. As James Madison bluntly put it, ". . . a review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws."[119] As the Supreme Court expressed it long ago:

> "The Constitution has presumed . . . that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice."[120]

That feeling intensified after the Civil War, leading to adoption of the Fourteenth Amendment, which seemed to "signal a popular intent to expand the powers of federal judges (if only to protect the rights of individuals against racist southern juries)."[121]

Williamson County's state court litigation mandate inverted this basic building block of federal property right protection: it interposed state courts to shield municipalities from federal accountability. As the Second Circuit put it in *Santini v. Conn. Hazardous Waste Management Service*,[122] it is ironic that "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim.").[123] Compounding that irony, property owners have found themselves shunted right back to the very courts that Congress intended to shield them from when it enacted Section 1983.[124] It is no answer to say that it is "more effective if takings

---

116 Martinez v. California, 444 U.S. 277, 284 (1980).

117 See Haywood, 556 U.S. at 739 ["A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear"]; Felder, 487 U.S. at 153 [striking down state notice of claim statute]).

118 Nollan v. California Coastal Commn., 483 U.S. 825, 841 (1987).

119 Quoted in Greenwood v. Peacock, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting). See also Bank of U.S. v. Deveaux, 9 U.S. (5 Cr.) 87 (1809).

120 Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 347-348 (1816). The Reconstruction Congress "displayed no solicitude for state courts." Briscoe v. Lahue, 460 U.S. 325, 363 (1983). Far from it, the "debates over the 1871 Act are replete with hostile comments directed at state judicial systems." *Id*. at 363-364. That this may have restricted "rights" otherwise held by the individual states was necessarily considered in the debates and negotiations leading to the adoption of the 14th Amendment, during which some choices were eliminated. "The enshrinement of constitutional rights necessarily takes certain policy choices off the table." District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

121 Lash, *Two Movements*, 33 U. Rich. L. Rev. at 501.

122 342 F.3d 118 (2nd Cir. 2003), *cert. den.*, 125 S.Ct. 104.

123 *Id*. at 130. See also San Remo, 545 U.S. 323, 349 (Rehnquist, C.J., concurring in the judgment on behalf of four Justices and urging eventual reconsideration of this anomaly).

124 See Lash, *Two Movements*, 33 U. Rich. L. Rev. at 500-01 (noting the anti-racist basis of the Fourteenth Amendment.) But parochialism extends beyond racism. As two seasoned practitioners put it in the land use context, "localisms, fiscal appetites, and xenophobia remain pervasive." Babcock & Siemon, ZONING

litigation is confined to one court system rather than two,[125] and then asserting that the choice of system goes to the states.[126] That is wholly contrary to virtually all section 1983 decisions, which have a distinct bias in favor of the federal courts. Having watched lower courts and local governments experiment with that wrong-headed view of the law in property cases, I believe it is time for the Supreme Court to set things right by reasserting federal primacy.

Indeed, any requirement to file an unsuccessful suit to establish that there is no remedy under state law would contravene not only Section 1983, but subsequent Congressional action as well. Since adopting Section 1983, Congress has clearly reinforced the need for strongly enforcing that bedrock civil rights law. Any required suit for payment would be contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the days when government could simply grab property first and then say "sue me" to the aggrieved owner are over.[127] That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation[128] or, failing that, condemnation.[129]

Section 1983 was designed to provide a prompt, *independent* federal remedy with real compensatory redress. It is the Fourteenth Amendment's response to any lingering negative effects of federalism on Bill of Rights guarantees.

III

STATE COURTS POSSESS NO MAGICAL ABILITY TO APPLY LOCAL LAW THAT ALLOWS THEM TO EVADE FEDERAL COURT PROTECTION OF FEDERAL RIGHTS

Regulatory takings are the only constitutional rights subjected to a *Williamson County*-like diversion to state court. That property owners have been singled out is clear.[130] As one

---

REVISITED 1). For further discussion of local parochialism against property owners and land developers, see Berger, *Property*, 5 Brigham-Kanner Prop. Rts. Conf. J. at 61-63.

125 Sterk, *Federalist Dimension*, 114 Yale L.J. at 300.

126 By what mode of "choice"? A coin flip?

127 Compare Stringer v. United States, 471 F.2d 381, 384 (9th Cir. 1973); United States v. Herrero, 416 F.2d 945, 947 (9th Cir. 1969) ("to seize and say 'sue me' is high-handed government conduct, and not to be favored"). Some spokespeople for local government control view the "right" to sue, pleading with a court to provide recompense, as a remedy. E.g., Echeverria, *Koontz*, 39 Vt. L. Rev. at 584. That is plainly out of line with congressional policy. Filing suit is a last resort when government defies the law and takes property without paying. It should not be seen as displacing the government's duty to pay *ab initio.*

128 42 U.S.C. § 4651(1).

129 42 U.S.C. § 4651(8). The Act provides succinctly: "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.)

130 See, e.g., Daniel R. Mandelker, Land Use Law, § 2.24 at 2-32 (5th ed. 2003) (concluding that "[t]he Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases."); John Delaney & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 Urb. Law. 195, 196 (1999) (showing that "the ripeness

commentator concluded, "[t]he state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of the law."[131]

No parallel, indeed.[132]

There are two possible bases on which such discrimination might rest. First, as property law is generally said to be based on the customs and practices of localities, it might be thought that the courts that are closest to the action would be more familiar with and thus better able to apply the law for all citizens. Second, some misguided aspect of federalism might create the belief that each state should be responsible for its own law. Neither holds water.[133]

First, it is certainly appropriate for the Federal Constitution to lay a protective baseline, what Professor Michelman referred to as "a uniformly binding body" of constitutional property law:

> "It could be perfectly reasonable to say that the Federal Constitution mandates upon the States a minimum content of property law, a common substrate, while all the rest of property law, elaborations and superstructures that give law its concrete shape and content, are given by the diverse positive laws of the several States."[134]

The Ninth Circuit has explored this issue in depth and held that there is "a 'core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny."[135] The existence of this "constitutional core" means that states can neither enlarge, restrict, or prohibit without violating such core precepts. Because such property rights are deeply engrained in our general common law tradition, they are "protected by the Takings Clause regardless of whether a state legislature purports to authorize a state officer to abrogate the common law."[136]

---

and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims").

131 Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 (1995).

132 See Michael M. Berger, *"Ripeness" Test For Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zoning & Planning Law Report 57 (Sept. 1988).

133 See San Remo, 545 U.S. at 350 (Rehnquist, C.J., concurring in the judgment and finding no "longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed.").

134 Michelman, *Federalism* 35 Wm. & Mary L. Rev. at 321. Professor Hills notes that the "federal substrate" may be found by "relying on the common law of property to determine whether some restriction on land use inheres so deeply in title as to define federally protected 'property.'" Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 Geo. Wash. L. Rev. 888, 904 (2006). Professor Sterk apparently disagrees, invoking the shade of federalism in justification. See Sterk, *Federalist Dimension*, 114 Yale L.J. at 288.

135 Schneider v. California Dept. of Corr., 151 F.3d 1194, 1200 (9th Cir. 1998).

136 Fowler v. Guerin, 2018 WL 3893114 (9th Cir. 2018). For an interesting analogy, see Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992), in which the court held that the papers produced and collected during President Nixon's term of office were the personal property of the President himself, based in large part on the history of how each President since Washington had treated such papers. For anyone interested in the process, the opinion is highly recommended. The court discusses the idiosyncrasies of each President in his treatment of the papers accumulated during his term. It makes for fascinating reading. In any event, Congress changed the rule for succeeding Presidents.

Moreover, and somewhat paradoxically in light of this theory, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the 5th Amendment's Just Compensation Clause. Federal court 1st Amendment cases abound, for example, in which the validity of local land use ordinances regulating or zoning for (or against) "adult entertainment" has been challenged.[137] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases — and, indeed, as does any regulatory taking case. Cases are thus decided in federal court, based on "local community standards," without initial state court suits.

Similarly, whether an artistic or literary work is obscene under the 1st Amendment is determined by "contemporary community standards" and "applicable state law." [138] Free speech claims under the 1st Amendment are similarly tied to local conditions, about which local judges and officials might be thought better informed. Yet the federal courts routinely adjudicate them.[139]

To paraphrase Justice Brennan's classic dissent in *San Diego Gas*, if federal judges can routinely determine land use aspects involving the boundaries of "adult entertainment" regulations, why can't they do the same when the regulation in question restricts wholesome community needs, such as housing?[140]

State court judges do not have a monopoly on measuring the words against those local standards. Nor should it be conceded that state courts are the appropriate place to "police local regulators" through various forms of non-monetary relief.[141] That battle ended in 1987, when *First English* recognized that non-monetary remedies fail to fulfill the federal constitutional takings mandate.[142]

Federal judges have shown no hesitation to involve themselves in local issues invoking the kind of neighborhood and family values typically involved in regulatory taking cases. In a celebrated zoning case, the Supreme Court concluded that:

> "[a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[143]

---

137 E.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, 427 U.S. 50 (1976); see San Remo, 545 U.S. at 350 (Rehnquist, C.J., concurring in judgment).

138 Miller v. California, 413 U.S. 15, 24 (1973).

139 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

140 See, e.g., Agins v. City of Tiburon, 598 P.2d 25, 32 (1979) (Clark, J., dissenting). *Agins* was affirmed at 447 U.S. 255 (1980) and disapproved in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

141 Sterk, *Federalist Dimension*, 114 Yale L.J. at 291.

142 First English, 482 U.S. at 311. See Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735 (1988).

143 Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). Belle Terre was, in Professor Kanner's words, "the sort of place where God would live if He could only afford it." Gideon Kanner, *Do We Need to Impair or*

In that case, the Second Circuit Court of Appeals had "start[ed] by examin[ing]" the zoning ordinance with reference to "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern . . . ."[144]

Even after *Williamson County*, federal courts have relied on *Belle Terre* as authority for measuring zoning laws against the blessings of wide yards and peaceful neighborhoods, with no concern that they should not be adjudicating issues of state law.[145] If it is proper for federal courts to examine such intensely local and personal issues in the context of zoning and proposed development, it cannot become unacceptable when a landowner wants to challenge regulatory restrictions on constitutional grounds implicating the Fifth, rather than the First Amendment.

First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance, even though they all involve intensely local issues.[146] An analysis of freedom of speech cases also shows deference to local conditions, but no need to defer to state courts to adjudicate the issues.[147]

As the Supreme Court itself has noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others, including a prominent eminent domain case:

> "But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum, its power to license motor vehicles, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law."[148]

Moreover, other constitutional rights are not treated with the kind of back-handed nonchalance meted out to regulatory taking cases. Fourth Amendment search and seizure cases, for example, often depend on local practices upon which local judges and law enforcement officers could be said to have superior knowledge and localized "expertise."[149] Indeed, "[w]hether a search is reasonable may depend on conditions that vary from house to house and

---

Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand, 31 U. Haw. L. Rev. 423, 451 n. 108 (2009).

144 Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973).

145 See, e.g., Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 135 (3d Cir. 2002).

146 E.g., Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); *City of Boerne v. Flores*, 521 U.S. 507 (1997); Larkin v. Grendel's Den, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994); Capital Square v. Pinette, 515 U.S. 753 (1995).

147 Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 53, 82 (Somin, *Federalism*).

148 County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 191-92 (1959) [collecting cases].

149 Ornelas v. United States, 517 U.S. 690, 699 (1996).

hour to hour. Yet federal judges routinely address these issues, and do not simply defer to the views of local officials."[150]

Many of the cited cases deal with parallel features of the Bill of Rights, notably the Due Process Clause, routinely protected in federal court through 42 U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

As Professor Somin put it:

> "If taken seriously, the federalism rationale for judicial deference on property rights applies to a wide range of other constitutional rights. It therefore serves more as a general argument against federal judicial review of state policy than as a narrowly targeted critique of judicial protection of property rights."[151]

More directly on point, federal courts are granted "diversity" jurisdiction over cases involving plain issues of state and local law where the parties are citizens of different states and one simply has a preference for litigating those state law issues in federal court.[152] As Justice Douglas explained:

> "[T]he complexity of local law to federal judges is inherent in the federal court system designed by Congress. Resolution of local law questions is implicit in diversity of citizenship jurisdiction. Since *Erie* . . . , the federal courts under that head of jurisdiction daily have the task of determining what the state law is. The fact that those questions are complex and difficult is no excuse for a refusal by the District Court to entertain the suit."[153]

Why, then, are federal judges perfectly capable of deciding issues of local land-use law in a diversity case but abruptly lose that ability when federal jurisdiction is invoked under Section 1983?

Equally important, the Supreme Court itself has already recognized that regulatory taking cases can be tried in federal court *without first being tried in state court.* In *City of Chicago v. International College of Surgeons*,[154] the property owner filed suit in state court, as instructed by *Williamson County.* But the city was not satisfied with that venue and, invoking 28 U.S.C. § 1441(a), removed the case to federal court before any substantive proceedings could be had in state court under state law and the Supreme Court upheld removal. The Court saw nothing untoward in trying the case in federal court, with no proceedings in state court under state law to guide the way.[155] As made clear by Radford and Thompson, "no one has advanced a federalism-

---

150 Somin, *Federalism*, 2011 U. Chi. Legal Forum at 80. See also Kelo v. City of New London, 545 U.S. 323, 518 (2005) (Thomas, J., dissenting).

151 Somin, *Federalism* at 87.

152 U.S. Const., Art. III, cl. 2; 28 U.S.C. § 1332.

153 England v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411, 426 (1964) (Douglas, J., concurring).

154 522 U.S. 156 (1997).

155 The Eighth Circuit later tried to reconcile *Williamson County* and *City of Chicago*, but gave up after finding the outcome "anomalous" (*Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), cert. den. (2002)) and then concluding that the way to resolve the resulting conundrum "is for the Supreme Court to say, not us." (*Ibid.*)

based rationale that explains why plaintiffs raising regulatory takings claims must be relegated to state court, while defendants may elect to have the identical claims adjudicated in federal court, should they choose to do so."[156]

There is nothing so special about regulatory taking cases as to insulate them from federal court review.

Second, there is nothing so endemic to the concept of federalism to stand in the way of protecting basic aspects of the Bill of Rights against states and localities in federal courts. When Chief Justice Rehnquist penned his famous concurring opinion in *San Remo Hotel*, urging that the state court litigation requirement of *Williamson County* be reexamined, he raised no issue of federalism as standing in the way. In fact, he seemed rather contrite that he had joined in the *Williamson County* opinion that relegated this litigation to state courts. In his words, "[t]he Court today makes no claim that any . . . longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed."[157] The late Chief Justice went on to point out that *San Remo*'s invocation of greater state-court familiarity with local land use disputes is not comparable to "the type of historically grounded, federalism-based interests" that justify the relegation of other claims to state court.[158] The lower federal courts have been similarly reticent to tie *Williamson County*'s state litigation requirement to any concern for federalism, although some casually recite federalism as support for *Williamson County*.[159]

Indeed, in *Felder*, the Court was told that it should rule in the government's favor out of some respect for "equitable federalism," i.e., a belief that states needed to retain some measure of control over their own litigation. *Felder* rejected the idea, concluding strongly that "it has no place under our Supremacy Clause analysis."[160]

Presumably, the Court understood that need when it granted certiorari recently in *Knick v. Township of Scott*, no. 17-647 for the specific purpose of reexamining the state court litigation requirement of *Williamson County*.

156 Radford & Thompson, *Accidental Abstention*, 67 Baylor L. Rev. at 617.

157 San Remo, 545 U.S at 350 (Rehnquist, C.J., concurring in the judgment).

158 *Id.*

159 *Compare* Miles Christo Religious Order v. Township of Northville, 629 F.3d 533, 553 (6th Cir. 2010); Wilkins v. Daniels, 744 F.3d 409, 418 (6th Cir. 2014); Front Royal and Warren County Indus. Prk Corp. v. Town of Front Royal, 135 F.3d 275, 284 (4th Cir. 1998); Kuhnie Brothers, Inc. v. County of Geauga, 103 F.3d 516, 520 (6th Cir. 1997); Millington Homes, Investors, Ltd. v. City of Millington, 60 F.3d 828, 832 (6th Cir. 1995); *with* Kurtz v. Verizon New York, Inc., 758 F.3d 506, 512 (2d Cir. 2014); Murphy v. New Milford Zoning Commn., 402 F.3d 342, 348 (2d Cir. 346); Insomnia, Inc. v. City of Memphis, 278 Fed. Appx. 609 (6th Cir. 2008); Holiday Amusement Corp. v. South Carolina, 493 F.3d 404, 409 (2007) (citing *San Remo Hotel*); Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957, 979 (9th Cir. 2011); Wayside Church v. Van Buren County, 847 F.3d 812, 818 (6th Cir. 2017); Islamic Community Center v. City of Yonkers Landmark Preservation Bd., 2018 WL 3323639 (2d Cir. 2018); Signature Properties, Int'l Ltd. P'nership v. City of Edmond, 310 F.3d 1258, 1269 (10tkh Cir. 2002); Doe . Virginia Dept. of State Police, 713 F.3d 745, 753 (4th Cir. 2013); SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 676 (7th Cir. 2010); Wisconsin Cent. Ltd. v. Pub. Serv. Comm., 95 F.3d 1359, 1366 (7th Cir. 1996); Town ov Nags Head v. Toloczko, 728 F.3d 391 (4th Cir. 2013); McNamara v. City of Rittman, 473 F.3d 633, 641 (6th Cir. 2007) (citing Prof. Sterk)

160 487 U.S. at 150.

Nor was *Felder* alone. In *McDonald v. Chicago*,[161] the Court dealt expressly with the idea that federalism somehow stood in the way of incorporating the Bill of Rights into those guarantees vouchsafed against state and local government:

> "There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. This argument was made repeatedly and eloquently by Members of this Court who rejected the concept of incorporation and urged retention of the two-track approach to incorporation. Throughout the era of 'selective incorporation,' Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. [¶] Time and again, however, those pleas failed. Unless we turn back the clock . . . [the argument] must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."[162]

The Court has explicitly recognized that fully applying Bill of Rights guarantees against the states might "to some extent limit the legislative freedom of the States [because] this is always true when a Bill of Rights provision is incorporated."[163] Indeed, the Supreme Court long ago applied the brakes to states' ability to continuously redefine property rights so as to preclude federal protection. In *Lucas*, for example, the Court quoted its classic decision in *Mahon* to voice its concern that, taken too far, such definitional power would extend so far that "at last private property disappears."[164]

In other words, Section 1983, a federal statute of uncommon strength, adopted by Congress for the specific purpose of restricting the ability of state and local government officials to impose on the rights of ordinary citizens, had to prevail.[165]

Williamson County's ripeness rule that has, for more than three decades, diverted legitimate constitutional claims away from the federal court system has no basis in history or precedent or constitutional exegesis.

CONCLUSION

Having failed to derail Section 1983 on its inexorable journey to enforce Bill of Rights guarantees against state and local government, defenders of the local public purse have sought to revive the myth of federalism as the basis for stripping property owners — and only property

---

161 561 U.S. 742 (2010).

162 *Id*. at 784; citations omitted.

163 *Id.* at 790. See also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 3304, 321 (1987) ("We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of government authorities . . . .")

164 Mahon, 260 U.S. 393, 415 (1922).

165 487 U.S. at 153.

owners — of the right to seek federal court redress for violation of federally protected rights. They are wrong. Federalism was never strong enough to bear the weight of their argument. And it has become weaker over time. The invocation of federalism carries no more merit in this field of law than it did after *Brown v. Board of Education*,[166] when some southern states tried to invoke the so-called "interposition doctrine," seeking thereby to evade the constitutional doctrine of Equal Protection in racial desegregation cases.[167]

The Constitution was not drafted for an Orwellian world where "some animals are more equal than others." All rights protected by the Constitution are entitled to federal court protection. We need to stop pretending otherwise.

320163209.1

166 347 U.S. 483 (1954).

167 Cooper v. Aaron, 358 U.S. 1 (1958).