WHAT'S FEDERALISM GOT TO DO WITH REGULATORY TAKINGS?

MICHAEL M. BERGER*

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[1]—to issues of fundamental rights, without first establishing and acknowledging the existence of a uniform federal baseline of constitutional protection,[2] something Professor Michelman has called "a national constitutional norm of regard for a specified class of individual rights."[3] I especially

* Partner, Manatt, Phelps & Phillips and co-chair of its appellate practice group. Quondam adjunct faculty at the University of Southern California, Washington University in St. Louis, University of Miami, and Loyola of Los Angeles Law School during the last forty-five years, where I taught takings, land use litigation, and appellate practice. I was the Brigham-Kanner Property Rights Conference 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.

1. 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, 439 (2002) [hereinafter Fallon, *Conservative Paths*], whether to defer to state control is the concern of this paper.

2. *See, e.g.*, John Echeverria, Horne v. Department of Agriculture: *An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 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, 1824–25 (2010) (noting 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 UCLA L. REV. 1681, 1683, 1694 (2007). 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*, *supra* note 1, at 460.

3. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 306 (1993).

get this feeling when some of those proposing such state deference concede that "state courts have had a somewhat checkered record" in protecting the rights of property owners.[4] 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 that "checkered" conclusion is vastly understated (at least as it applies to California).[5] The idea of handing over complete control of constitutional protection to the tender mercies of courts that can thumb their judicial noses at the U.S. Supreme Court as easily as California has[6] makes my blood run cold.[7] And why should other states not jump on the California band-wagon (as California continuously shows what it

4. Sterk, *Federalist Dimension*, *supra* note 2, at 206. More generally, as one commentator noted, "[L]eaving such decisions to the states . . . has served more to inhibit individual liberty than to advance it." Owen Lipsett, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?*, 10 U. PA. J. CONST. L. 643, 645 (2008).

5. 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, 227 (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." (format changed from original)); David L. Callies, *Land Use Controls: An Eclectic Summary for 1980–1981*, 13 URB. 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"). Professor Sterk cavalierly suggests that anyone who buys land in California simply "assumes the risk" of hostile treatment. Sterk, *Federalist Dimension*, *supra* note 2, 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. 1 (2019).

6. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 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."); First English Evangelical Lutheran Church v. Cty. 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."); Kanner & Berger, *supra* note 5.

7. 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. For example, two knowledgeable commentators (whose viewpoints are generally supportive of regulators) observed that "[i]n California, the courts have elevated governmental arrogance to a fine art." BABCOCK & SIEMON, *supra* note 5, at 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, *supra* note 2, at 1684. Nonetheless, she believes that "disdain has the momentum" 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 1684, 1696.

can get away with), even though they may be more rational now?[8] As if to prove my point, Professor Sterk has opined that, after the Supreme Court decided *First English Evangelical Lutheran Church v. County of Los Angeles*—holding that the Fifth 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."[9] If nothing else, such state court mutinies demonstrate the need for more Supreme Court intervention and a clearer system of uniformly applied standards.[10]

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 to protect all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection.[11] So, let's get to the bottom line of this

8. Many of California's harebrained ideas eventually roll downhill to other states. *See* Editorial, *California Prays to the Sun God*, WALL STREET J., May 12–13, 2018, at A12 ("California is often where bad ideas spring to life these days, and they're worth highlighting lest they catch on in saner precincts."). The article focused on a 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. This is hardly new. In my early days as an airport-noise lawyer, I noted a California city seeking to simply ban loud aircraft noise by city ordinance, much to the amusement of others. *See* Michael M. Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631, 682 (1970).

9. Sterk, *Federalist Dimension*, *supra* note 2, at 246 n.188 (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). As the initial draft of this article was being written, the California courts did it again. They disregarded the clear holding in *First English*, 482 U.S. 304, that the Fifth Amendment protects against temporary as well as permanent takings. A California Court of Appeal denied relief to a property owner because, even though an easement had been taken and compensation would have been mandatory had it been permanent, the regulatory body had the power to eliminate or ameliorate the easement condition, making it "only" temporary. (Surfrider Found. v. Martins Beach 1, LLC, 14 Cal. App. 5th 238 (Cal. Ct. App. 2017).) There was no reference in the opinion to *First English*. Both the California and United States Supreme Courts denied review.

10. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 52 (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").

11. Joslin Mfg. Corp. v. City of Providence, 262 U.S. 668, 676–77 (1923) (holding that a state is "powerless to diminish" rights but may increase them). *See also* Mills v. Rogers, 457 U.S. 291, 300 (1982) (noting that the U.S. Constitution provides "minimum" protection to which all are entitled); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 BYU L. REV. 329, 330 ("[T]he constitutional division of authority can rightfully claim to protect the governed from governmental overreaching and arbitrariness.").

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.[12] In the Supreme Court's words, "the Constitution divides authority between federal and state governments for the protection of individuals."[13] 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.[14]

Professor Akhil Amar summarizes it simply: "[T]he federal Constitution stands as a secure political safety net—*a floor below which state law may not fall*."[15] As Justice Story explained, the primary reason

---

12. 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-1990s 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, *supra* note 10, at 6. If Professor Shapiro "could not hope to read all of the relevant literature in one lifetime," I must conclude there is no hope for me, given the even greater bulk of material that has built up in the intervening decades. *Id.* Hopefully, I have managed to hit at least some of the high spots.

13. New York v. United States, 505 U.S. 144, 181 (1992).

14. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). Note that "property" was included matter-of-factly in the list of protected rights. Governmental apologists dispute the propriety of constitutional protection for property owners by definitional denigration. *See, e.g.*, Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENV. L.J. 247, 295 (2015) (claiming that property rights are not "fundamental"). They are wrong, of course, as no Supreme Court case has ever gone that far. 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* note 58.

15. 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) [hereinafter Amar, *Five Views*] ("Rightly understood, 'federalism' should protect citizens and limit government abuse . . . ."). *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); Gideon Kanner,

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."[16] Any conflicting state law is simply "without effect."[17] In other words, as the Supreme Court classically held in *Marbury v. Madison*,[18] it is the Supreme Court's job to see that other organs of government remain true to the Constitution[19] so that, as Professors Fallon and Meltzer classically expressed it, we have a constitutional structure "adequate to keep government generally within the bounds

---

Condemnation Blight: Just How Just is Just Compensation?, 48 NOTRE DAME L. REV. 765 (1973) [hereinafter Kanner, *Condemnation Blight*]. "[I]t 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 governmental excesses. . . . [T]he purpose of the . . . Bill of Rights . . . was to protect the people from the government, not vice versa." *Id.* at 784. Other learned commentators concur. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 1.6(c), at 19 (5th ed. 1995) ("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."); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1558–59 (2003) ("Federal takings guarantees set a constitutionally guaranteed floor, not a constitutionally mandated ceiling. . . . [states] can develop state takings law to bring *more* clarity and fairness to the takings protections in their states.") (emphasis added).

16. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (emphasis added) (footnote omitted). 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, *supra* note 3, 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).

17. Maryland v. Louisiana, 451 U.S. 725, 746 (1981); Sibron v. New York, 392 U.S. 40, 60–61 (1968). As the Supreme Court put it directly, all state powers are "limited by the inhibitions of the 14th Amendment." Southern Ry. v. Virginia, 290 U.S. 190, 196 (1933). See the cases collected in Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching:* Nestle v. City of Santa Monica, 9 CAL. W. L. REV. 199, 220 n.107 (1973).

18. 5 U.S. (1 Cranch) 137, 177 (1803).

19. *See* United States v. Morrison, 529 U.S. 598, 616, n.7 (2000) ("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 R. 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.").

of law."[20] That job would include protecting the rights of property owners from the depredations of state and local government.[21]

A critical inquiry would be to determine whether that baseline preservation of rights 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:

> [I]t 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.[22]

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 away 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, they had just lived through an effort to establish a country with a weak center and strong extremities,

---

20. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

21. The Founders saw the protection of individual property rights as "the first object of government." RICHARD EPSTEIN, TAKINGS—PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7–18 (1985); THE FEDERALIST No. 10, at 78–79, 84 (James Madison) (Clinton Rossiter ed., 1961); James Madison, *Property*, NAT. GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 267–68 (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). For a general overview, see EDWARD J. LARSON, THE RETURN OF GEORGE WASHINGTON (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.

22. SHAPIRO, FEDERALISM, *supra* note 10, at 56.

through the ill-fated Articles of Confederation,[23] and understood too well the centrifugal dangers in concentrating power on the periphery.[24] As Judge 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."[25]

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."[26] Much of the work solidifying the federal courts role of 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

---

23. 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. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 (7th ed. 2015). *See* NOWAK & ROTUNDA, *supra* note 15, § 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, *supra* note 10, at 15 (noting the "dissatisfaction with [the] weak central government that led to a call for a convention"); Smith, *supra* note 21, at 299 (noting that "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").

24. *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").

25. Don Willett, *Happy Constitution Day, If You Can Keep It*, WALL STREET J., Sept. 17, 2018, https://www.wsj.com/articles/happy-constitution-day-if-you-can-keep-it-1537129604.

26. 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 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, *supra* note 15, at 489.

back to the center, thereby countering the omnipresent threat that the federal republic would revert to a confederation."[27]

Thus, notwithstanding that "every schoolchild learns [that] our Constitution establishes a system of dual sovereignty between the States and the Federal government,"[28] those same schoolchildren also learn that federal law is paramount when the two systems diverge. This 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*.[29]

Thus, states bear a "coordinate responsibility" to protect all Americans' federal rights because the federal-supremacy concept makes federal laws "as much laws in the States as laws passed by the state legislature."[30]

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, changes occurred as the nation matured.[31] It is hard to ignore the fact that the

---

27. Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205, 210 (2012).

28. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

29. 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 also* SHAPIRO, FEDERALISM, *supra* note 10, at 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"); Frank B. Cross, The Folly of Federalism, 24 CARDOZO L. REV. 1, 3 ("The primary constitutional provision on the states' relationship with the central government is found in the Supremacy Clause, which explicitly subordinates state authority.").

30. Howlett v. Rose, 496 U.S. 356, 367 (1990). *See also* Claflin v. Houseman, 93 U.S. 130, 137 (1876) (explaining that both state and federal courts must enforce "the laws of the United States"); Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 98 (2009) (collecting cases). 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).

31. *See* Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's*

Civil War intervened, for example,[32] and the distrust of too much centralized power, which 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.[33]

The decades between the 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.[34] Professor Michelman 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

---

The Bill of Rights, 33 U. RICH. L. REV. 485, 489 (1999) (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).

32. *See* Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1023 (1985) ("[T]he 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*, *supra* note 15, 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 supplemented by the Fourteenth Amendment, defining an extensive set of individual liberties protecting citizens from government at all levels." John D. Echeverria, *The Costs of* Koontz, 39 VT. L. REV. 573, 596–97 (2015) [hereinafter Echeverria, Koontz].

33. SHAPIRO, FEDERALISM, *supra* note 10, at 28.

34. *See* 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."); Lash, *supra* note 31, at 489–98.

> 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.[35]

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.[36] Thus, those who created the Fourteenth Amendment were writing against a long history of state abridgement of fundamental rights.[37] 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 . . . ."[38] 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."[39] They expected the new amendment to add a broad, new

---

35. Michelman, *supra* note 3, at 303 (1993); *see also* LAURENCE TRIBE, CONSTITUTIONAL LAW 549 (2d ed. 1988).

36. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) [hereinafter AMAR, BILL OF RIGHTS]. This conclusion is clear from the debates over adoption of 42 U.S.C. § 1983. *See* Briscoe v. Lahue, 460 U.S. 325, 363–64 (1983). As this article is focused on property rights, it is interesting to note that a major issue facing Congress at the time was the widespread denial of property rights to the former slaves. CONG. GLOBE, 39th Cong., 1st Sess. 94, 475, 588 (1866); Report of the Joint Committee on Reconstruction, H.R. REP. NO. 30, 39th Cong., 1st Sess., pt. II, at 243 (1866). "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an *essential pre-condition to the realization of other basic civil rights and 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 (2007). Even *Kelo v. City of New London*, 545 U.S. 469 (2005), not generally viewed as particularly protective of property owners' rights, says that states may place "further restrictions on [the] exercise of the takings power" and contains a caution against government rationalizations that are merely "pretextual" rather than actual. *Id.* at 489, 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).

37. CONG. GLOBE, 39th Cong., 1st Sess. App. 256 (1866) (Rep. Jehu Baker).

38. 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).

39. Lash, *supra* note 31, at 1326. No one in either house of Congress expressed any

constitutional guarantee designed to secure "the civil rights and privileges of all citizens in all parts of the republic"[40] and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country."[41]

With state certification of its three post–Civil War constitutional amendments, Congress had the power to move.[42] It swiftly enacted legislation that has been widely seen as applying Bill of Rights protections directly to state and local governments. 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."[43] Indeed, by setting a constitutional floor securing individual rights, the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States."[44] That "restructured relationship" included a full-throated application of the Bill of Rights guarantees to state and local governments. As the Court repeatedly said, "the 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.'"[45] Rather, they are to be enforced

---

disagreement with this central precept. AMAR, BILL OF RIGHTS, *supra* note 36, 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 it would establish/ensure the federal government, rather than the states, as the primary insurer of individual liberties).

40. JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 1st Sess. xxi (1866).

41. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

42. 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).

43. *McDonald*, 561 U.S. at 762. Moreover, the proponents' "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).

44. 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).

45. 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

against the states by the same standards that protect those rights against federal encroachment.[46] In the context of property rights, one might view the guarantees 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."[47] This is no more than acknowledgement of our "constitutional culture," based on the common understanding that the contents of a "bundle of rights" is acquired along with a title to land.[48] 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.[49]

---

substantive due process, incorporation gained strength as substantive due process fell out of favor. *See* NOWAK & ROTUNDA, *supra* note 15, at 361–66; TRIBE, *supra* note 35, at 772–74.

46. *Malloy*, 378 U.S. at 10; *McDonald*, 561 U.S. at 744.

47. Michelman, *supra* note 3, at 320; *see also* Amar, *Five Views*, *supra* note 15, 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").

48. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026–29. *See* Amar, *Five Views*, *supra* note 15, 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 Fourteenth Amendment's adoption.

49. Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 86 [hereinafter Somin, *Federalism*]. The absolutist position is typified by Andrew W. Schwartz, *supra* note 14, at 294. Schwartz treats as an absolute state "prerogative" the ability "to define where private property rights begin and the state's power ends." *Id.* That overstates the Supreme Court's decisions, which consistently say that property rights come from independent sources "such as" state law but not exclusively state law. Schwartz knows this, which is why he opens his screed by calling current fifth amendment law "a misunderstanding of the [Takings] Clause" and calls for the Supreme Court to jettison the regulatory taking concept wholesale. *Id.* at 248.

Note that the Supreme Court's familiar phrasing (that property rights come from sources "such as" state law) does not restrict those 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*[50] standards are so vague they provide only the most general guidance rather than actual rules.[51]

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]

---

50. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

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 preordained results. As Professor Sterk concluded with understatement, "*Penn Central* hardly serves as a blueprint for a municipality or a court seeking to conform to constitutional doctrine." Sterk, *Federalist Dimension*, *supra* note 2, at 232. In his words, "Whenever the Court conducts a *Penn Central* analysis of a state or local regulation, the regulation stands." *Id.* 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. & ZONING 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 BILL RTS. J. 679 (2005); Kanner & Berger, *supra* note 5 (collecting authorities).

52. Sterk, *Federalist Dimension*, *supra* note 2, at 236.

His reasons for not including property owners in such demonized groups ring a bit hollow. They can be boiled down to this statement: "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: "[T]he central purpose of the Reconstruction-Era laws is to provide 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:

> [T]he 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

---

53. *Id.* As for hanging one's hat on "investment-backed expectations," remember *Hodel v. Irving*, 481 U.S. 704 (1987). There, in striking down the 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[s]" in the property or any "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) ("Really?") (Breyer, J., dissenting). It is apparently *de rigueur*. At the oral argument in *Timbs v. Indiana,* Justice Gorsuch bearded the counsel for the government with the comment, "[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General." Transcription of Oral Argument at 32, Timbs v. Indiana, 138 S. Ct. 2650 (2018) (No. 17-1097). *See infra* note 89.

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).

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, *supra* note 36.

> 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 property owners from 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, federalism is never discussed by name therein), it would be *Williamson County Regional Planning Commission 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 § 1983 was not "ripe" for litigation in federal court until the plaintiff property owner had first sued in state court and had lost under the state's equivalent of the Fifth Amendment. That theory is wholly antithetical to the underlying basis of § 1983. Far from being "thrown open," the federal courthouse doors were slammed shut to regulatory taking victims by the *Williamson County* ripeness rule.[62]

---

58. Kanner, *Condemnation Blight*, *supra* note 15, 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. Fla. Bd. of Regents, 457 U.S. 496, 504 (1982) (emphasis added).

60. Sterk, *Demise*, *supra* note 51, at 300. Notwithstanding, he has expressed the view that "federalism 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). 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* had been described as "a critical mechanism for avoiding a controversial issue." Sterk, *Demise*, *supra* note 51, at 259. Indeed it is. For an example of this scholarly substantive debate, compare Norman Williams

There are two key matters to note about *Williamson County*. First, it is *not* based on federalism. Read the case as many times as you like; the concept of federalism 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) that compliance with its new template would "ripen" the matter for federal court litigation. That is, it would ensure that a case would be properly set up for federal courts to deal with on the merits. There could be no other rational meaning for "ripeness." The Court's 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 yourself. 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 [the] 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, the "respondent's claim is not ripe."[65] Please note again that the phrase chosen was "not ripe" rather than "dead." Absence of ripeness 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, and repeatedly saying that such cases *can* be ripened and *then* litigated in federal court:

---

et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) (advocating injunctive relief only) with Michael M. Berger & Gideon Kanner, *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, *supra* note 62, at 250.

64. *Williamson County*, 473 U.S. at 185 (emphasis added).

65. *Id.* at 186 (emphasis added).

> 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. . . . 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.
>
> . . . .
>
> . . . *until* [plaintiff] has utilized that procedure, its taking claim is premature.[66]

Indeed, the plain message of *Williamson County* is that claims that are generated because a local government agency has violated rights protected by the due process and just compensation guarantees 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 . . . . 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.
>
> . . . .
>
> . . . even if viewed as a question of due process, respondent's claim is *premature*.[67]

---

66. *Id.* at 194–95, 197 (emphasis added).

67. *Id.* at 195, 199 (emphasis added). I have cited 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, for example, the 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.*, Phelps v. U.S., 274 U.S. 341, 344 (1927); Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299, 304 (1923). *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"). 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.

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."[68]

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 could render their claims ripe for federal court litigation. If the Court meant "never," it could easily and plainly have said so.[69]

In short, the only justification presented by *Williamson County* for sending regulatory taking litigation to state courts was to properly season the litigation, not to end it. And it was not to serve some unrelated, and unstated, issue like federalism.[70] If that had been the point, it would have been clearly stated. *Williamson County* thus stands as a "puzzling exception" to ordinary rules of federal jurisdiction.[71] Moreover, having created the prerequisite of state court litigation as a "ripening" agent, nothing prevents the Court from rounding out that prerequisite by excusing the need for compliance with "full faith and credit" requirements, which are wholly antithetical to the *Williamson County* ripening concept.[72]

How does this ripeness rule 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

68. *Williamson County*, 473 U.S. at 200 (emphasis added).

69. *See* Radford & Thompson, *supra* note 55, at 582. Even defenders of local government agree that this is the clear import of the Supreme Court's words. *E.g.*, Echeverria, Horne, *supra* note 2, at 10736 (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").

70. *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"). For a contrary view, see Schwartz, *supra* note 14, at 296. The problem at the core of Schwartz's thesis is his assertion that "federalism concerns lie at the root of *Williamson*" when the word "federalism" does not appear in *Williamson County* at all.

71. Sterk, *Federalist Dimension*, *supra* note 2, at 255.

72. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 521–22 (1964) (allowing the "reservation" of a 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.

usurp that which is not given. The one or the other would be *treason to the constitution*."[73] Although the Court has developed methods by which it can use 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."[74] While such discretion necessarily tempers the universality of the *Cohens* cry of "treason,"[75] the Court's recent repetition of its "virtually unflagging" obligation to hear cases within its jurisdiction[76] shows that Chief Justice Marshall's belief still holds sway.

Section 1983 is one of the most consequential laws passed by Congress.[77] It was enacted to enforce the protections intended by the Fourteenth Amendment. Its goal was a significant restructuring of the relationship between citizens and local and state officials, with the courts of the United States acting as guarantors of federal rights.[78] In other words, the "dominant characteristic" of such § 1983 actions is that "they belong in court."[79] And, by 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*."[80]

---

73. Cohens v. Virginia, 19 U.S. [6 Wheat.] 264, 404 (1821);*see England*, 375 U.S. 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' obligations to hear and decide cases within their jurisdictions 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).

74. 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 the exercise of jurisdiction can be neither "uncontrolled or whimsical" but must be consonant with the *Marbury v. Madison* determination (5 U.S. (1 Cranch) 137 (1803)) of a general obligation to decide cases within jurisdiction. *Id.* at 579.

75. Shapiro, *Jurisdiction*, *supra* note 74, at 570.

76. *See* Mitchum v. Foster, 407 U.S. 225, 238–39 (1972).

77. It has been viewed as the source of authority to "make federal common law." Gerhardt, *supra* note 34, at 557.

78. *See Mitchum*, 407 U.S. at 238–39.

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

80. *Id.* (emphasis added). There is simply no way to reconcile that direct holding of *Burnett* with the "ripeness mess" prevailing in regulatory taking cases because of the Supreme Court's

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*.[81]

To those who have found their property rights regulated into near or total oblivion since *Williamson County*, the Court's words ring hollow.[82] 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."[83] 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.[84]

High time. As recently as a decade or so ago, commentators have 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."[85] But pendula swing.

---

demand in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), 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. Bd. 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 . . . .").

81. *McNeese*, 373 U.S. at 674 n.6 (emphasis added) (quoting with approval).

82. Criticism of *Williamson County*, 473 U.S. 172, 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, *supra* note 62, at 305 (noting the case was "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).

83. Patsy v. Fla. Bd. of Regents, 457 U.S. 496, 504 (1982).

84. *See* Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (March 5, 2018). For the outcome, see *infra* Epilogue.

85. Lipsett, *supra* note 4, at 658; *see also* Fletcher, *supra* note 82, at 776–78. Indeed, three decisions from 2005 were seen by a prominent federal appellate judge as signaling "a substantial

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.[86] As I have noted elsewhere, some of those pro–property rights decisions were either 9–0 or 8–1, showing that this shift of opinion was more than merely the conservative Justices ganging up on the liberals.[87]

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."[88] Although the Court acted slowly and selectively—that is, 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.[89] 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,"[90] and whether it is "deeply rooted in this Nation's history and tradition."[91]

---

change—entirely in the direction of relegating takings issues to the political and legal judgments of the states." *Id.* at 776.

86. *See* Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015), *and* 133 S. Ct. 2053 (2013) (denigrating government ripeness arguments); Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (criticizing the Solicitor General for raising an argument that was contrary to an argument on which he had prevailed in the past); Berger, *Property*, *supra* note 67, at 96–105 (noting *inter alia Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012)) (giving no credence to the "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).

87. Berger, *Property*, *supra* note 67, at 96–105. Curiously, one prominent commentator insists that these 8–1 and 9–0 decisions demonstrate that the Supreme Court has "incorrectly" read its own *Williamson County* decision and, indeed, that one of them "boosted the cause of anti-federalism." Schwartz, *supra* note 14, at 296, 297. With all the respect due it, unanimous Supreme Court votes in repeated cases outweigh the views of one disgruntled practitioner.

88. McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

89. *Id.* at 764. Recently, the Court determined that one of the last remaining parts of the Bill of Rights—the Eighth Amendment's Excessive Fines Clause—is similarly incorporated. *Timbs v. Indiana*, 139 S. Ct. 682 (2019). At the oral argument, the two newest Justices ridiculed the idea that anything substantive in the Bill of Rights was not incorporated. Justice Gorsuch said, "Really? Come on, General." Transcription of Oral Argument at 32, Timbs v. Indiana, 138 S. Ct. 2650 (2018) (No. 17-1097). Justice Kavanaugh said, "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?" *Id.* at 33.

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

91. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). An extensive analysis

In enforcing the Fourteenth Amendment, Congress simultaneously enacted 42 U.S.C. § 1983[92] and brought to the forefront the Constitution's Supremacy Clause, making it binding on the states. The validity of § 1983 has been too oft affirmed to be in doubt.[93]

So what was the point of § 1983? As Professor Gerhardt summarized it, "[T]he 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."[94] A § 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"[95] with "broad and sweeping protection"[96] so that individuals in a wide variety of factual situations would be able to obtain a *federal* remedy when their federally protected rights were abridged.[97] The statute must be broadly and liberally construed to achieve its goals.[98] Its "goals" have been straightforwardly stated: "to provide compensatory relief to those deprived of their federal rights by state actors"[99] by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights."[100]

One might say, in other words, that the whole point of § 1983 was to grant federal courts the authority and duty to provide protection of federal rights.[101] In Professor Shapiro's words, "[T]he post–Civil

---

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.

92. 42 U.S.C. § 1983 (2018). Section 5 of the Fourteenth Amendment granted Congress "the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

93. 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.

94. Gerhardt, *supra* note 34, at 562.

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

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

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

98. *See* 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, *supra* note 34, at 548.

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

100. *Mitchum*, 407 U.S. at 243.

101. *See* Gerhardt, *supra* note 34, at 613 (discussing the Supreme Court's policy in *Monell*

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."[102] Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability."[103] Properly so. "The purpose of Congress is [to be] the ultimate touchstone" for analyzing the relationship between state legislation and § 1983.[104] Anything "incompatible with the compensatory goals of the federal legislation"[105] cannot stand. The question, in other words, is whether a state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[106] Allowing states to erect any obstacles to federal court access violates this precept. In some cases, the federal courts have created doctrines that restrict their own jurisdiction.[107] Even allowing for the validity of such self-imposed limitations, nothing permits the states to create restrictions of 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."[108] This, of course, is contrary to settled Supreme Court holdings that "costs cannot outweigh the constitutional right"[109] and that "one who causes a loss should bear the loss."[110] It is also contrary to the Supreme Court's

---

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).

102. Shapiro, *Jurisdiction*, *supra* note 74, at 584.

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

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

105. Felder v. Casey, 487 U.S. 131, 143 (1988).

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

107. For example, this is demonstrated with the various forms of "abstention."

108. Echeverria, Koontz, *supra* note 32, at 573. Paying more attention to governmental costs had already been considered. Indeed, saving the government money had been the express basis for the California Supreme Court's rule. *See* People v. Symons, 54 Cal. 2d 865 (1960); Agins v. City of Tiburon, 598 P.2d 25 (1979). The United States Supreme Court directly dealt with that in First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 311 (1987), and rejected the concept.

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

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

recent rejection of the government's "sky is falling" arguments in *Arkansas Game & Fish Commission v. United States*.[111]

A state law, regardless of its intent, cannot "thwart the congressional remedy"[112] or subvert Congress' clear goals in following its mandate to enforce the rights created and protected by the Fourteenth Amendment. The courts have not hesitated to strike down state policies that do so.[113] That is why the Supreme 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.[114]

This theory of protecting *federal* rights in *federal* courts dates to the founding of the republic (that is, it predates adoption of either the Fourteenth Amendment or § 1983) and makes it 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."[115] 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."[116] 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)."[117]

---

111. Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 521 (2012); *see supra* note 86.

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

113. *See* Haywood v. Drown, 556 U.S. 729, 739 (2009) ("A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear."); Felder v. Casey, 487 U.S. 131, 153 (1988) (striking down the state-notice-of-claim statute).

114. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987).

115. Greenwood v. Peacock, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting); *see also* Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 87 (1809).

116. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (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 363–64. 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 Fourteenth 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).

117. Lash, *supra* note 31, at 501.

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. Connecticut Hazardous Waste Management Service*,[118] 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.".[119] 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 § 1983.[120] It is no answer to say that it is "more effective if takings litigation is confined to one court system rather than two[121] and then asserting that the choice of system goes to the states.[122] That is wholly contrary to virtually all § 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 § 1983 but subsequent congressional action as well. Since adopting § 1983, Congress has clearly reinforced the need for that bedrock civil rights law. Any requirement for a 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.[123] That

---

118. 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (Oct. 4, 2004).

119. *Santini*, 342 F.3d at 130; *see also* San Remo Hotel v. City and Cty. of San Francisco, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment on behalf of four Justices and urging eventual reconsideration of this anomaly).

120. *See* Lash, *supra* note 31, 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, *supra* note 5, at 1. For further discussion of local parochialism against property owners and land developers, see Berger, *Property*, *supra* note 67, at 61–63.

121. Sterk, *Demise*, *supra* note 51, at 300.

122. By what mode of "choice"? A coin flip?

123. *Compare* Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. § 4601 (2018), *with* Stringer v. United States, 471 F.2d 381, 384 (9th Cir. 1973), *and* United States v. Herrero, 416 F.2d 945, 947 (9th Cir. 1969) ("[T]o seize and say 'sue me' is high-handed government conduct, and not to be favored."). Some spokespeople for local-government

Act makes it illegal for government agencies to require 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[124] or, failing that, condemnation.[125]

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.[126] As one commentator concluded, "The state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of the law."[127]

---

control view the "right" to sue, pleading with courts to provide recompense, as a remedy. *E.g.*, Echeverria, Koontz, *supra* note 32, 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*. The U.S. Solicitor General evidently disagrees. In a recent letter brief filed post argument in *Knick*, he urged that mere government refusal to acknowledge its action as potentially effecting a taking could not itself be a taking. Brief for United States as Amicus Curiae, Knick v. Twp. of Scott, 138 S. Ct. 1262 (2018) (No. 17-647). At oral argument, however, the Chief Justice had forcefully told counsel that takings occur at the moment of impact of the regulation. Transcription of Oral Argument, *Knick*, 138 S. Ct. 1262 (No. 17-647).

124. *See* 42 U.S.C. § 4651(1).

125. *See* 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." *Id.* To make this a truly "uniform" law, as its title had 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.

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

127. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 23 (1995).

No parallel, indeed.[128]

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.[129]

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.[130]

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."[131] The existence of this "constitutional core" means that states can neither enlarge, restrict, or prohibit property rights 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."[132]

---

128. *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 L. REPORT 57 (Sept. 1988).

129. *See* San Remo Hotel v. City and Cty. of San Francisco, 545 U.S. 323, 350 (2005) (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").

130. Michelman, *supra* note 3, 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 a shade of federalism in justification. *See* Sterk, *Federalist Dimension*, *supra* note 2, at 288.

131. Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1200 (9th Cir. 1998).

132. Fowler v. Guerin, 899 F.3d 1112 (9th Cir. 2018). See, for example, *Nixon v. United*

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 Fifth Amendment's Just Compensation Clause. Federal court First 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.[133] 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 do any regulatory takings cases. 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 First Amendment is determined by "contemporary community standards" and "applicable state law."[134] Free speech claims under the First 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.[135]

To paraphrase Justice Brennan's classic dissent in *San Diego Gas & Electric Co. v. City of San Diego*,[136] 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?[137]

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 to reach this decision, 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, so that all such papers now belong to the people not the individual who temporarily inhabits the White House. It may be worth noting, however, that each president since Nixon has established his own presidential library—at a site of his choosing—and has "borrowed" the papers from the government to fill the library.

133. *E.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, 427 U.S. 50 (1976). *See San Remo Hotel*, 545 U.S. at 350 (Rehnquist, C.J., concurring).

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

135. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

136. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S, 621 (1981).

137. *See, e.g.*, Agins v. City of Tiburon, 598 P.2d 25, 32 (1979) (Clark, J., dissenting). *Agins* was affirmed in its Supreme Court case, 447 U.S. 255 (1980), and disapproved in *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304 (1987). For an extended discussion, see Kanner & Berger, *supra* note 5.

State court judges do not have a monopoly on measuring public works 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.[138] That battle ended in 1987, when *First English* recognized that non-monetary remedies fail to fulfill the federal constitutional-takings mandate.[139]

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

> [in 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. . . . [i]t 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.[140]

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."[141]

Even after *Williamson County*,[142] federal courts have relied on *Belle Terre*[143] as the 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.[144] 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.

---

138. Sterk, *Federalist Dimension*, *supra* note 2, at 291.

139. *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).

140. Vill. 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 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).

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

142. 473 U.S. 172 (1985).

143. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

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

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.[145] An analysis of freedom of speech cases also shows deference to local conditions but no need to defer to state courts to adjudicate these issues.[146]

As the Supreme Court itself has noted, federal courts routinely review issues involving the exercise of a state's sovereign prerogative—including the power to regulate fishing in state waters, a state's power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of other matters under local control.[147]

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."[148] Indeed, "[w]hether a search is reasonable may depend on conditions that vary from house to house and hour to hour. Yet federal judges routinely address these issues, and do not simply defer to the views of local officials."[149]

Many of the above-mentioned cases deal with parallel features of the Bill of Rights. Notably, this includes 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 Fifth 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."[150]

---

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

146. *See* Somin, *Federalism*, *supra* note 49, at 82.

147. Cty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 191–92 (1959) (collecting cases).

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

149. Somin, *Federalism*, *supra* note 49, at 80. *See also* Kelo v. City of New London, 545 U.S. 323, 518 (2005) (Thomas, J., dissenting).

150. Somin, *Federalism*, *supra* note 49, at 87.

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 party simply prefers to litigate that state-law issue in federal court.[151] 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.[152]

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 § 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*,[153] 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. The Supreme Court upheld that removal. The Court saw nothing untoward in trying the case in federal court, with no previous proceedings in state court under state law to guide the way.[154] As made clear by R.S. Radford & Jennifer Thompson, "[N]o one has advanced a federalism-based rationale that

---

151. U.S. CONST. art. III, cl. 2; 28 U.S.C. § 1332 (2018).

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

153. 522 U.S. 156 (1997).

154. The Eighth Circuit later tried to reconcile *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), but gave up after finding the outcome "anomalous" (Kottschade v. City of Rochester, 319 F.3d 1038, 1041 (8th Cir. 2003), *cert. denied*, 540 U.S. 825 (2003)) and then concluding that the way to resolve the resulting conundrum "[was] for the Supreme Court to say, not us." *Kottschade*, 319 F.3d at 1041. Presumably, the Court understood that need when it granted certiorari in *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (2018) (No. 17-647) for the specific purpose of reexamining the state court litigation requirement of *Williamson County*.

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."[155]

There is nothing so special about regulatory taking cases that justifies insulating them from federal court review.

Second, there is nothing so inherent in the concept of federalism that prevents federal courts from protecting the basic aspects of the Bill of Rights against states and localities. When Chief Justice Rehnquist penned his famous concurring opinion in *San Remo Hotel*,[156] urging that the state court litigation requirement of *Williamson County* be re-examined, he did not raise any issues of federalism as standing in the way. In fact, he seemed rather contrite that he had joined in the *Williamson County* opinion that had relegated this litigation to state courts. In his words, "The 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 that state courts have greater 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.[159]

---

155. Radford & Thompson, *supra* note 55, at 617.

156. San Remo Hotel v. City and Cty. of San Francisco, 545 U.S. 323 (2005).

157. *Id.* at 350 (Rehnquist, C.J., concurring).

158. *Id.*

159. *Compare* Wilkins v. Daniels, 744 F.3d 409, 418 (6th Cir. 2014); Miles Christo Religious Order v. Twp. of Northville, 629 F.3d 533, 553 (6th Cir. 2010); Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 284 (4th Cir. 1998); Kuhnie Brothers, Inc. v. Cty. of Geauga, 103 F.3d 516, 520 (6th Cir. 1997); *and* Millington Homes, Inv'rs, Ltd. v. City of Millington, 60 F.3d 828, 832 (6th Cir. 1995); *with* Islamic Comty. Ctr. v. City of Yonkers Landmark Pres. Bd., 742 Fed. Appx. 521 (2d Cir. 2018); Wayside Church v. Van Buren Cty., 847 F.3d 812, 818 (6th Cir. 2017); Kurtz v. Verizon N.Y., Inc., 758 F.3d 506, 512 (2d Cir. 2014); Doe v. Va. Dep't of State Police, 713 F.3d 745, 753 (4th Cir. 2013); Town of Nags Head v. Toloczko, 728 F.3d 391 (4th Cir. 2013); SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 676 (7th Cir. 2010); Guatay Christian Fellowship v. Cty. of San Diego, 670 F.3d 957, 979 (9th Cir. 2011); Insomnia, Inc. v. City of Memphis, 278 Fed. Appx. 609 (6th Cir. 2008); Holiday Amusement Corp. v. South Carolina, 493 F.3d 404, 409 (4th Cir. 2007) (citing *San Remo Hotel*, 545 U.S. 323); McNamara v. City of Rittman, 473 F.3d 633, 641 (6th Cir. 2007) (citing Professor Sterk, Sterk, *Demise*, *supra* note 51, at 292–300); Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 348 (2d Cir. 2005); Signature Properties, Int'l Ltd. P'ship v. City of Edmond, 310 F.3d 1258, 1269 (10th Cir. 2002); *and* Wis. Cent. Ltd. v. Pub. Serv. Comm., 95 F.3d 1359, 1366 (7th Cir. 1996).

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

Nor was the *Felder* opinion alone. In *McDonald v. City of Chicago*,[161] the Court dealt expressly with the idea that federalism somehow stands 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 [has] always [been] true when a Bill of Rights provision [has been] incorporated."[163]

---

160. Felder v. Casey, 487 U.S. 131, 150 (1988).

161. 561 U.S. 742 (2010).

162. *Id.* at 784 (citations omitted).

163. *Id.* at 790. *See also* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 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 . . . .").

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, if taken too far, such power to redefine would extend so far that "at last private property [would] disappear[]."[164]

In other words, § 1983, a federal statute of uncommon strength and 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, has 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, precedent, or constitutional exegesis.

CONCLUSION

Having failed to derail § 1983 on its inexorable journey to enforce Bill of Rights guarantees against state and local governments, defenders of the local public purse have sought to revive the myth of federalism as the basis for stripping property owners—and only property owners—of the right to seek federal court redress for violations of federally protected rights. They are wrong. Federalism was never strong enough to bear the weight of their arguments, and it has become weaker over time. The invocation of federalism in this field of law carries no more merit than it did after *Brown v. Board of Education*,[166] when some southern states tried to invoke the so-called "interposition doctrine" and sought 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.

---

164. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
165. *Felder*, 487 U.S. at 153.
166. 347 U.S. 483 (1954).
167. Cooper v. Aaron, 358 U.S. 1 (1958).

EPILOGUE

As this article was in the final stages of production, the Supreme Court decided *Knick v. Township of Scott*. The question presented in the petition for certiorari was the starkly procedural one "whether the Court should reconsider the portion of *Williamson County* . . . requiring property owners to exhaust state court remedies to ripen federal takings claims."[168] Referring to some of the analysis in *Williamson County* as "simply confused," the Court concluded that "its reasoning was exceptionally ill founded" and "unworkable in practice" so that the only solution was to "overrule" the state court litigation requirement.[169]

Much will be written about *Knick* but, for our purposes, these are the major lessons:

- The state litigation requirement of *Williamson County* is dead. RIP. Property owners with Fifth Amendment takings claims can take them directly to federal court, just as all other American constitutional claimants.[170]
- The answer to the question posed in the title to this article is precisely what we said it was: nothing.

168. Petition for Writ of Certiorari, Knick v. Twp. of Scott, 138 S. Ct. 1262 (2018) (No. 17-647), 2017 WL 5158056 (citation omitted).

169. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2174, 2178–79 (2018).

170. *See id.*