Forgotten Federalism: the Takings Clause and Local Land Use Decisions

Melvyn R. Durchslag
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INTRODUCTION

Regulating land uses runs from a major activity of larger local governments to an obsession with those that are smaller and more rural. These regulations take many forms, the most familiar and venerable of which is zoning. In recent years, however, a host of other regulatory regimes have been used by local governments to restrict how one may use her land. These range from subdivision regulations, to attempts to preserve wetlands and open spaces, to historic

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2. See generally 1 Robert M. Anderson, American Law of Zoning § 1.13, at 22 (3d ed. 1986) ("Zoning is 'a legislative act representing a legislative judgment as to how the land within the City should be utilized and where the lines of demarcation between the several use zones should be drawn.'" (quoting City of Greeley v. Ells, 527 P.2d 538, 542 (Colo. 1974))); 1 Patrick J. Rohan, Zoning and Land Use Controls § 1.03(2)[a], at 1-23 (Eric Damian Kelly ed., 56th ed. 1999) ("The basic concept of zoning is simple. The governing body, with the advice of a planning commission, divides the community into districts, or zones, and adopts land use regulations that vary by district but that are uniform within each district.").

3. See, e.g., Timber Trails Corp. v. Planning & Zoning Comm'n, 610 A.2d 620, 624-25 (Conn. 1992) (holding that a local planning and zoning commission had the ability to take "action on . . . [a] subdivision application when it modified the lot configuration of the corporation's subdivision application by reducing the number of lots"); Rice v. City of Oshkosh, 435 N.W.2d 252, 255 (Wis. 1989) ("[t]he governing body of the town or municipality within which the subdivision lies may require that the subdivider make and install any public improvements reasonably necessary . . . ." (alteration in original) (internal quotation marks omitted) (quoting Wis. Stat. § 236.13(2)(a) (1985))). See generally 4 Anderson, supra note 2, §§ 25.02-25.03, at 263-79 (describing various subdivision controls employed by different states and jurisdictions); 7 Rohan, supra note 2, § 45.01[1][a], at 45-45 (explaining that "the primary purpose of subdivision regulation is integration of a new development into an existing community" (citations omitted)).

4. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (upholding, as legitimate, zoning ordinances that "discourage the 'premature and unnecessary conversion of open-space land to urban use'" because the ordinances advance legitimate government goals (quoting Cal. Gov't Code Ann. § 65561(b) (West Supp. 1979))); Potomac Sand & Gravel Co. v. Governor of Md., 293 A.2d 241, 248 (Md. 1972) (per curiam) (upholding a
preservation efforts,\(^5\) to saving scenic views from obstruction by high-rise buildings.\(^6\)

Whatever their diversity in scope or purpose, all land use regulations share two characteristics. First, they are far more likely to be enacted by local governments than by either state governments or the federal government.\(^7\) The reason for this is simple; the immediate

statute that “prohibit[ed] . . . dredging sand, gravel, or other aggregates or minerals” from wetland areas because the statute promoted the preservation of “exhaustible natural resources”). See generally 1 Anderson, supra note 2, § 2.09, at 43 (stating that “[a] growing number of states are imposing state controls on coastal and wetland areas”); 2 Rohan, supra note 2, § 16.06[2][b], at 16-195 (noting the existence of “a variety of federal and state efforts to preserve open space”).

5. See, e.g., St. Bartholomew’s Church v. City of New York, 914 F.2d 348, 356-57 (2d Cir. 1990) (finding that the application of New York City’s Landmark Preservation Law to a church did not constitute a taking); Portsmouth Advocates, Inc. v. City of Portsmouth, 587 A.2d 600, 602 (N.H. 1991) (“The protection of historic landmarks and areas is a legitimate and recognised exercise of a town’s police powers for the purpose of promoting that town’s general welfare.” (citing Victorian Realty Group v. City of Nashua, 534 A.2d 581, 383 (N.H. 1987))); Carol M. Rose, Preservation and Community: New Directions in the Law of Historical Preservation, 33 Stan. L. Rev. 475, 475-76 (1981) (suggesting that historic preservation serves important social purposes, such as building a sense of community). See generally 2 Anderson, supra note 2, § 9.74, at 331 (noting that “community effort to preserve the physical evidence of history through land-use controls”); 5 Rohan, supra note 2, § 31.01, at 31-11 (discussing various preservation efforts and noting that “[s]tatutory encouragement of historic preservation usually takes the form of tax incentives” (footnote omitted)).

6. This is not to say that federal or state land use regulations are unheard of or even unusual. The federal government, of course, controls land uses on federal lands. See, e.g., Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979) (finding congressionally approved use of federal lands to be good cause for encroaching on the historic police powers of the states). The federal government also controls land uses that “effect commerce.” See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 268 (1981) (upholding the Surface Mining Act of 1977, a statute designed to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations” as constitutional under the Commerce Clause (internal quotation marks omitted) (quoting 30 U.S.C. § 1202(a) (1976 & Supp. III))). Land uses that risk polluting waterways over which the federal government may exercise control are also controlled by the federal government. See, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (interpreting the Clean Water Act as authorizing the Army Corps of Engineers to require permits for the discharge of fill into wetlands adjacent to “waters of the United States” (internal quotation marks omitted)). For their part, states tend to limit their direct land use regulation to natural resource preservation such as environmentally sensitive coastlines and wetlands. See, e.g., Just v. Marinette
and most felt effects of land uses are local. The second shared characteristic is that many modern land use regulatory regimes go well beyond the nuisance prohibiting regulations first proposed in model form by the United States Department of Commerce in the 1920s and approved by the United States Supreme Court in Village of Euclid v. Ambler Realty Co. Modern land use regulations, even those that take the form of traditional "zoning," are more planning tools than a substitute remedy for common law nuisances or near nuisances. Many

County, 201 N.W.2d 761, 772 (Wis. 1972) (upholding as constitutional a local ordinance designed to meet standards for shoreland regulation). For a case on the preservation of scarce farmland, see, e.g., Meeker v. Board of Commissioners, 601 P.2d 804, 805 (Or. 1979), finding county approval of agricultural land division acceptable. Virtually all other land use regulation occurs at the local government level. Land use regulatory authority is delegated by states to their local governments, either by statute, see, e.g., ALASi STAT. § 29.40.010 (Michie 1998), or by judicial interpretation of constitutional home rule grants, see, e.g., City of Clinton v. Sheridan, 530 N.W.2d 690, 695 (Iowa 1995) (en banc), finding "no irreconcilable conflict between the election laws and the initiative and referendum provisions of the Clinton[, Iowa] home rule charter."

8. This is not to deny that local zoning ordinances, particularly those that impose large minimum lot sizes, can have significant extraterritorial impacts both in terms of the cost of housing in the broader regional market and in housing consumer location choices. See WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 218-52 (1995) [hereinafter REGULATORY TAKINGS] (reviewing "evidence that legal doctrines such as regulatory takings do make a discernible difference in the use of land and its cost"); see also WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS § 4.5, at 67 (1985) [hereinafter ECONOMICS OF ZONING LAW] (surveying the many ways in which zoning restricts residential development and increases costs); MADELYN Glickfeld & Ned Levine, Regional Growth . . . Local Reaction: The Enactment and Effects of Local Growth Control and Management Measures in California 27-43 (1992) (examining California's use of land use controls to curtail population growth); IRA S. Lowry & Bruce W. Ferguson, Development Regulations and Housing Affordability 1 (1992) (noting that zoning regulations may "limit the amount of housing and other space available"); Thomas K. Rudel, Situations and Strategies in American Land-Use Planning 1 (1989) (discussing how, between 1950 and 1980, a "wave of land-use conversion created opportunities" such as "increased land values for landowners, improved locations for businesses, and new, well-built, affordable homes for homeowners").

9. See A STANDARD STATE ZONING ENABLING ACT, Advisory Committee on Zoning 6 (U.S. Department of Commerce 1926) (listing, among the purposes of the Act, general goals such as the promotion of "health and the general welfare"); A STANDARD CITY PLANNING ENABLING ACT, Advisory Committee on Planning and Zoning 11 (U.S. Department of Commerce 1926); see also 9 ROHAN, supra note 2, § 53A.01[1] (describing the historical context of the two Acts).

10. 272 U.S. 365, 397 (1926) (holding that the nuisance-restrictive ordinance was a valid exercise of local police power). The Court did, however, recognize that both Euclid's ordinance and its holding went beyond preventing common law nuisances: "it may . . . happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate." Id. at 388. On the other hand, the Court did note that the inconsistency between residential uses and industrial or commercial uses created sufficient environmental dangers to sustain the ordinance as reasonable. See id. at 394-95.
local land use regulations attempt to ensure a sufficient tax base to support local schools and other public services,11 to preserve a "rural life style"12 or to save farmland from development pressures.13

Land use regulations that focus on the future of the community at large, those that attempt to define its character if you will, arguably view land differently and impose a different order of burden on landowners than those focusing on protecting neighboring land owners from locally undesirable land uses. When used as a planning device, zoning tends to view land as a community resource and its use therefore as integral to the future character of the local community as its public infrastructure and its educational facilities. Moreover, there is an intuitive difference between land use regulations designed to prevent harms and those designed either to preserve existing community amenities or to ensure future amenities.14 A traditional, harm-preventing zoning ordinance may result in a significant reduction in the land's value;15 it may even render the property valueless.16 But

11. See 1 ANDERSON, supra note 2, § 7.30, at 772-74 ("The zoning enabling statutes of a few states expressly state that zoning regulations may be adopted to protect the tax base of the community." (citations omitted)); 6 ROHAN, supra note 2, § 34.03[6], at 34-93 ("Most zoning enabling acts follow the language of the Standard Zoning Enabling Act, which provides that zoning regulations shall be designed "to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements." (citations omitted)); see, e.g., Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 961 (1st Cir. 1972) (permitting an ordinance requiring three and six acre lots to consider the financial burdens on police, sewer, road, and fire services). But see, e.g., Horn Constr. Co. v. Town of Hempstead, 245 N.Y.S.2d 614, 620 (App. Div. 1963) (finding that prevention of an increase in the school population and at the same time increasing the tax income of the school district are "praise-worthy objective[s]," but they cannot be achieved by immunizing property from "any reasonable use in the foreseeable future" (citation omitted)).

12. See 1 ANDERSON, supra note 2, § 7.06, at 697-99 ("Zoning Regulations may be adopted for the purpose of preventing the overcrowding of land and insuring against undue concentration of population."). 6 ROHAN, supra note 2, § 34.02[1][b], at 34-29 ("Two ... valid objectives of zoning enabling legislation are prevention of overcrowding of land and ensuring against undue concentration of population." (citing Kransteuber v. Scheyer, 574 N.Y.S.2d 968 (App. Div. 1991))); see, e.g., Cohen v. City of Des Plaines, 8 F.3d 484, 494 (7th Cir. 1993) (finding that "[a] city may use zoning regulations as an exercise of the police power to protect residents from the ill effects of urbanization"); Nopro Co. v. Cherry Hills Village, 504 P.2d 344, 349 (Colo. 1972) (upholding an ordinance that required large building lots in the center of the village because it was reasonably calculated to promote the statutorily authorized objective of maintaining the rural atmosphere of the village).

13. See infra note 244 and accompanying text.


15. See, e.g., Amber Realty Co., 272 U.S. at 384-85 (discussing how the value of one property would drop substantially if its use was restricted to residential purposes).
the regulated landowner is likely to evoke little sympathy if those living in the same neighborhood can demonstrate that the proposed land use will increase traffic thus endangering their children or will expose them to excessive noise during times when quiet is preferred. On the other hand, the argument for regulation evokes somewhat less sympathy when the only disagreement is whether the community ought to be a bedroom community with only limited commercial facilities or a community with a mix of residential, commercial, and light industrial uses. The sympathy may be all but gone if residents who have homes on two acre parcels wish to maintain their rural life style by down-zoning the remaining land in the community to five acre lots.

When a landowner is aggrieved by land use regulations, her current means of redress is the Takings Clause. The Takings Clause is a

16. See, e.g., Miller v. Schoene, 276 U.S. 272, 277 (1928) (examining a Virginia statute that rendered valueless ornamental red cedar trees by requiring their destruction).

17. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 85-86 (1981) (Burger, C.J., dissenting) (suggesting that a "bedroom" community of a few thousand people" ought to be permitted to pass "broad regulation prohibiting certain forms of entertainment").

18. See, e.g., id. at 83 (Stevens, J., concurring) (distinguishing, for purposes of regulation, between a business that "introduced cacophony into a tranquil setting or merely a new refrain" in an already partially commercial district).

19. Cf. Mugler v. Kansas, 123 U.S. 623, 669 (1887) (finding that a statute prohibiting the manufacture, sale, and bartering of alcohol did "not disturb the owner in control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests").

The "common sensible" difference between regulations that prevent harms and those that confer benefits is what Professor Bruce Ackerman has described as the "Layman's view" of compensable takings, embodied in the law by judges acting as "Ordinary Observers." Bruce A. Ackerman, Private Property and the Constitution 116-29 (1977). Ackerman did not suggest that "Layman's" analysis ought to control the takings doctrine. See id. at 156 (discussing the Takings Clause in "its singlet form" and contending that an extension of the "Layman's view" is necessary to fully understand takings law). Quite the contrary, he argued that the concept of property itself, to say nothing of how one determines whether property has been taken, is far too nuanced to rely on such a simplistic analysis. See id. at 166. However, "Layman's" analysis is, as a descriptive matter, often used by judges in deciding takings cases. See id. at 156 (citing, as an example, Pennsylvania Coal Co. v. Mahon, 260 U.S. 343 (1922)). Indeed, as I read Professor Ackerman, a more theoretically consistent view, what he calls the "Comprehensive View," will never completely displace the more intuitive and thus less coherent view of the "Ordinary Observer." Nor should it. See id. at 11, 176-83.

20. See U.S. Const. amend. V (requiring that "private property [shall not] be taken for public use without just compensation"). The Takings Clause was applied to the states through the Due Process Clause of the Fourteenth Amendment in Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897). While several years a trend does not make, it might well be that the Takings Clause will displace the Due Process Clause in property deprivation cases much like the Due Process Clause displaced the Privileges or Immunities
recent intruder in local land use disputes. Until 1922, it was generally assumed that the Takings Clause applied only to physical appropriations of property. That assumption was changed in Pennsylvania Coal Co. v. Mahon, in which the Court held that the Takings Clause (not the Due Process Clause) applied to regulations that went “too far.” According to Justice Holmes, when a regulation went too far was to be determined by balancing the regulatory burdens imposed on the individual with the interests of the regulating community. But it would

Clause after the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Certainly the Court’s decision in Eastern Enterprises v. Apfel, 524 U.S. 498, 504 (1998), which concluded that the Coal Act effected an unconstitutional taking, is a clear step in that direction, despite the language that seems to limit its scope to very narrowly focused, retroactive legislation. See id. at 537 (noting the Coal Act’s “severely retroactive impact” and “express[ing] concerns about using the Due Process Clause to invalidate economic legislation” (citations omitted)).

21. See Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 72 (1977) (explaining that during the nineteenth century, “judges began to develop a distinction between immediate and consequential injuries, so that . . . injurious acts that were neither direct trespasses to land nor actual appropriations for public use were often held to be noncompensable”); Joseph M. Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221, 221-34 (1931) (discussing the Takings Clause and its original application as a physical concept); cf. James L. Kainen, Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State, 51 Buff. L. Rev. 381, 401 (1982) (noting more generally that “the constitutional arguments of the early and late nineteenth century were about whether a party had a vested or substantive right against the state”); Rubenfeld, Uses, supra note 14, at 1082-83 (noting that “[a]lthough early compensation doctrine is often characterized as adhering to a strictly ‘physical’ understanding of property . . . the idea of physicalism is not adequate to account for a significant strand running through the case law during this period” (footnote omitted)); Stephen A. Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 76-81 (1986) (analyzing nineteenth century judicial application of the Takings Clause and noting that, at that time, “the constitution protected possession only, and not value”); Scott M. Reznick, Comment, Land Use Regulation and the Concept of Takings in Nineteenth Century America, 40 U. Chi. L. Rev. 854, 854-58 (1973) (“The financial benefits of the possession of eminent domain power were increased by a doctrinal development—the narrowing of the definition of compensable takings through the conceptualization of property as physical objects.”).

22. 260 U.S. 393 (1922).

23. See id. at 415 (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”).

24. See id. at 415 (“The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.”); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (reiterating that “the application of landuse regulations to a particular piece of property is a taking only ‘if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land’” (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980))); Agins, 447 U.S. at 260-61 (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance state interests . . . or denies an owner economically viable use of his land . . . .” (citations omitted)); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (stating that the Court “has examined the ‘taking’ question by engaging in essentially ad hoc, fac-
be sixty-five years before the Court would next hold that a land use regulation violated the Takings Clause. Heeding the persistent calls of some academics\(^2\) and several dissenting Supreme Court Justices,\(^2\) the Court lured the regulatory takings dragon from its cave in \textit{Nollan}

\textit{Nollan} and his contemporaries have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance" (citing \textit{Penn Cent. Transp. Co. v. New York}, 438 U.S. 104, 124 (1978)); \textit{Penn Cent. Transp. Co.}, 438 U.S. at 115-16 (examining the diminution in a particular property’s value that was produced by a municipal ordinance in light of the total value of the takings claimant’s other holdings in the vicinity); Daniel R. Mandelker, \textit{Land Use Law § 2.11}, at 29 (3d ed. 1993) (noting that “some commentators believe [Justice Holmes] adopted a balancing test to decide this question” and describing the apparent test); Frank Michelman, \textit{Takings}, 1987, 88 COLUM. L. REV. 1600, 1614 (1988) [hereinafter \textit{Takings, 1987}] (“[L]and-use regulation can be characterized as the ‘total’ deprivation of an aptly defined entitlement . . . . [A]lternatively, the same regulation can always be characterized as a mere ‘partial’ withdrawal from full, unencumbered ownership of the land-holding affected by the regulation . . . .”); Carol M. Rose, \textit{Takings, Federalism, Norms}, 105 YALE L.J. 1121, 1124-30 (1996) (reviewing William Fischel, \textit{Regulatory Takings: Law, Economics, and Politics} (1995) and its arguments for balancing the regulatory burden). But see Robert Brauneis, “The Foundation of Our ‘Regulatory Takings’ Jurisprudence”: \textit{The Myth and Meaning of Justice Holmes’ Opinion in Pennsylvania Coal Co. v. Mahon}, 106 YALE L.J. 613, 617, 657-60 (1996) (arguing that \textit{Mahon} was not a balancing case or a ‘diminution in value’ case). According to Brauneis, \textit{Mahon} was not a Takings Clause case at all. See \textit{id}. at 701. Rather, when unpacked, it was a complex expression of Justice Holmes’s views of the constitutional law of property. See \textit{id}.

25. Professor Richard Epstein has been the leading spokesperson for vigorous judicial enforcement of the Takings Clause. See, e.g., Richard Epstein, \textit{Takings: Private Property & the Power of Eminent Domain} (1985) [hereinafter \textit{Takings}]. See also Douglas W. Kmiec, \textit{Inserting the Last Remaining Pieces into the Takings Puzzle}, 38 WM. & MARY L. REV. 995, 995-99 (1997) (contending that the Takings Clause cases “perpetuate an overly deferential standard of review and proof burdens that undermine the goal of fairly balancing the reciprocally defined concepts of property & police power”); Saul Levmore, \textit{Just Compensation and Just Politics}, 22 CONN. L. REV. 285, 285-93, 308-11 (1990) [hereinafter \textit{Just Compensation}] (advocating that the Takings Clause be viewed as “sensitive to the ease with which those who endure politically imposed burdens can bargain within the political arena”).

26. See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 648 (1981) (Brennan, J., dissenting) (noting that “[o]n many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment ‘taking’ and condemning the Court for not applying the Takings Clause in this case (citations omitted)); United States Trust Co. v. New Jersey, 431 U.S. 1, 60 (1977) (Brennan, J., dissenting) (reminding the Court that “the command of the Fifth Amendment that ‘private property [shall not] be taken for public use without just compensation’ also ‘remains a part of our written Constitution’” (alteration in original) (citations omitted)); El Paso v. Simmons, 379 U.S. 497, 528 (1965) (Black, J., dissenting) (criticizing the Court for “subvert[ing] the protection of . . . the Fifth and Fourteenth Amendments' prohibitions against taking private property for public use without just compensation” and stating that “the Court has . . . imported into this constitutional field what I believe to be a constitutionally unsupportable due process ‘balancing’ technique to which I have objected in cases arising under the Due Process Clauses of the Fifth and Fourteenth Amendments” (citations omitted)).
THE TAKINGS CLAUSE AND LOCAL LAND USE

Nollan struck down a regulation of the California Coastal Commission that required, as a condition to issuing a building permit, that the landowners allow public access across their private beachfront. Nollan is, however, a minor blip on the takings radar screen. While the land use restriction took the form of a regulation, its effect was to exact a conditional physical taking. Consequently, the only question in Nollan was whether "requiring [a public easement] to be conveyed as a condition for issuing a land-use permit" negates the requirement for compensation. Treating Nollan as a case of the state's attempt to gain access to the Nollan's private property, i.e., as a physical takings case, the balancing described by the Mahon case was not applicable; the only question was the value of the easement.

It was not until five years after Nollan and seventy years after Mahon that the Supreme Court declared a land use regulation simpliciter had gone "too far" and thus violated the Takings Clause. In Lucas v. South Carolina Coastal Council, the Court declared that a regulation that prohibited development within a certain distance from the shore to prevent further beach erosion along the sea coast of South Carolina's Barrier Islands violated the Takings Clause. Following Nollan's analysis, rather than the language of Mahon, the Court did not balance the state's interest in preventing further beach erosion and the contribution of additional building to that erosion against the loss to

28. See id. at 829.
29. See Michelman, Takings, 1987, supra note 24, at 1612 (pointing out that the Nollan opinion defined "taking" as no more than a physical occupation). On the other hand, Nollan made clear that the right to build on one's property is not simply a "governmental benefit;" rather, it inheres in the title itself. Nollan, 483 U.S. at 833 n.2.
30. Nollan, 483 U.S. at 834.
31. Cf. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (applying a per se rule to physical takings, whatever the value of the property from which the owner is deprived of physical control). But cf. id. at 442-43 (Blackmun, J., dissenting) (objecting to the majority's abandonment of the Court's traditional balancing approach). The only balancing that seemingly occurs in conditional physical dispossession cases is consideration of whether the conditional enactment is "proportional" to the public harm that is likely to occur from the landowner's planned use. See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). This tit for tat formula is not the same balancing Justice Holmes had in mind in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) in determining whether a regulation has gone "too far," id. at 413, nor does it resemble the balancing engaged in by the Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).
33. Id. at 1006-09, 1032.
the landowner to reach the result it did. Rather, it rejected its previous balancing approach in favor of a per se takings rule.

Scholars have weighed in on both sides of the Court’s post-1987, revitalized Takings Clause. It is no wonder. Since the Due Process Clause no longer defines the line between private property and public authority, the Takings Clause remains the only constitutional obstacle to the legislature’s treating land “as part of an ecosystem, rather than as purely private property.” However, the place private property deserves in our hierarchy of values, while certainly germane, is

34. See id. at 1014-15.
35. See id. at 1019 (stating that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking” (footnote omitted)).
37. See Nebbia v. New York, 291 U.S. 502, 599 (1934) (permitting broad regulation by the state to control the price of milk, instead of leaving the price to be determined by market forces). But cf. Ronald J. Krotoszynski, Jr., Fundamental Property Rights, 85 GEO. L. J. 555, 557 (1997) (arguing that one’s reputation is a property interest in, as a property interest, ought to be protected by the Due Process Clause to the same degree as a liberty interest); Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism, 35 WM. & MARY L. REV. 501, 520-24 (1993) [hereinafter Property, Federalism and Jurisprudence] (suggesting that one reading of Lucas is that the legal concept of property contains a constitutionally irreducible minimum derived either from ‘natural law’ or historical understandings); Rubenfeld, Usings, supra note 14, at 1097-1111 (arguing that the Court’s current takings jurisprudence has incorporated “fundamental rights logic” into the takings analysis).
not the only factor that ought to determine the outcome of a zoning dispute. It does not alone determine the latitude that federal courts ought to give to local legislative bodies in distinguishing those land uses that are, to that community, tolerable from those that are not. Indeed, my argument is that more than other rights protecting provisions, when the Takings Clause is applied to local land use regulation, it must be tempered with a concern for federalism.

Attempts to square takings doctrine with federalism concerns is a much written-about topic. Most prominently, Professors Frank Michelman and Carol M. Rose, have raised distinct (from each other) questions about how the current Court has resolved the evident conflict between protecting private property from "excessive" state regulation and preserving the states' role in regulating land uses. Building on the insights of both, I argue that the Court must apply the same version of "Our Federalism" to the Takings Clause as it does to the Liberty Clause. I do not reach this conclusion easily because I do not ordinarily advocate that basic liberties be modified in the name of federalism values. But as I hope to demonstrate, land use regulation is a, if not the, leading candidate for an exception.

The next part explores the two impediments when accounting for federalism values in assessing local zoning regulations under the Takings Clause. The first is the Court's current takings doctrine. The second is more theoretical. This impediment results from viewing the Takings Clause as protecting "process" rather than "substantive" values. Part II will then explore the aspect of takings ignored by the current Court and the "process" theorists, federalism. It will consider what are the values protected by federalism, how those values affect substantive constitutional liberties in contexts other than takings, and whether the federalism balancing that is so much a part of how the Court decides the scope and breadth of liberty interests can and should be incorporated into the Court's Takings Clause analysis. Fi

39. See Michelman, Property, Federalism, and Jurisprudence, supra note 37.
40. See Rose, Takings, Federalism, Norms, supra note 24.
41. The phrase "Our Federalism" comes from Justice Black's majority opinion in Younger v. Harris, 401 U.S. 37, 44 (1971). As understood by Justice Black, "Our Federalism" described the federal judiciary's obligation to respect "the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Id. at 44.
42. See Melvyn R. Durchslag, Federalism and Constitutional Liberties: Varying the Remedy To Save The Right, 54 N.Y.U. L. Rev. 723, 724 (1979) [hereinafter Federalism and Constitutional Liberties] (arguing that "if any accommodation is to be reached between the protection of individual liberties and the presentation of the autonomy of state and local institutions, it ought to be reached remedially and not substantively").
nally, the inquiry moves from the ordinary Takings Clause plaintiffs, the regulated landowners, to housing consumers. More particularly, this part analyzes the problem of (for want of a more descriptive term) "exclusionary zoning" and whether the Takings Clause is, as some have claimed, a necessary surrogate remedy to protect the consumer or whether, consistent with concerns for preserving local autonomy, state law remedies are adequate.

I. IMPEDIMENTS TO FEDERALISM BALANCING

A. Takings Doctrine

It is certainly not necessary at this late date to rehash *Lucas v. South Carolina Coastal Council*. For present purposes it is enough to emphasize three aspects of the case. First, *Lucas* put a stop to the open-ended balancing approach to takings. Second, *Lucas* held that land use regulations will constitute a taking when "the owner . . . has been called to sacrifice all economically beneficial use in the name of the common good." Finally, in that event, the regulating agency can avoid paying compensation only if it can demonstrate "that the proscribed use interests were not part of [the owner's] title to begin with." Whether a proscribed use interest inheres in the title itself is determined solely by reference to the state's common law of nuisance.

Most obviously *Lucas* relegates the policy making organ of government, the legislature, to a secondary role at best. Its conclusions, even its findings, with respect to what land uses are sufficiently "harmful" to justify regulation and the degree of regulation necessary to overcome that "harm" are entitled to no deference whatsoever.

44. *See id.* at 1019; *see also supra* note 35 (quoting *Lucas*). This approach had reached its apex in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *See supra* notes 24-31 and accompanying text.
45. *Lucas*, 505 U.S. at 1019. *See id.* at 1017 ("[F]or what is the land but the profits thereof?]" (internal quotation marks omitted) (quoting 1 E. Coke, INSTUTES, ch. 1, § 1 (1st Am. ed. 1812))).
47. *See id.* at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). The Court did offer some flexibility by suggesting that "changed circumstances or new knowledge" could justify some variance from the strict common law of nuisance, but it did so only parenthetically and then by way of citation to the Restatement of Torts. *Id.* at 1031.
48. *Cf. id.* at 1035 (Kennedy, J., concurring) ("The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent
Viewed differently, *Lucas* holds either that a state’s common law of nuisance has acquired substantive constitutional status49 or, more likely, there is some irreducible minimum property right defined, not by the state, but by either the federal constitution or by federal common law.50

If it were clear that *Lucas*’s per se takings rule would continue to be limited to those situations in which a land use regulation deprives a landowner of all “economically beneficial or productive use of land”51 the opinion would be far less problematic for federalism. Rendering property valueless undoubtedly crosses the opaque line that separates physical takings from the state’s police power.52 Moreover, because regulation can be used as an inexpensive way of acquiring a public use, Justice Scalia has a point that one should at least be suspicious of the government’s motive when regulation squeezes from property all its economic value.53 There are hints, however, that at least some of those who made up the *Lucas* majority are not content to leave presumptive takings there. The first is found in *Lucas* itself. After stating the “rule,” Justice Scalia appended a footnote: “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule


50. Michelman, *Property, Federalism, and Jurisprudence*, supra note 37, at 320 (suggesting that “[t]here could be a uniformly binding American background property law” which is specifically federal constitutional law).


52. See *Lucas*, 505 U.S. at 1017 (stating that “[p]erhaps . . . total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation” (citation omitted)).

53. See id. at 1018 (noting that “regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm” (citation omitted)). But cf. Miller v. Schoene, 276 U.S. 272, 278-79 (1928) (finding that the destruction of a plaintiff’s cedar trees was justified on the ground that they caused disease to neighboring apple orchards and that the state could reasonably prefer the more profitable apple trees to the more decorative cedar trees).
is greater than its precision." He then described the "denominator" problem, the base from which the determination of the extent of the economic deprivation is to be measured. If, as Justice Stevens feared, a developer can create separate contiguous parcels and stage their development, she can recover for regulations that severely restrict development of one parcel despite turning a healthy profit on the balance. Admittedly, the denominator problem may be a red herring; it is somewhat of a technicality and can be dealt with as a factual matter on a case-by-case basis. Two recent cases, however, may pose more serious difficulties.

In *Suitum v. Tahoe Regional Planning Agency* the Court was faced with a familiar, albeit difficult, procedural problem—whether a takings claim was ripe for determination. Justice Scalia, joined by Justices O'Connor and Thomas, concurred with the Court's judgment that the claim was ripe, but in doing so, commented that "a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value." Given the context in which the statement was made (the ripeness of the claim), it is difficult to know what to make of his apparent modification of *Lucas*’s "all economic value" standard, particularly since the majority did not in any way respond. That it can be read in the future to expand the category of per se takings to include regulations that reduce land values substantially cannot, however, be dismissed out of hand. And if the Court does expand *Lucas* to include even significant, albeit not total, land value degradations, the range of land use policy options available to local governments will be dramatically reduced, either because some op-

55. See id. at 1016-17 n.7. The denominator problem can be simply illustrated. If one owns 100 acres, 20 of which have a protected wetland on which development is prohibited, the question is whether the denominator is 100 acres, the total parcel, or the 20 acres on which development is prohibited. For a comprehensive review of how lower federal and state courts have dealt with the denominator issue, as well as a general critique of the various approaches, see Steven J. Eagle, *Regulatory Takings* 329-44 (1996). The denominator problem is explored further infra notes 67, 172.
56. *See Lucas*, 505 U.S. at 1065-66 (Stevens, J., dissenting) (expressing the dangers of landowner manipulation of his development plan to create a lower denominator). The state court in *Penn Central* had an answer to the question of how to measure the denominator; it included all of the individual's holdings. See *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977). Justice Scalia found this approach "extreme—and . . . unsupportable." *Lucas*, 505 U.S. at 1016 n.7. Whether the Court's criticism of the New York Court of Appeals is limited to the particular facts in *Penn Central*, the ownership of a number of disconnected and distant parcels in an urban environment, is unclear.
57. 520 U.S. 725 (1997).
58. *Id.* at 728-29. Ripeness in the takings context is discussed infra notes 150-165 and accompanying text.
59. *Suitum*, 520 U.S. at 748 (Scalia, J., concurring) (citation omitted).
tions will be constitutionally unavailable or because the price of exercising those options will be too high.

The possibility that per se takings might be expanded beyond the Lucas limits is pushed along by the Court's latest venture into the land of takings, Eastern Enterprises v. Apfel. Apfel involved neither a local government nor a land use regulation and so its bearing on Lucas might be questioned by those who persist in the belief that the Court will not any time soon move beyond the "all economic value" standard for per se takings. Apfel was a challenge to the Coal Act, a federal statute designed to "stabilize plan funding and allow for the provision of health care benefits to" retired coal miners by imposing premiums on all coal companies that were signatories to a previous program to fund miner health benefits. Eastern Enterprises was assessed a premium of $5 million for a one-year period despite the fact that it was no longer directly in the coal business; its coal operations were, since 1966, operated through a subsidiary.

Apfel raises some intriguing questions, not the least of which is whether the Takings Clause will now become the vehicle for a new Lochner era, albeit under a different name. What is important for present purposes, however, is one part of the holding of the court of appeals, the response of Justice O'Connor's plurality opinion to the court of appeals, and Justice Kennedy's rejoinder to the plurality's takings analysis. The court of appeals rejected Eastern Enterprise's takings claim, inter alia, because "the Act 'does not involve the total deprivation of an asset.'" Justice O'Connor began her response ad-

61. Id. at 514 (internal quotation marks omitted) (quoting the Coal Act, § 19142(a)(2)).
62. See id.
63. See id. at 516 (noting that "[i]n 1963, Eastern decided to transfer its coal-related operations to a subsidiary"); id. at 529 (stating that the company owed $50 to $100 million to the Combined Fund).
64. See Lochner v. New York, 198 U.S. 45 (1905); see also infra note 169.
65. That discussion is beyond the scope of this Article. It will, I suspect, become the subject of extensive scholarly commentary in the coming years.
66. Justice O'Connor, writing for herself and Justices Scalia and Thomas and Chief Justice Rehnquist, held that the Coal Act took Eastern Enterprise's property without just compensation and was thus unconstitutional. Apfel, 524 U.S. at 504. Justice Kennedy was the fifth vote but he rejected the takings argument, preferring to rest his argument on the Due Process Clause of the Fifth Amendment. See id. at 547 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy's analysis will be discussed in more depth infra notes 217-230 and accompanying text.
67. Id. at 518 (quoting Eastern Enters. v. Chater, 110 F. 3d 150, 160 (1st Cir. (1997)). Six years earlier, the Court rejected a similar claim that each dollar taken was a dollar taken in its entirety and therefore met the Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), test for a regulatory taking. See Concrete Pipe & Prods. of California, Inc. v.
mitting that the Coal Act was not a "classic taking" but it nevertheless "permanently deprived [Eastern] of those assets necessary to satisfy its statutory obligation." 68 Then, borrowing a page, without direct citation, from the exactions cases, 69 the plurality determined that monetary liability, to survive a takings challenge, must not be "out of proportion to its experience with the plan." 70 This reasoning, if applied to land use controls, would require compensation if any regulation extracts more value from one's land than is justified by the harm from the proposed use. 71 For the moment, however, the Court has decided against applying a "proportionality" or "efficiency" requirement on local land use regulations that do not require, either directly or conditionally, a dedication of land for public use. While unnecessary to the ultimate decision in the case, the Court in City of Monterey v. Del Monte Dunes at Monterey, Ltd. 72 unanimously held that "the rough-proportionality test of Dolan is inapposite to a [regulatory takings] case." 73 The current state of the doctrine notwithstanding, there is a

Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 643-44 (1993). The ground for doing so, however, was that the fund itself was indivisible and could not be segmented for purpose of the Takings Clause. See id. at 644. While citing Concrete Pipe in support of its decision, the plurality in Apfel ignores the indivisibility language of Concrete Pipe, relying instead on its conclusion that the liability was out of proportion to its experience with the plan. See Apfel, 524 U.S. at 530. This might lead one to conclude that Apfel leaves the door open for a claim that the proportionality requirement might extend to land use regulations as well. However, the Court's unanimous disavowal in Del Monte Dunes, infra note 72 and accompanying text, coupled with the plurality's determination in Apfel that requiring dollars to be spent in order to comply with a particular regulation is not the constitutional equivalent of those dollars being physically taken.


69. See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (stating that "a term such as 'rough proportionality' best encapsulates...the requirement of the Fifth Amendment"); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (stating that unless a "permit condition serves the same governmental purpose as the development ban, [a] building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'" (citations omitted)).

70. Apfel, 524 U.S. at 528 (internal quotation marks omitted) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226 (1986)).

71. This result would come close to what Richard Epstein has advocated. See Epstein, Takings, supra note 25, at 100-04 (noting that the use of private property is supported by the same propositions as taxation and takings). It would also be consistent with the Court's holdings in other areas. See Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 428, 437-43 (noting that the Supreme Court has "economized" affirmative action programs by subjecting them to cost-benefit balancing).


73. Id. at 1635. The Court did not explain why Dolan's rough proportionality was inapplicable when the only claim was that a use regulation went too far. The dissent, apparently happy with the majority's concession, simply expressed its agreement. See id. at 1650 (Souter, J., concurring) (joining in Part II of the opinion, the section in which the Court decided that rough proportionality was inapplicable).
second and equally serious threat to federalism that is the subject of the next part.

B. The Process-Based Takings Clause

While several commentators have opined that a process view of the Takings Clause has yet to influence the takings doctrine, the evident mistrust, or distrust, of legislative declarations of harm that underlies the Lucas Court's reliance on common law nuisance assumes process failures similar to those expressed by public choice theorists and applied to local government land use regulation by Professors Fischel, Ellickson, and others.

74. See James E. Krier, Takings From Fruend To Fischel, 84 Geo. L.J. 1895, 1909 (1996) (contending that the “process theory . . . is not going to win enough subscribers to establish it as the dominant way of thinking about regulatory takings”); Rubenfeld, Using, supra note 14, at 1106 (maintaining that “the interpolation of [the process theory] . . . into takings law has been a wish consummated far more in the commentary than in the case law” (footnote omitted)).

75. See Lucas, 505 U.S. at 1014 (stating that “the natural tendency of human nature [would be] to extend the qualification . . . until at last private property disappear[ed]” (internal quotation marks omitted) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))). Indeed, Professor Margaret Jane Radin argued that the recent Supreme Court takings cases reflect a public choice view that legislation that does not maximize total welfare (i.e. is inefficient) must have an illicit, redistributive motive. Margaret Jane Radin, Reinterpreting Property 183 (1993).

76. The process approach to takings jurisprudence is supported by two quite independent analyses. First, and most obviously, is the microeconomic analysis and most particularly the public choice theory. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 97 (1980) (the Takings Clause does not “simply . . . mark the substantive value of private property for special protection from the political process . . . . On the contrary, the amendment assumes that property will sometimes be taken and provides instead for compensation . . . yet another protection of the few against the many . . . .”); Fischel, Regulatory Takings, supra note 8, at 183-217; Fischel, Economics of Zoning Laws, supra note 8, at 202 (explaining the rules for takings and entitlement protection in the context of economics); Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 420 (1977) [hereinafter Suburban Growth Controls] (justifying the takings doctrine on the grounds that it can “prevent the costs of a public program from being arbitrarily imposed” and even “may serve the very different purpose of deterring legislatures from enacting inefficient programs”); Levmore, Just Compensation, supra note 25, at 308-19 (noting that the takings doctrine is heavily influenced by the extent to which the burden is isolated and the ability of those burdened to bargain in the political market); Mandelker & Tarlock, supra note 1 (discussing the political processes of local governments and their effects on public perception and arguing that local land use decisions deserve heightened scrutiny). But cf. Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 72-73, 116-43 (1991) (arguing that courts should concentrate on legislative processes and structures to ensure against rent seeking legislation, but also arguing that with regard to the Takings Clause, public choice theory is more relevant to creating safe harbors from takings claims than defining when a presumption of a takings is appropriate). It is probably unrealistic to assume that this Supreme Court, with its emphasis on bright line rules, will ever accept in whole Fischel's argument that deference to local land use regulations should depend upon whether, in the Court's
judgment, the regulating authority is sufficiently “diverse” so as to assume pluralistic bargaining. On the other hand, the apparent belief that the state’s primary policy making body, the legislature (at whatever level), is prone to rent seeking produces the same, if not a greater, threat to the state’s ability to deal with local problems.

Second, support for a process reading of the Takings Clause comes from a decidedly noneconomic source, the recent historical analysis of the Takings Clause by Professor William Treanor. See William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995). Professor Treanor marshalled an impressive array of historical evidence to demonstrate that, with one exception, the concerns that prompted the framers to propose and to ratify the Takings Clause was a fear of sheer numbers, what today’s process scholars denominate as majoritarian bias. See id. at 818-19. Komesar, however, differentiated between majoritarian “influence” and majoritarian “bias.” NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW AND PUBLIC POLICY 76-77 (1994). He argued that whether majoritarian influence may be described as majoritarian bias may well depend upon one’s values and goals: “[T]hose who value . . . equal distribution of wealth may have a different conception of majoritarian bias than those who value only resource allocation efficiency.” Id. at 79. Of particular concern to James Madison were (1) the abolition of slavery and the freeing of all slaves by the more populous and nonslaveholding North and (2) the subordination of the possessory interests of propertied (landed) persons to the nonpropertied interests of the fast-growing manufacturing and commercial sectors. See Treanor, supra, at 851-55. Only the fear that the military, in times of emergency, would confiscate both real and personal property without first seeking political approval was unrelated to majoritarian bias. See id. at 836 (arguing that “few” saw the military’s ability to take property “without providing redress” as a “critical problem”). Although not necessarily related to majoritarian bias, this too reflects a “process failure,” one having to do with the lack of any accountable political process. Id. This is analogous to Professor Fischel’s concern with state or federal administrative agencies that act under broad delegations of authority and with respect to isolated or very few landowners. FISCHEL, REGULATORY TAKINGS, supra note 8, at 330-35 (“Isolating such areas and uses makes landowners affected by the regulations less able to form political coalitions with others similarly situated elsewhere in the state in order to mitigate their burdens.”). As a result, land use regulations promulgated by these agencies would be an exception to Fischel’s ordinary rule that large governmental bodies, such as states and the federal government, ought to be exempt from close judicial scrutiny under the Takings Clause. From this historical evidence Treanor concludes that “[c]ompensation is due when a governmental action affects only the property interests of an individual or small group of people and when, in the absence of compensation, there would be a lack of horizontal equity.” Treanor, supra, at 872. Even if Professor Treanor is correct that Madison’s fears were as he says, and I have no basis for saying otherwise, if Professor Kramer is correct that Madison’s views were not generally persuasive to the constitutional “framers,” there is no basis for a constitutional conclusion that the Takings Clause must be interpreted in light of a fear of majoritarian bias. See Larry D. Kramer, Madison’s Audience, 112 HARV. L. REV. 611, 671-76 (1999).

A unique perspective, one that has the potential to reorient significantly how we think about takings, has recently been offered by Professor Saul Levmore, who himself takes a process view of the Takings Clause. Levmore, Changes, Anticipations, and Reparations, supra note 48. Using microeconomic analytics, Professor Levmore opined that we ought to encourage people to anticipate government’s regulatory behavior and, by doing so, take the needed measures to correct the problems. See id. at 1663. In takings analysis, this would mean that any regulation which could have reasonably been anticipated would not be compensable (like prohibiting one from building on a beach when to do so is likely to increase erosion damage?).
Process theory is suspicious of the government's use of power in a way that reduces the value of a person's property to benefit the larger community. This suspicion is magnified when the size of the regulating community is sufficiently small that minority voices are drowned out by the din of a cohesive majority. The suspicion reaches its summit when the regulatory subject is land. Land is immobile. Since the owner cannot remove her investment and move it to a more regulatory friendly jurisdiction, she must either accept the value reduction or abandon her investment. Once one accepts this line of argument, federalism, a respect for a local community's authority to cope with the peculiarly local results of land development, drops from the radar screen. The focus is no longer the proposed land use and its impact on the larger community. The only question is the developer's ability to protect her investment either by influencing the local governing body or by escaping the jurisdiction with the investment more or less intact.

The process theorists make three fundamental assumptions about our political process and those who participate in that process. First, government is only a mechanism by which individuals can sometimes satisfy their wants more efficiently than by going it alone on the open market. Consequently, cooperation between neighbors will only occur when necessary to maximize each individual's utility. Second, those who represent the residents are themselves trying to maximize their own utilities, which, in this setting, means maximizing

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77. See Fischel, Regulatory Takings, supra note 8, at 139 (suggesting that under the process theory, "judicial review of property regulation is an essential method of coordinating the intertemporal commitments of local governments," which otherwise "can use regulation in a way that subverts the Constitution's clear commands not to take property without compensation" and further encouraging "judicial review of local majoritarianism").

78. See id. at 204 ("The rationale for including the just compensation requirement in the U.S. and state constitutions was to curb the inclinations of political majorities to impose excessive burdens on politically isolated minorities.").

79. See id. at 139 (noting that "regulation of immobile property by independent local governments and state agencies, requires most of the attention of judges in regulatory takings cases").

80. Cf. Krier, supra note 74, at 1910 (noting that "[i]t is much easier to complain to the city council than it is the state legislature, let alone the Congress").

81. See Farrer & Frickey, supra note 76, at 44 ("In public choice, government is merely a mechanism for combining private preferences into a social decision.").

82. See Robert M. Axelrod, The Evolution of Cooperation 6-7 (1984) (basing cooperation theory on the assumption that individuals will pursue their own self-interest and discussing in what situations self-interested individuals are most likely to come together and to act collectively).
their chances for reelection.\textsuperscript{83} They are thus unlikely to act as states-
people, dispassionately weighing various land development options and rationally determining the most appropriate course of action ac-
cording to some notion of a greater community good. Rather, they are more likely to view themselves as mere agents to implement the desires of those who elect them. Third, relying on James Madison’s \textit{Federalist No. 10},\textsuperscript{84} the process theorists argue that the smaller and more homogeneous the government, the more manifest the rent seeking behavior of both the citizens and their representatives.\textsuperscript{85}

A number of scholars have questioned whether the assumptions of the process theorists accurately describes current politics. Profes-
sors Farber and Frickey’s research indicates that economic models that purport to predict legislative behavior fail to consider that legisla-
tors’ votes are motivated by more than an interest in re-election.\textsuperscript{86} A legislator’s personal ideology and individual perception of “the public good” are at least powerful influences.\textsuperscript{87} Indeed, with respect to the

\textsuperscript{83. See JAMES M. BUCHANAN & GORDON TULLOCK, \textit{THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY} app. at 334 (1962). At the risk of gross oversimplification, public choice theory posits that individuals “buy” political or publicly produced goods in the same manner and for the same reasons as they buy consumer or privately produced goods. \textit{See id.} at 17-19, app. at 334-35. Political goods, like other goods, are consumed to maximize individual utilities. \textit{See id.} at 19. More importantly, those who supply political goods, the elected representatives, respond to the same self-interested incentives as suppliers of other goods. The desire to be reelected, however, is not viewed by Buchanan and Tullock as something to be criticized, as it is by the contemporary press. \textit{See id.} at 23-24. It is not based on a desire to “control” the electorate by the elected, but is rather a recognition that those who choose to serve in an elective capacity have the skills necessary to maximize the individual utilities of those who elect them. \textit{See id.} at 19, 23-24. Not all agree with this rather benign view of what motivates legislators. \textit{See, e.g.,} William H. Riker & Barry R. Weingast, \textit{Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Decour} efence to Legislatures, 74 VA. L. REV. 573, 596 (1988) (contending that legislators merely “build[] up an ad hoc majority for the next election” (citations omitted)).

\textsuperscript{84. THE FEDERALIST No. 10 (James Madison) (Henry Cabot Lodge ed., 1902).}

\textsuperscript{85. See FISCHEL, REGULATORY TAKINGS, \textit{supra} note 8, at 105-07 (discussing the Tenth Federalist and maintaining that “the real problem of faction is not minority interests, but the majoritarianism rampant in the small republics”).}

\textsuperscript{86. See FARBER & FRICKNEY, \textit{supra} note 76, at 20-33 (arguing that “[s]ome crucial features of the political world do not fit the economic model” and that public choice does not account for ideological politicians and popular voting).}

\textsuperscript{87. See FISCHEL, REGULATORY TAKINGS, \textit{supra} note 8, at 27-33 (describing bills written by a city solicitor who had developed local support for his personal goals). Others have reached the same conclusion. A number of studies that noneconomic factors such as altruism “demonstrat[ing] ideology play at least some role in political participation and decisionmaking” have been noted. \textit{See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?}, 101 YALE L.J. 31, 43 (citing Farber & Frickey, \textit{The Jurisprudence of Public Choice}, 65 TEX. L. REV. 873, 912-14 (1987); Herbert Hovenkamp, \textit{Legislation, Well-Being, and Public Choice}, 57 U. CHI. L. REV. 63, 88 & n.56 (1990); Mark Kelman, \textit{On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Move-}
Takings Clause, Farber and Frickey conclude not that public choice theory can provide a rationale for requiring compensation in cases of perceived majoritarian bias, but rather that it can be helpful in providing safe havens from takings claims where the beneficiaries of the legislation in question are far more diffuse than those who are burdened by the regulation.\textsuperscript{88}

Even discounting Farber and Frickey's work in favor of the \textit{a priori} reasoning of the process theorists, the case for any particular interpretation of constitutional text still falls short.\textsuperscript{89} Rather, the link between assumptions of process failures and a process-based interpretation of the Takings Clause comes from two closely linked sources, John Hart Ely's theory that the Constitution should be interpreted so as to reinforce democratic values\textsuperscript{90} and the third paragraph of footnote four of \textit{United States v. Carolene Products Co.}\textsuperscript{91} The process defect is a

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ment, 74 VA. L. REV. 199, 214-23 (1988); Edward Rubin, \textit{Beyond Public Choice}, 66 N.Y.U. L. REV. 1, 2 & n.3, 12-45 (1991)). \textit{See also} Hovenkamp, \textit{supra}, at 88 n.56 (citing empirical studies rejecting the theory that interest groups overcome ideology and voter preferences). \textit{But see} Jerry L. Mashaw, \textit{Greed, Chaos, and Governance: Using Public Choice to Improve Public Law} 38-39 (1997) (questioning the methodology employed by these studies and suggesting that "[a]bout all that can be said is that models that contain both ideological and self-interest factors seem to outperform purely economic models in predicting the behavior of legislators").

88. \textit{See supra} note 76. The theory is that if the burden is isolated on a few individuals, their ability to mount a political opposition is far greater than is that of the diffuse beneficiaries to mount an effective counter campaign. \textit{See} Farber & Frickey, \textit{supra} note 76, at 71-72 ("Public choice suggests that diffuse groups will generally find it difficult to obtain legislation that benefits them at the expense of more compact groups, even where the legislation creates much greater benefits than costs."); \textit{see also} Bruce A. Ackerman, \textit{Beyond Carolene Products}, 98 HARV. L. REV. 713, 713, 717 (1985) (arguing "that the \textit{Carolene} formula cannot withstand close scrutiny" after quoting \textit{United States v. Carolene Prods. Co.}, 144, 152 n.4 (1938)); Mashaw, \textit{supra} note 87, at 68 (describing footnote four's perception of legislative failure as "remarkably underinclusive").

89. For a general, values-based criticism of the use of public choice theory to undergird constitutional interpretation see Mark Tushnet, \textit{Public Choice Constitutionalism and Economic Rights, in Liberty, Property and the Future of Constitutional Development} 23, at 23 (Ellen Frankel Paul & Howard Dickman eds. 1990) describing public choice theory, in its constitutional dimension, as "the conservative analogue to [footnote four's] theory of constitutional law." \textit{See also} Mashaw, \textit{supra} note 87, at 51-52 (stating that constitutional theory cannot be created from public choice theory); Elhauge, \textit{supra} note 87, at 109 (favoring decision theory because public choice theory offers a limited view).


91. 304 U.S. 144, 153 n.4 (1938). The third paragraph of footnote four states: Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

\textit{Id.}
majoritarian bias that increases as (1) the size of the regulating entity and (2) its range of permissible powers decreases. The smaller (and presumably more homogeneous) the community, the greater the possibility of majoritarian bias. And the more focused the community is on land use, the fewer opportunities there are for dissenting landowners to gain land use compromises by forming coalitions around other issues. These assumptions prompt William Fischel to conclude that those who own undeveloped land in small, homeowner dominated communities should be treated as "discrete and insular minorities" because, on both the supply and demand side, land is inelastic; the landowner is required to put her land to the prescribed use regardless of what the land use regulation does to the price. Because of the inelastic character of land supply and demand, Fischel compares the regulation of land uses as akin to the regulation of religion by those who would prefer the individual to conform her religious beliefs to the norms of the community. The argument, unfortunately, fails to

92. See, e.g., Fischel, Regulatory Takings, supra note 8, at 332 (stating that "local government land use regulations require greater scrutiny [as subject to majoritarian bias] because the alternative protections of exit and voice are less available").

93. See Krier, supra note 74, at 1902 (discussing the "majoritarian politics of small governments" posited under the process theory).

94. See, e.g., Fischel, Regulatory Takings, supra note 8, at 328 (suggesting that "landowners should generally fare better in the politics" of large cities, because of the "heterogeneity of interest groups" in the cities).

95. See id. at 135 ("Inelasticity of the supply of land is half of the reason that landowners sometimes need the protection of judges in the same way that racial minorities sometimes do.").

96. See id. (explaining that this "inelasticity can come from the insensitivity of either the quantity supplied or the quantity demanded to changes in rewards and penalties").

97. Id. (suggesting that "inelasticity of the supply of land" is comparable to a near-immutability of religion since involuntary religious conversion is generally "strenuously resisted" and that landowners may therefore particularly "need the protection of judges"). This accounts for Fischel's limiting his takings theory not only to small homogeneous local governments but (a) to regulations of land because investments in land are immobile and, thus, there exists no or limited exit opportunities for the investor, see id., and (b) to regulations of undeveloped land since prohibitions on development are likely to have the most significant spillover affects on those unrepresented in the local political process. See id. at 251-52. In so limiting his concerns, Professor Fischel relied, as so many others have, on the seminal work of Albert Hirschman. Professor Hirschman (oversimplified) posited that an organization's (including a political organization's) competitive position is affected by how it responds to those who no longer desire to "purchase" what it offers (exit) and the expressions of dissatisfaction from those individuals (voice). See Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 21-41 (1970). His book is an exploration of the interplay between these two determining factors.

Despite the attempts at analogy, the reasons for a lack of voice of a landowner caught by a restrictive local land use regulation, even assuming that is true (compare note 100 and accompanying text, infra), does not approach that of a member of Justice Stone's "discrete and insular minority." Footnote four simply posits a process-based rationale for heightened scrutiny for a legislation that is unconstitutional for normative reasons—discrimina-
distinguish the Takings Clause from any other provision of the Bill of Rights or any other constitutional provision for that matter. Since all are controls on majoritarian excesses, the argument would invalidate any legislation that is even marginally redistributive.98 One would only need a “comfortable” constitutional provision to do so.

Not only is the extension of Justice Stone’s “discrete and insular minority” characterization inapt to most local zoning disputes in which it is the developer who is claiming harm, in many instances it overstates the lack of “voice” of those regulated.99 Certainly resident landowners, like farmers who desire to sell their land to a developer, have a voice.100 Their voice may not prevail or even be listened to, but that is not because of some prejudice or even necessarily a lack of respect for their position.101 Rather, their voice may not be heeded because there is a difference of opinion on something as fundamental as the community’s future and, at least for the moment, only one view can prevail. Moreover, those who are imposing the regulation are not

98. This is certainly Richard Epstein’s position. See Epstein, Takings, supra note 25, at 100-04. Since public choice theory teaches that all legislation is nothing more than private deal-making under the cloak of public respectability, all legislation would carry a presumption of unconstitutionality. See Mashaw, supra note 87, at 76-78 (stating that “[i]n some sense, all legislation is special interest legislation”); see also Tushnet, supra note 89, at 38 (attacking “public choice constitutionalism”). Fischel does not go that far. See Fischel, Regulatory Takings, supra note 8, at 328-29 (suggesting that large cities require less judicial intervention than small locales because they are less subject to a majoritarian bias found in a small, homogenous population due to the “heterogeneity of interest groups” found in large municipalities).

99. Cf. Elhauge, supra note 87, at 50 (noting that a “small intensely interested group” may prevail over “the diffuse . . . interest of the majority” in some circumstances).

100. Cf. Carol M. Rose, The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on “Monarchism” to Modern Localism, 84 Nw. U.L. Rev. 74, 95-96 (1989) [hereinafter Ancient Constitution] (stating that in local governments, without the “structural restraints” of the federal and state governments, there are the “possibilities for constituent contact and civil participation—. . . the ‘voice’ option” (quoting Hirschman, supra note 97)).

101. See Hirschman, supra note 100, at 32 (noting that “on the one hand, the citizen must express his point of view so that the political elites know and can be responsive to what he wants, but, on the other, these elites must be allowed to make decisions”).
those who have had a history of isolating and/or persecuting their neighbor, the farmer. They are friends and neighbors, people with whom the dissenting landowner has lived and socialized with for much of her life.\textsuperscript{102} Finally, the smaller the community the greater the number of opportunities there are for informal political participation to give voice to dissenting landowners.\textsuperscript{103} Voluntary civic organizations, such as the PTA, the local places of worship, the local VFW, etc., are all institutions in which voices can be heard and policies influenced, albeit informally.\textsuperscript{104} As Professor Rose has noted, "[p]ublic life at the local level is much more idiosyncratic than national public life, and much less homogenized."\textsuperscript{105} These participatory opportunities, win, lose, or draw, give those with a dissenting viewpoint, at a minimum, the ability to help frame the parameters of the debate.\textsuperscript{106} Of course, some of those harmed do not have a voice, either formal or informal in this local community, most obviously nonresident developers and consumers of whatever those developers hope to produce. Public action inevitably produces cross-boundary spillovers, some small and some not so small. But the question, if one is to analogize to footnote four, is not where those affected reside but who those people are.

This is not to deny that restrictive land use regulations may impose what Professor Michelman described as "demoralization costs."\textsuperscript{107} These are costs that stem from a number of factors, including a sense that the burden the individual is required to bear is disproportionately large compared to other property owners and that those regulated have little leverage to influence the political system in their favor in the future.\textsuperscript{108} It is not unlikely that demoralization costs will be imposed on current residents who have the requisite "voice" to make their views known, for example a farmer having difficulty making ends meet working her small family farm, "stuck" with an unprofitable piece of property and no way to dispose of it at anywhere near a "fair" price. In addition, there is some evidence that these feelings

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\textsuperscript{102} See Rose, \textit{Takings, Federalism, Norms}, supra note 24, at 1136 (stating that "people at [local government] meetings may not like what you have to say . . . but they know you, and they know what you stand for").

\textsuperscript{103} See Rose, \textit{Ancient Constitution}, supra note 100, at 96-97.

\textsuperscript{104} See id. at 97.

\textsuperscript{105} Id. at 97.

\textsuperscript{106} See Elhauge, supra note 87, at 103-04 ("The minority that loses one vote always has the possibility of winning the next vote by reframing the issue.").


\textsuperscript{108} See id. at 1217-18.
might be more prevalent in small, homogeneous communities because governments in those communities are likely to have a strong bias in favor of the status quo\textsuperscript{109}—to retain undeveloped land in its existing state. Because land is immobile, exit possibilities are decreased and demoralization costs are increased.\textsuperscript{110} However, even this reasonable \textit{a priori} conclusion is subject to some dispute. Professor Vicki Been has accumulated some impressive support for her argument that exit possibilities are far greater than process theory would allow. She has asserted that competition among communities in most metropolitan areas will prevent the pure rent seeking, majoritarian land value grabs that the public choice theorists posit.\textsuperscript{111} Developers can choose from among a number of communities, shopping for the most favorable zoning.\textsuperscript{112} This ability to choose the location of one's investment can also act as an effective voice to persuade a local com-

\textsuperscript{109} Professor Fischel stated that the majoritarian bias in smaller units of government is in favor of the "median voter" who is a homeowner interested in preserving the value of her major asset, her home. See Fischel, Regulatory Takings, supra note 8, at 257-59. Cf. Robert C. Ellickson, Cities and Homeowner's Associations, 130 U. PA. L. REV. 1519, 1561 (1982) (suggesting that applying the one-person/one-vote requirement to local governments permitted current local residents to maximize their own property values at the expense of outsiders). There is some empirical evidence to support these conclusions, even when current property values may well increase as a result of increased development activity. Elinor Ostrom has demonstrated that in "uncertain and complex environments" people weigh possible harms far more than they weigh possible benefits. See Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 207-10 (1990). Changing the status quo from "within" is thus very difficult when, if Fischel is correct, most everyone perceives the same harm to the same asset (the home) stemming from the same proposed activity. See Fischel, Regulatory Takings, supra note 8, at 262.

In addition, Ostrom posited that while small local governing units are likely to encourage cooperation among residents, that cooperation is likely to lead to the imposition of costs on outsiders. See Elinor Ostrom, Institutional Arrangements and the Commons Dilemma, in Rethinking Institutional Analysis and Development: Issues, Alternatives and Choices 107 (Vincent Ostrom et al. eds., 1989) (explaining that "[c]ooperation is not an unambiguous good in all situations" because cooperation among some participants "may lead to harms externalized on others"). Professor Fischel agreed, suggesting that the lack of current adverse impact of the land use regulations on residents and the expectation that their offspring will live elsewhere provides sufficient incentives for small communities to export the costs of their land use regulation to outsiders. See Fischel, Regulatory Takings, supra note 8, at 131-35 (noting that "dynastic restraints" may not apply when it is "clear that one's descendants or others one cares about will not in fact be burdened by promise-breaking" and "most of the costs fall on someone else").

\textsuperscript{110} Cf. Levmore, supra note 25, at 309 (noting that "[p]roperty owners will be somewhat discouraged from investing in their property to the extent that they fear uncompensated losses").

\textsuperscript{111} See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 508-43 (1991) [hereinafter "Exit"].

\textsuperscript{112} See id. at 509 (stating that a "developer dissatisfied with a community's exactions policy can take the project to another jurisdiction that offers better terms").
munity of the benefits of more intensive development. Moreover, even from the perspective of the embattled resident landowner who may feel trapped and put upon, there is some question about whether he bears the full cost of the restrictive regulation or whether that cost is shared with developers and potential residents. To the extent that it is shared, the choice of those burden sharers can act as an effective exit opportunity for current residents.

Two conclusions can be drawn from the works of Professors Been and Rose. First, demoralization costs may not be nearly so significant as process theory would assume. More importantly, exit and voice are not necessarily conditions that can be determined ex ante simply from a priori reasoning. Whether exit is possible and voice exists are empirical questions. They will vary from community to community depending on local conditions such as size, political structure, and the like. They will also vary from region to region depending on the development regulations of other communities within the same market, the extent to which those communities compete with each other and the nature of that competition. Consequently, exit and voice, if they are to be constitutionally relevant at all, can only be so as applied, on a case-by-case basis.

Finally, even if the concern for a lack of exit and/or voice is appropriate in the context of local land use regulation, the process theorists never explain why the Takings Clause is the proper constitutional remedy. Certainly it cannot simply be that property interests, even real property interests, are at stake, for property interests are at stake in many disputes to which the Takings Clause has not been thought to

113. See id. at 477 n.21 ("Developers often have considerable power to effect public policy . . . ."); see also Rose, Ancient Constitution, supra note 100, at 97 (maintaining that choice requires local governments to exercise care in their choice of regulatory policies).


115. See id. at 920 (contending that the difference between herself and Professor Fischel on exit opportunities is empirical); see also FARBER & FRICKEY, supra note 76, at 116-17 (criticizing the methodology of public choice theory, reasoning a priori from first principles, as being inconsistent with the "situational practical reasoning" ordinarily applied to both private and public law).

116. Cf. Been, "Exit," supra note 111, at 541-43 (noting that the "incidence of exactions will depend upon the nature of the supply and demand in the market as well as the structure of the local building industry" (citations omitted)).

117. Cf. id. at 509-11 (maintaining that "[i]f a municipality uses exactions to overregulate or overcharge, the developer will take or threaten to take, its capital elsewhere").

118. But see Been, The Perils of Paradoxes, supra note 114, at 921 (suggesting that focusing on exit and voice permits a "broader determination that on a case by case analysis").
be applicable.119 If the problem is that spillover effects are excessive in the sense that those outside the jurisdiction are suffering the lion's share of the burdens, the Takings Clause is certainly not necessary to protect those interests. Such excessive extraterritorial effects will, in all likelihood, invalidate the zoning under state law as exceeding the community's statutory or constitutional home rule zoning authority.120

Moreover, the Court has given no indication that it is willing to rethink its holding that neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment invalidate the direct imposition of a local government's laws on those who reside outside a local government's boundaries and thus on those who have no "voice" (vote) in that community's political process.121

Because these persons are (or certainly might be) homeowners, they have the same exit problems as those who own undeveloped land. If lack of voice and exit does not raise process concerns sufficient to invalidate regulatory impositions on nonparticipants under the Equal Protection or Due Process Clauses, it is hard to understand why lack of voice and exit should mandate a contrary result under the

119. See, e.g., City of Renton v. Playtime Theatre, Inc., 475 U.S. 41, 43, 54-55 (1986) (holding, as valid, a city ordinance prohibiting "adult motion picture theatres from locating within 1000 feet of residential zones, single- or multiple-family dwelling, church, park, or school" and finding that it did not violate the First and Fourteenth Amendments); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435, 442, 447-40 (1985) (holding as irrational and as violating the Equal Protection Clause (not the Takings Clause) a requirement of special use permit for a group home for mentally retarded persons); Moore v. City of East Cleveland, 431 U.S. 494, 495-96, 503-04 (1977) (invalidating a city housing ordinance definition of "family" as a violation of the Due Process Clause (not the Takings Clause) of the Fourteenth Amendment); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 254-55, 270-71 (1977) (finding that a rezoning denial for proposed racially integrated low- and moderate-income housing was not a violation of the Equal Protection Clause of the Fourteenth Amendment); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 52, 58, 72-73 (1976) (holding that a city ordinance prohibiting adult theatres from locating within 1000 feet of any two other "adult" entertainment establishment, hotels, or within 500 feet of a residential area was not a violation of the Due Process Clause of the Fourteenth Amendment).

120. See infra notes 253-264 and accompanying text.

121. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 61-63, 73-75 (1978) (holding that the Equal Protection Clause of the Fourteenth Amendment did not protect nonresidents of the city of Tuscaloosa, Alabama from the direct regulatory authority of that city enforced beyond the city's boundaries). While Justice Stevens mentioned zoning as one of the powers that the city did not have, see id. at 77 (Stevens, J., concurring), there is no indication either in his opinion or that of then Justice Rehnquist, that zoning power alone would have resulted in a different decision. Cf. Melvyn R. Durchslag, Salyer, Ball and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution, 33 Case W. Res. L. Rev 1, 35-37 (1982) (arguing that the lack of zoning powers should have had no bearing on outcome of the case).
Takings Clause. Moreover, as long as arguments about both the empirical basis and normative conclusions of public choice theory continue to rage, there is little upon which to base an overarching, process-based theory of the Takings Clause. Indeed, when the basic assumptions that dictate a preference for judicial, rather than legislative, decision making are in doubt, the constitutional and prudential underpinnings of “Our Federalism” demand that deference to legislative policy judgments, even those of small, limited jurisdiction local governments, be the rule.¹²²

II. LOCAL LAND USE REGULATION AND FEDERALISM

A. Federalism Values

This is hardly the place for a long essay on federalism. The political science and legal literature on federalism would likely fill several libraries.¹²³ Most generally, federalism is a political concept (judicially enforced or not)¹²⁴ whereby governmental power is allocated between the national government and the states.¹²⁵ Not surprisingly, most of the explicit federalism controversies and much of the federalism literature is directed to conflicts between federal and state legislative authorities.¹²⁶ That aspect of federalism is not my immediate

¹²² Cf. Henry N. Butler & Jonathan R. Macey, Externatilities and the Matching Principle; The Case For Reallocating Environmental Regulatory Authority, 14 YALE L. & POL’Y REV. 23, 66 (1996) (arguing that state and local governments are the more appropriate regulating agencies where the harms caused by the regulated activity are not external to that agency’s political boundaries).

¹²³ Cf. Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1485 (1994) [hereinafter Understanding Federalism] (noting that the subject has so many dimensions that even it could “occupy most of an academic career”).

¹²⁴ Compare Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) (5-4 decision) (“[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government.”), with New York v. United States, 505 U.S. 144, 146 (1992) (declaring invalid a congressional statute that forced states to either make arrangements for disposal of low-level nuclear waste generated within their borders or to take title to that waste) and United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (“[T]he absence of structural mechanisms to require [federal] officials to undertake [to protect state interests], and the momentary political convenience . . . attendant upon their failure to do so, argue against a complete renunciation of the judicial role.”).

¹²⁵ See Garcia, 469 U.S. at 549-52 (“The power of the Federal Government is a ‘power to be respected’ . . . , and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies.”).

¹²⁶ See New York v. United States, 505 U.S. at 149 (“The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.”). Part of the reason is historical. The allocation of legislative authority between the states and the newly formed federal government was foremost in the minds of the Framers. Until recently, however, lawyers arguing about federal-
concern however. Rather, I will focus on a different federalism issue—whether the Court should account for local land use policy judgments in determining how broadly to interpret the Takings Clause.

In one sense, these two distinct aspects of federalism are quite congruent. Whether state or local policy making is displaced by Congress by reason of the Supremacy Clause or because the Court, acting pursuant to the Fourteenth Amendment, has determined that the state’s means of land use regulation is excessive, the effect on the generally agreed upon values underlying our federal structure is more or less the same. The state’s ability to “experiment” with a variety of values did so only hypothetically. Between 1941, when the Court decided in United States v. Darby, 312 U.S. 100 (1941), that Congress could regulate the wages of employees, whether actually engaged in the production of goods destined for interstate commerce or not, and 1992, when the Court struck down Congress’s attempts to regulate interstate shipments of low-level nuclear waste by imposing certain obligations on the states in New York v. United States, 505 U.S. 144 (1992), judicial oversight of federal/state legislative prerogatives was all but absent. Since 1992, and particularly since 1995, the Court has reasserted itself as an umpire of the federal system. See City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997) (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain ... the federal balance.” (emphasis added)); Seminole Tribe v. Florida, 517 U.S. 44, 47, 78 (1996) (finding that Congress has no power under the Commerce Clause to waive states’ Eleventh Amendment immunity); United States v. Lopez, 514 U.S. 549, 551-52, 567 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeds Congress’s Commerce Clause powers).

127. Certainly, legislative federalism issues may arise with respect to local land use issues. One of the principal arguments of the plaintiffs in Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264 (1981), was that the federal statute requiring reclamation of land used for strip mining encroached on state land use regulation prerogatives, a “traditional” local function. See id. at 274. Moreover, federal legislation has been proposed that would, inter alia, have required states to compensate landowners for regulatory land value reduction. See Property Rights Implementation Act of 1998, S 2271, 105th Cong. (this particular legislation was killed by a Senate filibuster). See generally Glenn P. Sugameli, “Takings” Bills Threaten People, Property, Zoning, and the Environment, 31 URB. LAW. 177 (1999) (cataloguing and describing recent congressional efforts to limit local zoning). If such legislation were to be enacted, challengers would not only argue the separation of powers claim that Congress had exceeded its powers under § 5 of the Fourteenth Amendment by interpreting § 1 of the Fourteenth Amendment more broadly than did the Court, but, in light of Boerne’s evident concern for preserving state prerogatives, 521 U.S. at 507, 536, would argue infringement on state legislative prerogatives as well.

130. Most commentators identify at least three underlying values of federalism, protecting states and ultimately the people themselves from the tyranny of a large centralized authority (the federal government), encouraging citizen participation at the level of government where it is most possible, the local level, and allowing experimentation, and thus diversity, in how best to deal with social and economic problems. See, e.g., Erwin Chemerinsky, The Values of Federalism, 47 FLA. L. REV. 499, 525 (1995). Professors Adler and Kreimer have added a fourth, recognition that geographic diversity demands different governmental responses in different regions of the country. See Matthew D. Adler & Seith F. Kreimer, The New Etiquette of Federalism: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 77-78.
of land use regulatory policies is severely limited whether in the name of an overriding federal legislative agenda or in the name of individual rights. In the same vein, one can hardly imagine a greater disincentive to political engagement at the local level, the government most conducive to republican values of participation, than severely circumscribing its major policy making role, controlling its physical and environmental amenities.

Even the other commonly cited value of federalism, preserving a structural mechanism for protecting individual liberties, if not contradicted by the Court's current takings jurisprudence, is at least compromised by partially federalizing state property rights determinations. First, by necessity, Lucas severely restricts what Professor A.E. Dick Howard called "a dialectic about the allocation of power." In the takings setting, this "dialectic" or dialogue centers around the level of government that most appropriately should determine when and to what extent one's property rights must be compromised to protect local community values. Lucas does nothing to encourage this dialogue. More significantly, Lucas disengages the state's major policy arm, the legislature, from the process of experimenting with a variety of land use control devises to conserve an increasingly scarce resource. The Court instead prefers the principles of common law as the outer benchmark of the state's regulatory prerogatives. As Professor Michelman has argued, Lucas either implicitly adopts a federal

131. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that states "serve as . . . laborator[ies]; [to] try novel social and economic experiments without risk to the rest of the country"). Professor Deborah Merritt was correct when she argued that despite the quote's cliché value, it has particularized applicability, certainly when considering the degree of latitude federal courts should give local zoning authorities. Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1575 (1994); see infra notes 133-135 and accompanying text.

132. Cf. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (relegating the state legislature to a secondary role, and noting that the "'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that acquire when they obtain title to property").

133. See A.E. Dick Howard, Does Federalism Secure or Undermine Rights?, in Federalism and Rights 11-20 (Ellis Katz & G. Allan Tarr eds., 1996) ("Of all the values implicit in federalism, none is more fundamental to self-government by a free people than is the right of choice."); see also id. at 13-16 (listing and elaborating on other similar values including "the educational value of civic participation," maintaining a "sense of community," and providing "local solutions to local problems"). I read these latter three values as subsets of the larger value of local self-determination.

134. Id. at 18-19.

135. Cf. Rose, Takings, Federalism, Norms, supra note 24, at 1148 (noting that "takeings jurisprudence has to take into account communities' need to deal with shrinking common resources").
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common law of property or constitutionalizes William Blackstone's natural law property rights. Either way the Court does serious damage to principles of federalism. If Lucas has formulated generally applicable principles of federal property law, that would be inconsistent with the judicial federalism of Erie Railroad Co. v. Tompkins. On the other hand, if the Court was merely setting the constitutional floor on the protection of property rights, as it does with respect to liberty or equality rights:

[O]nce again it seems deeply at odds with Our Federalism. For its consequence is to federalize the law of land use in a peculiarly profound way. The effect is to make the Federal Constitution, specifically the Taking Clause, dictate to the States the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions.

This leads to the third concern, centralization. Lucas raises many of the same federalism objections that troubled the Court in United States v. Lopez. First, Lucas has the effect of preempting state legislative authority with respect to the kinds of harms that may appropriately be considered when deciding whether to limit how a landowner uses her property. Arguably, the Court did the same thing in Roe v.

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136. See Michelman, Property, Federalism, and Jurisprudence, supra note 37, at 318-27 (maintaining that Lucas may be an attack on Erie and a support of a "federal constitutional law" or that Lucas finds that the "Fourteenth Amendment mandates a minimum natural-law content"). Blackstone's bundle of property rights is described in Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1362-63 (1993). Professor Rubenfeld certainly believes that Lucas 'Lochnerizes' federal takings jurisprudence. Rubenfeld, Usings, supra note 14, at 1099-1100 (stating that "the close of the Lochner era... marked the end of Supreme Court takings decisions resting foursquare on the harm principle," but also stating that the Court has "kept the principle alive" in Lucas).

137. 304 U.S. 64, 65 (1938) ("There is no such thing as a federal common law... ."); see supra note 136.

138. Michelman, Property, Federalism, and Jurisprudence, supra note 37, at 327. The passage quoted above is the last step of Professor Michelman’s very careful and structured analysis of the federalism implications of the Court’s opinion in Lucas. Between his expressions of concern about Lucas's natural law approach to defining the minimum bundle of property rights and the quoted passage lies Michelman’s critique (destruction?) of arguments founded on natural rights ("nature") and “American constitutional culture.” Id. at 321-24 (internal quotation marks omitted).


140. See Michelman, Property, Federalism, and Jurisprudence, supra note 37, at 311-14 (explaining that a "[s]tate's regulatory restriction of land use can be a taking of property in the constitutional sense, and it is (generally speaking) a taking when it deprived an owner of a land parcel of all economically beneficial use of the parcel," notwithstanding a "very strong reason of public policy for imposing the restriction" (citing Lucas, 505 U.S. at 1022)).
Wade\textsuperscript{141} and City of Richmond v. J. A. Croson Co.\textsuperscript{142} The difference, however, is that notions of liberty and racial equality are determined without regard to \textit{current} legal facts.\textsuperscript{143} Property, on the other hand, owes both its existence and its contours to positive law, local positive law.\textsuperscript{144} Property simply does not exist in the absence of state law.\textsuperscript{145} Second, Lucas preempts that authority in an area that is ordinarily regarded as one of largely local concern.\textsuperscript{146} Finally, by effectively requiring the states to consider (at the least) a more formalist or rule-based approach to their property laws, Lucas co-opts the state's legislative and judicial processes in much the same way that the dissent in Federal Energy Regulatory Commission v. Mississippi\textsuperscript{147} claimed that the Public Utilities Regulatory Policies Act of 1978 co-opted the state's administrative/legislative agenda.\textsuperscript{148}

The point is not to repeat what Professor Michelman has already observed, that there is an inconsistency between how the Court has approached "Our Federalism" in Lucas and how it has approached "the Other Guy's (Congress's) Federalism" in Lopez.\textsuperscript{149} Rather, the point is to raise a separate question—whether the individual rights context of Takings Clause litigation necessarily means that the Court should ignore federalism concerns, particularly in those areas, such as land use regulation, that are widely regarded as being of local concern. In the following part, I argue that not only should the Court account for federalism values in all but the most extreme cases, but its failure to do so is inconsistent with its analysis in other land use regu-

\begin{itemize}
\item \textsuperscript{141} 410 U.S. 113 (1973). Justice White, who dissented in both \textit{Roe v. Wade} and \textit{Doe v. Bolton}, expressed the federalism impact as follows: "[T]he legislators of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus . . . against a spectrum of possible impacts on the matter." \textit{Doe v. Bolton}, 410 U.S. 179, 222 (1973) (White, J., dissenting).
\item \textsuperscript{142} 488 U.S. 469 (1989). By limiting a city's remedial efforts to correcting identified past discrimination and imposing strict standards of proof regarding demonstrating past illegal discrimination, the Court severely limited state and local authority to correct the problem of a segregated labor and capital market in the construction industry.
\item \textsuperscript{143} Michelman, \textit{Property, Federalism, and Jurisprudence}, supra note 37, at 304 (emphasis added); \textit{see also} James F. Blumstein, \textit{Federalism and Civil Rights: Complementary and Competing Paradigms}, 47 VAND. L. REV. 1251, 1252 (1994) ("The traditional civil rights paradigm protects individual liberties by resort to universalistic principles . . . ").
\item \textsuperscript{144} \textit{See} Michelman, \textit{Property, Federalism, and Jurisprudence}, supra note 37, at 305 (stating that "property cannot stand while the laws fall").
\item \textsuperscript{145} \textit{See id.}
\item \textsuperscript{146} \textit{See supra} note 140 and accompanying text.
\item \textsuperscript{147} 456 U.S. 742 (1982).
\item \textsuperscript{148} \textit{See id.} at 772-73 (Powell, J., dissenting) (arguing that the Public Utilities Regulatory Policies Act of 1978 "forces federal procedures on state regulatory institutions").
\item \textsuperscript{149} Michelman, \textit{Property, Federalism, and Jurisprudence}, supra note 37, at 302, 311-15 (citing Younger v. Harris, 401 U.S. 37, 44 (1971)).
\end{itemize}
lation cases, even when so-called fundamental rights are claimed to have been violated.

B. Balancing Individual Rights and Federalism Values

1. Two Preliminary Observations.—Before proceeding to analyze the question posed above, there are two preliminary matters that deserve mention. First, the Court quite regularly accounts for federalism values in takings challenges to local land use regulations. In *Agins v. City of Tiburon* the Court held that a landowner’s claim for inverse condemnation was not ripe for adjudication unless the landowner has submitted a development plan to the local authorities and that development plan was rejected. Five years later, in *Williamson County Regional Planning Commission v. Hamilton Bank*, the Court extended the submission requirement of *Agins*. The developer submitted a development plan and, indeed, spent over $3 million dollars on site improvements, including a golf course for the development. The county then amended the zoning ordinance to reduce the density of the proposed housing. Based on that amendment, the planning commission rejected the development proposal, and the developer initiated an inverse condemnation suit. Again, the Court found that the action was not ripe because, under state law, the developer could have filed for a variance but failed to do so. Finally, one year later, in *MacDonald, Sommer & Frates v. County of Yolo*, the Court again held that an inverse condemnation claim was not ripe because it read the two state court opinions as providing a possibility that the county would permit some form of development on the property, even though it had unconditionally rejected the development plan submitted by the plaintiffs.

151. *Id.* at 260 (“Because the appellants have not submitted a plan for development of their property . . . , there is yet no concrete controversy regarding the application of the specific zoning provisions.” (citing Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972); Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring))).
153. *Id.* at 186-97 (finding that a takings claim is not ripe until a final decision has been made by the responsible government concerning the application of the ordinance and the regulations to the property and all state procedures providing for obtaining compensation have been utilized).
154. See *id.* at 178.
155. See *id.*
156. See *id.* at 181-82.
157. See *id.* at 188.
159. See *id.* at 351-52.
Ripeness as applied by the Court in these cases, however, reflects, at best, a respect for state processes. If there is an analogy to be drawn, these cases are more analogous to the abstention requirement of *Younger v. Harris* than to *Lopez*’s respect for state policy choices in areas of significant local impact. My argument is founded on the latter. Moreover, after *Lucas*, one has to at least wonder how strictly the Court will adhere to its previous ripeness decisions. The ripeness issue came up in *Lucas* because the inverse condemnation action was heard in the state supreme court but before its decision, South Carolina amended the Beachfront Management Act to permit special use permits to construct dwellings otherwise prohibited by the Act. The Court held that ripeness was not an issue because Lucas had a temporary takings claim for the period between the effective date of the Beachfront Management Act (1988) and the enactment of the special permit proceeding in 1990. Because of the amendment’s timing, that part of the ruling in itself does not question the previous ripeness cases. But, as Justice Blackmun argued in his dissent, Lucas never submitted a development plan nor did he challenge the statute’s baseline or set back requirement as he was permitted to do even under the unamended version of the Act. The majority’s response was simply (and in a footnote) that such action would have been fruitless.

160. 401 U.S. 37 (1971). In *Younger*, the Court refused to enjoin a criminal prosecution under the California Criminal Syndicalism Act where it is possible for the defendant to assert his federal constitutional claims in that state court proceeding. See *id*. at 41. The same year, *Younger* was held applicable to actions seeking federal declaratory relief because of the res judicata effect of a federal judgment on the state criminal proceeding. See *Samuels v. Mackell*, 401 U.S. 66, 68-69 (1971). *Younger* was subsequently extended to state civil proceedings where important state interests are at stake. See *Middelsex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 429, 431-32 (1982). More pertinent to land use regulation, *Younger* was held to apply to state administrative proceedings. See *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 622, 626-29 (1986). *Younger* abstention also applies to federal judicial intervention in an on-going state eminent domain proceeding. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984).

161. *See United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (refusing to “obliterate the distinction” between what is truly national and what is truly local (internal quotation marks omitted) (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 550, 554 (Cardozo, J., concurring)); *see also id*. at 581 (Kennedy, J., concurring) (outlining the reach of the commerce power and advocating that the court “must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern”).


163. *See id*. at 1012-14 (“In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created ‘special permit’ procedure before his takings claim can be considered ripe.”).

164. *Id*. at 1042-43 (Blackmun, J., dissenting).

165. *See Lucas*, 505 U.S. at 1012 n.3 (“Such a submission would have been pointless, as the Council stipulated . . . no building permit would have been issued under the 1988 Act,
The second preliminary matter has been dealt with above but it bears repeating briefly. My argument is not that local policy reasons can justify a total "wipe-out" of all economic value from one's land. To make that argument one would not only have to reject excessive regulation as a basis for a takings claim, (something worth considering but hardly on the near horizon) but would probably have to attack the very notion of the "commodification" of property, a concept that goes back at least to Lord Coke. I am neither the person, nor is this the place to make those arguments. I accept the Lucas Court's holding that only community harm of the most significant variety, like a public or private nuisance, can justify a total loss of value. I worry, 

application or no application." (citation omitted)). It is that summary dismissal of the applicability of Hamilton Bank that leads me to wonder about how strictly it and Yolo County will be applied in the future. I will not, however, pursue that line of argument any further in this paper because, as noted above, my concern is with the integrity of the substance of local land use decisions, not with whether an inverse condemnation plaintiff has exhausted all her state administrative remedies. For an excellent discussion of ripeness in takings cases see Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48 VAND. L. REV. 1 (1995).

166. See infra notes 230-231 and accompanying text.

167. The phrase "wipe-out" is taken from WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 5 (Donald G. Hagman & Dean J. Myczynski eds. 1978) (defining "wipeout" as "any decrease in the value of real estate other than one caused by the owner or by general deflation").

168. For a well-supported argument that the Court's current regulatory takings jurisprudence is not only lacking in textual support and "Framer's intent," but is denied by local land use regulations adopted during the colonial period and in effect at the time of the "framing," see John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 HARV. L. REV. 1252, 1289-93 (1996).

169. See Lucas, 505 U.S. at 1017; see also supra note 45. Compare Ellickson, supra note 136, at 1375-80 (exploring the benefits of viewing land as an instrument of commerce, as well as some of the arguments against), with RADIN, supra note 75, at 11-43, 53-55, 80-84 (discussing the distinction between "personal" and "fungible" property rights). Professor Radin's argument is not that property should not be "commodified," but rather that only that property that is intimately tied to one's individual identity, one's personhood, and ultimately to one's freedom should be compensable under the Takings Clause. See id. at 53. Property that a developer holds merely for resale or speculation, the true commodity, and what Professor Radin described as "fungible" property, should not be compensable under the Takings Clause. See id. at 12; see also Gregory S. Alexander, Dilemmas of Group Autonomy: Residential Associations and Community, 75 CORNELL L. REV. 1, 9-11, n.40 (1989) (discussing "the personality theory of property" and noting that certain residential arrangements may give "people an instant feeling of identity").

170. See Lucas, 505 U.S. at 1029-30. But see Just v. Marinette County, 201 N.W.2d 761, 772 (Wis. 1972) (upholding a local regulation prohibiting use of wetland property for purposes other than "natural purposes" to stop the despoliation of natural resources). Like Justice Kennedy, however, I am not persuaded that state and local legislative bodies are institutionally incapable of making judgments about how much harm necessitates an absolute prohibition on "valuable" (read market rewarding) uses of land. See Lucas, 505 U.S. at 1035 (Kennedy, J., concurring) (arguing that the "state should not be prevented from exacting new regulatory initiatives in response to changing conditions"); see also Key-
however, that the Court’s recent decisions$^{171}$ coupled with several circuit court opinions$^{172}$ will not limit the per se rule of Lucas to those cases in which the owner has been deprived of all economic value of his land. As I argue below, when a land use regulation does not impose that extreme a burden, the Court should give state and local governments a fairly wide berth when determining whether a landowner should be compensated for the developmental effect of land use regulations.$^{173}$ What this means, as a practical matter, is that the

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$^{171}$ See Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 475 (1987) (5-4 decision) (analyzing a case in which the legislature determined that certain mining practices constituted a threat to the general welfare); Miller v. Schoene, 276 U.S. 272, 279 (1928) (examining a case in which the legislature determined that the state’s economic interest in apple production justified removal of all disease-producing red cedar trees). Moreover, the notion that a regulation can be “unconstitutional,” requiring the government to pay damages in the form of compensation, not because the legislature intended to extract from a landowner all of the value she has in a piece of property for redistribution to the community at large, but because the private market attaches no monetary value to the use permitted, is troubling. It effectively holds government’s policy choices hostage to the whims of the private market. Cf. Lochner v. New York, 198 U.S. 45, 64 (1905) (holding effectively that government policy regarding wage and hour legislation is governed by the common law of contracts). If, because of the availability of camping facilities near the shoreline in South Carolina (or for numerous other reasons), appraisers determine that private persons are not willing to pay for the permanent right to pitch a tent on Lucas’s land, any regulation that effectively limits the property to that use is a taking, irrespective of a range of policy reasons that might otherwise provide a solid basis for the regulation. See Lucas, 505 U.S. at 1037-39 (Blackmun, J., dissenting) (outlining the reasons for South Carolina’s Beachfront Management Act). On the other hand, as long as land is viewed, constitutionally, largely as a market commodity, albeit a unique market commodity, that result is probably inevitable.

$^{172}$ See Florida Rock Indus., Inc., v. United States, 18 F.3d 1560, 1562-63 (Fed. Cir. 1994) (appellees seeking compensable takings for denial of Clean Water Act permit to mine for limestone under 98 acres of the 1560 acres of wetland owned by them); Loveladies Harbor, Inc., v. United States, 28 F.3d 1171, 1174 (Fed. Cir. 1994) (appellees seeking compensable takings for denial of permit to backfill 11.5 acres of a 250 acre parcel of wetlands owned by them). These cases, in effect, held that a landowner could subdivide his track into several parcels and recover compensation for each parcel on which development was unreasonably restricted.

$^{173}$ This is essentially Justice Powell’s reasoning in what is possibly the paradigm modern case in which the Court accounted for state sovereignty interests in defining the scope of individual rights. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Powell distinguished the plaintiff’s equal protection claim of sub-par educational expenditures in the San Antonio school district from the case in which there had been “an absolute deprivation of the desired benefit.” Id. at 23-24. Before that point has been reached, the majority’s concern for preserving state policy choices about how it funds its public services trumps the harm that those choices inflict on individuals. See id. at 58 (“The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of various States . . . . ”). Cf. Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down a Texas statute that absolutely denied illegal aliens the right to free public education in the Texas school system).
reasons for the land use restriction need only pass rational basis scrutiny.

2. Accounting for Federalism Values—The Experience Outside Takings.—Does the individual liberties focus of Takings Clause litigation so change the inquiry that the federalism concerns expressed in *Lopez* become inconsequential in a case like *Lucas*? The public choice answer is undoubtedly a resounding yes. State policy making has more to fear from Congress than it does from the federal judiciary. At least that much is implicit in the *Lopez* Court's rejection of structural protections as the sole insurer against federal overreaching. Momentary passions and the desire of legislators to do what must be done to curry favor with the voters contrasts sharply with the lifetime appointed federal judiciary. The assumption is not without merit. There is growing experience to support the notion that Congress has shown little regard for federalism principles, particularly when dealing with high profile, "hot-button" political issues that are ready made for demagoguery and/or "credit grabbing." If anything, just the opposite is true of the federal judiciary; the Court at times has placed an inappro-

174. See *supra* note 83 and accompanying text.
175. See U.S. Const. art. III, § 1. Professor Epstein has argued that even state judges, many of whom are elected, are less subject to rent seeking behavior than are elected representatives. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 831, 835 n.32.
176. See William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 145 (1998) (recognizing that politicians may weigh the political rewards of getting on "the bandwagon of popular legislation" against the "political damage" of opposing it). To Professor Marshall's list might be added the rush for additional federal gun control legislation in the aftermath of the Littleton, Colorado school shooting. But see Jesse H. Chopper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 184-88 (1980) ("As illustrated by the prolonged constitutional debates in Congress that delayed passage of the Sherman Act for several years and stalled desperately needed antilynching laws and civil rights legislation . . ., Congress has generally paid fastidious attention to the notion that certain government powers are reserved to the states." (footnote omitted)). Cf. Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 133-34 (1998) (arguing that there is little history to support the view that judicially-enforced federalism was ever actively engaged in by the federal judiciary). This is a line of argument that I will not pursue or try to resolve here. Suffice it to say that my own view is that whatever one may say about the theoretical justifications for the Court's attempts to keep Congress in line in the name of protecting federalism values, it will probably end in failure as it did prior to Wickard and Darby. See Melvyn R. Dutschlag, *Will the Real Alphonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671, 679-83 (1996) ("To paraphrase Justice White, the Court undoubtedly has the 'raw judicial power' to review whether there exists a sufficiently substantial relationship between an activity and our national economic welfare to justify federal regulation. But the wisdom of undertaking that review is quite something else." (quoting Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting))). For a more complete analysis of the
priately heavy thumb on federalism values at the sacrifice of individual liberties. Moreover, because state and particularly local legislative bodies pose even greater threats to “minority” (dissenting) property interests than Congress, there is even greater reason for judicial intervention than in *Lopez* despite the centralizing effect of that intervention. *Lucas* is thus arguably a breath of fresh air.

One need not adhere to that “dark” view of legislative processes (or a “bright” view of judicial processes) to conclude that the Court plays a far different role in protecting individuals from state action than it does in insulating states’ lawmaking institutions from federal preemption. A simple formalistic argument would combine the textual protection of property rights in the Fourteenth Amendment, the Supremacy Clause, and the (maybe too) often repeated statement from *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is” to require that the Court protect property rights as vigorously as it protects other personal liberties. The final step in the argument is the proposal that by protecting individuals from the actions of their own states, the Fourteenth Amendment effectively removed federalism concerns

institutional difficulties with judicially-enforced federalism limits on Congress see Kramer, *Understanding Federalism*, supra note 123, at 1494-1503.

177. Durchslag, *Federalism and Constitutional Liberties*, supra note 42, at 731-34 (stating that when the Supreme Court “derogate[s] principles of individual liberty” to the furtherance of federalism, it appears to be a “betrayal of its perceived mission” as a “forum of last resort for the protection of individual liberties”).

178. This is certainly the basis of Professor Fischel’s thesis regarding the Takings Clause as well as that of Professors Mandelker and Tarlock. See supra note 95. And while certainly less “process oriented,” Professor Epstein would not disagree that given the choice of protecting the lifestyle desires of the many or protecting the “property rights” of the stalwart individual, the legislature, *any legislature*, will opt for the former. See Epstein, *Takings*, supra note 25, at 263-66, 281-82.


181. 5 U.S. (1 Cranch) 137 (1803).

182. Id. at 177.
from the individual rights balancing equation.\textsuperscript{183} The latter conclusion, however, significantly overstates the truth both historically and currently. In the balance of this subsection, I will demonstrate that the Court considers values of local control of local matters when deciding how broadly to read protections afforded by the Bill of Rights.

Historically, the Court's first opportunity to interpret the Fourteenth Amendment, the \textit{Slaughter-House Cases},\textsuperscript{184} gutted the Fourteenth Amendment's privileges or immunities clause simply because the Court did not want to disrupt the federal/state balance.\textsuperscript{185} That caution is intermittently observed today under both the equal protection and the due process clauses of the Fourteenth Amendment.\textsuperscript{186} Take for example the "Incorporation" cases. While it is true that with the exception of the Seventh Amendment right to a jury trial in civil

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\textsuperscript{183} See Michael W. McConnell, \textit{Federalism: Evaluating the Founder's Design}, 54 U. CHI. L. Rev. 1484, 1501 (1987) (noting that the "premise of the Fourteenth Amendment" was that the federal government, not, as the original design would have it, the states, would be the primary insurer of individual liberties); Jean Yarbrough, \textit{Federalism and Rights in the American Founding, in Federalism and Rights} 70 (Ellis Katz & G. Allan Tarr eds., 1996) ("It is now clear that the abandonment of federalism resulted . . . from an enthusiasm for using the powers of the national government to protect rights and liberties."); see also Kramer, \textit{Understanding Federalism, supra} note 123, at 1494-96 ("[T]he key to a viable federalism is said to be the guarantee of judicially-enforced substantive limits on national authority."). \textit{But see} Earl M. Maltz, \textit{Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust}, 42 OHIO ST. L. J. 209, 216 (1981) (arguing that substantive rights and concepts of equality must be understood in terms of our constitutional structure that establishes dual sovereigns).

\textsuperscript{184} 83 U.S. (16 Wall.) 36 (1872).

\textsuperscript{185} See \textit{id.} at 74-75, 82 (stating that the Court did not see any reason to "destroy the main features of the general system"). \textit{But cf.} Saenz v. Roe, 119 S. Ct. 1518, 1525-26 (1999) (holding that the right to travel and to remain temporarily in a state is protected by the Privileges and Immunities Clause of Article IV, and the right of newly arrived residents to be treated like any other citizen of the state is protected by the Privileges and Immunities Clause of the Fourteenth Amendment).

\textsuperscript{186} See Durchslag, \textit{Federalism and Constitutional Liberties, supra} note 42, at 735, 761 (noting that the Supreme Court has "consistently recognized federalism concerns in interpreting civil rights laws" as well as it being an "important consideration in determining the requirements of [the Fourteenth Amendment's] due process."); see also Melvyn R. Durchslag, \textit{Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on Dandridge v. Williams, 26 Case W. Res. L. Rev.} 60, 78 (1975) (discussing the noninterventionist policy of the Supreme Court in Maryland's treatment of welfare recipients in \textit{Dandridge v. Williams, 397 U.S.} 471 (1970)); Michael J. Gerhardt, \textit{The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. Cal. L. Rev.} 539, 613 (1989) (discussing the Supreme Court's policy in \textit{Monell v. Department of Social Services, 436 U.S.} 658 (1978), that struck a balance between the accountability of municipalities in federal court for their constitutional violations and the degree to which they are subject to federal court supervision); Louise Weinberg, \textit{The New Judicial Federalism, 29 Stan. L. Rev.} 1191, 1193-94 (1977) (stating that "a new judicial federalism seems to be emerging, requiring deferences to state administration and state adjudication that only yesterday were thought unnecessary or unwise").
cases exceeding twenty dollars, all of the other first eight amendments on which the Court has ruled have been applied to the states through the Due Process Clause of the Fourteenth Amendment. 187 It is also true that when states are held to the restraints of one of the first eight amendments, those restraints are identical to those imposed on the federal government. 188 There is thus no accommodation made in the name of preserving some degree of state autonomy. But the process for determining whether a right is sufficiently fundamental to justify applying it to the states is conscious of the states and their interests. In determining whether the right to a jury trial in noncapital felony cases was "fundamental," and thus binding on the states, the Court in Duncan v. Louisiana 189 noted that "[i]n every State . . . the structure and style of the criminal process . . . naturally complement jury trial, and have developed in connection with and in reliance upon the jury trial." 190 The Court, in other words, looked to a consensus of the states in determining the scope of federal "procedural" rights.

Consideration of state views and interests is not limited, however, to the incorporation of procedural rights. There are a number of examples in which federalism has played a crucial role in narrowing the

187. The Court has not ruled on whether or not the Second Amendment's right to bear arms and the Third Amendment's prohibition on quartering troops in private residences are sufficiently "fundamental" to be incorporated. A number of commentators have argued the likelihood of the Second Amendment being incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. See, e.g., Steven H. Gunn, A Lawyer's Guide to the Second Amendment, 1998 B.Y.U. L. Rev. 35, 46 (addressing the unlikelihood of the Supreme Court finding an individual right to bear arms in the Second Amendment and applying it to the states by incorporation through the Fourteenth Amendment); Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 253 (1983) (noting the absurdity of excluding the Second Amendment from incorporation against the states as it contradicts the "entire doctrinal basis" of the current incorporation of the Bill of Rights against the states); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 653 (1989) (questioning the justification for treating the incorporation of the Second Amendment against the states differently from the incorporation of the First, Fourth, Fifth, Sixth, and Eighth Amendments); Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 Ala. L. Rev. 103, 110 (1987) (arguing the inconsistency of excluding the Second Amendment from incorporation against the states in light of the doctrine of incorporation that "is so unquestioningly applied to other provisions of the Bill of Rights"). One United States district court has held that the Third Amendment was applicable to the states. See Engblom v. Carey, 522 F. Supp. 57, 67-68 (S.D.N.Y. 1981) (finding no violation of the Third Amendment by the state), rev'd on other grounds, 677 F.2d 957 (2d Cir. 1982).


190. Id. at 150 n.14.
substantive scope of federal constitutional liberties but, because of its remarkable contrast with Lucas, perhaps the best example is Paul v. Davis, in which the Court held that an individual had no constitutionally protected interest in his reputation. The "reasoning" in Paul is revealing for what it says about how the Court circumscribed state property law in Lucas. Then Justice Rehnquist, writing for the majority, began his federalism analysis with a remarkable statement. Quoting from Screws v. United States, which in turn took its cue from the Slaughter-House majority, Rehnquist observed that the Fourteenth Amendment did not significantly alter the federal system. He then proceeded more specifically to two related threats that accepting the plaintiff's claim would pose to federalism values. First, Justice Rehnquist argued that to accept the plaintiff's assertion of a constitutionally protected right in reputation would effectively impose a "body of general federal tort law." Second, he expressed a reservation that the federal judiciary was institutionally incapable of administering such a body of law because of its inability to tailor the law to the diverse problems encountered in each state. Professor Michelman's analysis places Lucas squarely within the Court's judicial federalism in

191. See, e.g., DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 203 (1989) ("The people of Wisconsin may well prefer a system of liability which would place upon the State . . . the responsibility for failure to act . . . . But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment."); City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (finding that "a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal law"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44-53 (1973) (upholding the Texas school financing system against a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment). Cf. Miller v. California, 413 U.S. 15, 30-37 (1973) (adopting a local standards test for determining obscenity under the First and Fourteenth Amendments); Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1678 (1999) (Kennedy, J., dissenting) (arguing that federalism concerns over a federal presence in state school systems demand a close look at whether Congress clearly authorized private suits against local school districts under title IX of the Civil Rights Act).


193. See id. at 702 (finding "no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" (footnote omitted)).

194. 325 U.S. 91 (1945).


196. See id. at 700-01.

197. Id. at 701 (citing Griffen v. Breckenridge, 403 U.S. 88, 101-02 (1971)).

198. See id. This is not the only example of how federalism values have been used by the Court in determining the scope of substantive constitutional liberties or the remedial power of the federal judiciary. See supra note 191; see also DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 195-97 (1989) (holding that generally the Due Process Clause does not create an alternative duty on the state to protect the individual against private actors).
Moreover, on the few occasions when the Court has reviewed local land use decisions when takings has not been the issue, it has substantially deferred to local legislative judgments notwithstanding the assertion of other, nonproperty-related individual liberties.200

These cases are distinguishable from Lucas in one fundamental way; they all involve attempts to extend individual rights beyond what the Court had previously accepted and certainly beyond those enumerated in the text.201 Justice Powell’s response in Rodriguez was simple: “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”202 Rather, the question is “whether there is a right . . . explicitly or implicitly guaranteed by the Constitution.”203 Because property is protected by the text of the Fourteenth Amendment, the argument would run, it is no more appropriate to limit basic property rights in the name of federalism than it would have been to limit a black student’s right to attend an integrated school because education is a traditional local concern and thus should be substantially controlled by the state.204 That argument, however, does not answer two land use cases in which a textual right, the right of free speech, was

199. Michelman, Property, Federalism, and Jurisprudence, supra note 37, at 309-10 (suggesting that under the Takings Clause, “no constitutionally significant taking of property can occur unless some government in some way perpetuates a departure from some then-existent body of law,” and “it is a commonplace of Our Federalism that [matters of property law] are left for definition by bodies of state law” (emphasis omitted)). Cf Paul, 424 U.S. at 710 (noting that the liberty and property interests protected by the Due Process Clause “attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law” (footnote omitted)).

200. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (finding that single family zoning that effectively prohibited low-income housing apartments in the area was not racially discriminatory); Village of Belle Terre v. Boraas, 416 U.S. 1, 8-9 (1974) (upholding the exclusion of households consisting of more than two nonrelated residents from a single family residential zone against due process and equal protection challenges).

201. The exception is Arlington Heights, which ruled on whether racial discrimination could be demonstrated only by the exclusionary effect of the zoning ordinance. 429 U.S. at 270; see also Washington v. Davis, 426 U.S. 229, 248-52 (1976) (deferring to the legislature and declining to extend the more lenient test of title VII cases to a verbal aptitude test).


203. Id. at 33-34; see also Vacco v. Quill, 521 U.S. 793, 807 (1997) (refusing to extend the Cruzan right to “assisted suicide”); Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261, 286-87 (1990) (refusing to extend the right to refuse treatment beyond “the patient herself”); Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (refusing to extend the Griswold/Roe right beyond “family, marriage, or procreation”).

204. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (noting that “education is perhaps the most important function of state and local governments” and holding that “segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities”).
seemingly modified or at least curiously applied out of apparent deference to state "environmental" concerns, Young v. American Mini-Theatres, Inc.\textsuperscript{205} and City of Renton v. Playtime Theatre, Inc.\textsuperscript{206} Both cases involved attempts by cities, Detroit in the former case and (obviously) Renton, Washington in the latter, to eliminate locally undesirable land uses (LULU's) from areas in which residential or related uses were common.\textsuperscript{207} In both cases, the LULU was defined (in part in Young and wholly in Renton) in terms of the content of the speech sold or produced by the prohibited uses.\textsuperscript{208} Finally, in both cases, the Court upheld the regulation, despite its content specificity, on the ground that the city was not directing its regulation to limiting what it considered offensive speech but was instead attempting to prevent neighborhood deterioration.\textsuperscript{209}

Admittedly it is a stretch to read Young as a federalism case. Justice Powell's concurring (and controlling) opinion uses the findings of the Detroit Common Council more to establish the lack of a specific intent to prohibit showing certain materials because of their content than to establish a general principle of deference to local land use determinations.\textsuperscript{210} The same, however, cannot be said of Renton. The Renton ordinance did not limit a wide range of LULU's as did the Detroit ordinance.\textsuperscript{211} Nor, unlike Detroit, was there any evidence of city council hearings that indicated any threat to Renton from "adult" entertainment facilities. Consequently, there was no evidence whatsoever that the Renton ordinance was in fact directed at so-called secondary effects rather than at the content of the speech itself.\textsuperscript{212} Indeed, common sense would suggest that the city of Renton was sim-

\textsuperscript{205} 427 U.S. 50 (1976).
\textsuperscript{206} 475 U.S. 41 (1986).
\textsuperscript{207} Both cases dealt with adult movie theatres. See Renton, 475 U.S. at 43; Young, 427 U.S. at 44.
\textsuperscript{208} See Renton, 475 U.S. at 43; Young, 427 U.S. at 44.
\textsuperscript{209} See Renton, 475 U.S. at 54-55 (finding as legitimate a city's interest in preserving the quality of life for its citizens); Young, 427 U.S. at 71-73 (finding as legitimate a city's interest in preserving the present and future character of its neighbors).
\textsuperscript{210} Young, 427 U.S. at 74-75 (Powell, J., concurring) (stating that "the Council was motivated by its perception that the 'regulated uses' ... worked a 'deleterious effect upon the adjacent areas' and could 'contribute to the blighting and downgrading of the surrounding neighborhood'" (quoting Young, 427 U.S. at 54 & n.6)).
\textsuperscript{211} Renton, 427 U.S. at 57 (Brennan, J., dissenting) (noting that only adult movie theaters are prohibited, and not "other forms of 'adult entertainment'"). The Renton City Council explained its intention in adopting the ordinance as "promoting the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning." Id. at 58-59.
\textsuperscript{212} See id. at 57 (stating that the "selective treatment" of adult movie theaters "strongly suggests that Renton was interested not in controlling the 'secondary effects' associated
ply trying to keep certain "pornographic" material beyond its borders. The Court determined, however, that Renton cared only about its neighborhoods and not about the availability of the proscribed speech. And "a city's 'interest in attempting to preserve the quality of urban life . . . must be accorded high respect." The Court thus applied rational basis scrutiny, both to the determination of the nature of the ordinance (key to determining whether the ordinance is content-specific or content-neutral) and to whether the local community reached the appropriate balance between the harm the speech imposed on the "quality of urban life" and the restrictive impact the ordinance had on the quantity of admittedly protected speech entering the "marketplace." Both Justices Blackmun and Stevens, in their own way, argued in *Lucas* for the same deference to local legislative declarations about the threat posed by the proposed land use to the broader community interests. *Lucas* is thus not only difficult to square with the Court's professed concerns for federalism expressed in cases like *Lopez*, but it is also at odds with its use of federalism in individual rights cases in general and in land use regulation cases specifically.

3. The Problem of Mobility.—Federalism is a two-way street. Although it is most often used, as I have been guilty of doing here, to put a weightier thumb on state authority at the expense of federal impositions, it also protects individuals from overreaching at the local

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213. See *Renton*, 427 U.S. at 48 (stating that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression"). Apparently, as long as the ordinance looks like a zoning ordinance it will be treated as a zoning ordinance. See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (finding that a general statute prohibiting nudity in a public place was constitutionally applied to adult entertainment facilities on the grounds that the statute regulated "secondary effects").

214. *Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71) (citing id. at 80 (Powell, J., concurring)).

215. See *Renton*, 475 U.S. at 54-55 (finding that Renton did not employ "'the power to zone as a pretext for suppressing expression,' . . . but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas" (internal citation omitted) (quoting *Young*, 427 U.S. at 84 (Powell, J., concurring))).

216. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1026, 1045-51 (1992) (Blackmun, J., dissenting) (arguing for the traditional rule requiring plaintiffs to produce some evidence to contradict the legislature's findings); id. at 1068-71 (Stevens, J., dissenting) ("The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.").
level. Most often this requires "federalization" of basic individual liberties, a concept at odds with the original design of the Constitution. The "need" to federalize rights, however, is not necessarily inevitable. It only becomes inevitable when government (at whatever level) is exercising monopoly regulatory power, thus providing no out for those regulated. The key to federalism is therefore mobility. And, as the phrase goes, "therein lies the rub" with judicial deference to local land use policies. Land is immobile. As a result, there is no exit from regulations that substantially impinge on the use value of land. Because the landowner cannot pick up her marbles (so to speak) and go home, she has no choice but to accede to the community land use choices. This is the essence of Professor Fischel's argument that the land use policies of small homogeneous local governments should be viewed with skepticism by the Court as well as Professor Epstein's broader argument that nonnuisance-based land use regulations are takings.

217. See Akhil Reed Amar, Five Views of Federalism: "Converse-1983" in Context, 47 VAND. L. REV. 1229, 1239-40 (1994) (citing THE FEDERALIST No. 51 (James Madison) and suggesting that federalism assures compliance with specific individual rights); Kramer, Understanding Federalism, supra note 123, at 1502 (illustrating the need for broader federal authority and helping states to protect themselves); Richard B. Stewart, Federalism and Rights, 19 GA. L. REV. 917, 918 (1985) (contending that federalism prevents local oppression of minorities).

218. See Blumstein, supra note 143, at 1259 (arguing that the traditional paradigm protects individual liberties by resorting to universalistic principles); Richard A. Epstein, Exit Rights Under Federalism, 147 LAW & CONTEMP. PROBS. 147, 150 (1992) [hereinafter Exit Rights] ("The insight that federalism offered the prospects of structural limitations against the abuse of state power against its own citizens was not . . . part of the original constitutional plan, but instead ranks only as a necessary and happy byproduct of that design.").

219. See Stewart, supra note 217, at 923 (arguing that personal mobility has been a key element in monitoring the individual-local-federal balance). Cf. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 53 (1990) (suggesting that federalism is the only neutral principle for protecting individual rights because it maximizes individual choice regarding regulatory regimes); McConnell, supra note 183, at 1493 (illustrating that decentralized authority, by promoting free choice, also maximizes aggregate societal welfare).

220. See FISCHEL, REGULATORY TAKINGS, supra note 8, at 271, 285 (noting that citizens cannot "withdraw immobile assets from jurisdictions whose laws threaten to devalue those assets" and "[l]ocal land use regulations are an unusually effective means of transferring wealth from a distinct minority to a political majority and should thus be subject to special scrutiny under the Takings Clause"). One could quibble that Fischel's concern is not so much that land is immobile, thus making exit impossible, but that landowners have no voice in the chambers that promulgate land use regulations. That is the basis for his distinction between small homogeneous communities where pluralistic bargaining is absent and larger more diverse communities where political bargaining can blunt the potential for significant land use regulatory exactions. I accept that. On the other hand, it is the lack of exit opportunities that allows the lack of voice to manifest itself in "confiscatory" regulation.

221. See EPSTEIN, TAKINGS, supra note 25, at 216-19 (concluding that when the state prohibits full exploitation of resources, prohibiting individual maximization of wealth for the
This argument is difficult to counter. In *Village of Belle Terre v. Boraas*, the Court upheld a zoning ordinance that prohibited unrelated individuals from occupying homes in areas zoned for single family dwellings. In terms of options, the property owner could have rented his home to married college students from Stoney Brook, could have lived in it himself, or could have, like all other residents of the village, sold it as a single family residence. The same could be said of the land use regulation in *Renton*, since profitable commercial uses other than adult entertainment were permitted. Moreover, in both *Renton* and *Belle Terre*, the regulatory impact was not so much on the use of the land itself, but on the nature of commercial activity that could be conducted on the land. The effect was thus more on how commercial capital was invested than on the land *qua* land. Finally, even *Rodriguez*, perhaps the case in which the Court’s accounting for federalism values in the rights balancing equation was least defensible, can be rationalized on a form of exit theory. While it is tempting to view *Rodriguez* as a case in which poor people, because of their poverty, were trapped in school districts that under state law were incapable of increasing educational spending even if they wanted to, in fact the Court found that there was little correlation between the wealth of the individual and the taxable wealth of the school district. Without that correlation, it is difficult to argue, certainly *a priori*, that exit opportunities to school districts that had a greater ability to increase educational funding did not exist.

223. Id. at 8-9.
224. Professor Radin has a different “spin” on *Belle Terre*. She argued that the small community of Belle Terre was articulating its residents’ “personhood,” which outweighed either the personhood of the S.U.N.Y. students or the property owner who was merely selling living space to the highest bidder. *Radin*, *supra* note 75, at 70, n.151.
228. *See id.* at 23 (stating that “there is no basis on the record . . . for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts”).
229. The Court has certainly not been consistent with limiting deference to state policies to those instances in which one can make a plausible argument that those whose rights have been compromised can assert them in other locations. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court determined
Of course, as noted above, if Professor Been is correct that the ability of a burdened landowner to escape to a more investment-friendly jurisdiction is far greater than the economists would allow, the lack of mobility is no impediment to deference to local land use restrictions. But one need not accept Professor Been's conclusions to reach the same judgment. As I have noted, for purposes of the thesis of this Article, I accept the proposition that a regulation that deprives a landowner of all economic value of contiguously developable property cannot be justified in terms of some overriding principle of local autonomy. I reach a different conclusion, however, when a local land use regulation only reduces the value of a particular parcel. As long as value remains, the regulation does not deny the possibilities of mobility, it merely imposes a cost on exit. That is insufficient to deny deference to local land use judgments. To do so would be inconsistent with deference to local land use decisions exhibited by the Court in other cases and would impose upon the Court an inquiry that it is incapable of conducting.

Let me illustrate with a somewhat overly detailed "hypothetical." Assume a small township consisting of 20,000 acres of land (more or less), approximately sixty-five percent of which is being actively farmed. Only about fifteen percent of the land is residential. The balance is devoted to infrastructure, commercial and industrial uses (about two percent), parks, and institutional (mostly governmental) uses. The township is bisected by two divided, four-lane state highways, one north/south and the other east/west. That in itself has not been sufficient to promote large scale development in the township, in part because of the distance to the county's major city, but more importantly, because there is no easy access to water and to sewage treatment, although estimates are that over the past several years about 500 acres of township land has been converted from agricultural to residential uses. Current residential zoning requires a two acre minimum lot.

Change, however, may be in the offing. A small incorporated village adjacent to the township has recently drilled two new water wells,
bringing the total capacity to nearly one million gallons per day. Residents of the village consume only about 160,000 gallons per day, creating a substantial excess of capacity. In addition, the village has a sewage treatment plant, and there are plans to upgrade and to increase the capacity of that plant. At a recent village council meeting, it was proposed (although not acted upon) that the village sell its excess water and sewage treatment capacity outside of its borders. This action would significantly increase the value of the township’s land for development despite its distance to a major population center.

A owns Blackacre, a 200-acre farm that has been in the family for a number of generations. It is still a profitable farm, but there are increasing difficulties ahead. A’s only son has expressed doubts about his desire to continue in the family business, and the market for agricultural products may soon require some shift in the farm’s output to remain profitable. D is a developer who, since the village’s discussion of selling excess water and sewage treatment capacity beyond its borders, has been eyeing A’s farm. Given the community’s two acre zoning, D figures that she can build between seventy-five and eighty new homes on the property. That would increase the township’s population by more than one-third. Recognizing that the current two acre zoning is no longer sufficient to prevent turning the township into just another urban-type suburb, the town has considered a number of land-use options, including increasing the minimum lot size to either five or seven acres, maintaining the two acre minimum lot size but requiring dedication by developers for open space, and setting aside a substantial portion of the community’s land for agricultural uses. Finally, we can assume that any one of these changes will reduce the market value of A’s farm by something approaching fifty percent.233

Professor Epstein would undoubtedly consider these zoning changes to be a taking. Even the current two acre zoning would constitute a taking.234 As I read Professor Fischel, he too would consider the proposed zoning changes to be a taking. He would consider the

233. The hypothetical concentrates on A, the farmer, rather than on D, the developer, to avoid the criticism leveled by Professor Epstein that Professor Been’s work says nothing about the exit rights of nondeveloper landowners whose property is ripe for purchase. See Epstein, Exit Rights, supra note 218, at 155 n.17 (criticizing Been for not taking into account the “fundamental difference in the position” of the landowner and of the developer). But see Been, Exit, supra note 111, at 501-04, 511 (contending that the exit right will protect the developer).

234. See Epstein, Takings, supra note 25, at 102-04 (arguing that focus should not be on the size of the economic value but rather on the loss of a property right); Epstein, Exit Rights, supra note 218, at 155-56 (discussing the effects on the landowner who does not share the exit right of developers).
proposals to be pure rent seeking because existing residents are attempting to preserve what they value most, their rural environment, by appropriating the property values of nonconsenting residents (political minorities) and those with no voice, the developer (presumably a nonresident) and future residents, by adopting zoning regulations that vary from the community's norm.\textsuperscript{235} Neither conclusion, however, sufficiently recognizes the benefits that derive from decentralized decisionmaking.\textsuperscript{236} Epstein accounted for it not at all and Fischel, because of his fundamental distrust of land use legislation enacted by the likes of our hypothetical township, would apparently lock it into an existing zoning plan enacted well before the threat of urbanization appeared on the radar screen.\textsuperscript{237}

Failing to account for federalism values might be correct if we can assume that \textit{A} and all other \textit{A}'s in the world in fact have no exit possibilities. \textit{A} does however; it will just cost money. How much can be fairly calculated as the present value of his land for residential development under the existing two acre zoning reduced by the present value of his farm as currently operated. The question is whether the imposition of a cost, any cost, on mobility to a friendlier territory means that judicial recognition of local autonomy is out of bounds. The norm, it would appear, is otherwise. By limiting the amount of land available for adult entertainment facilities, the City of Renton increased the cost of Playtime Theatre's exercising its First Amendment rights.\textsuperscript{238} Presumably, when the Village of Belle Terre restricted the rental market (the demand) by removing unrelated individuals (and therefore much of the college community at the adjoining state university), it reduced the market value of Boraas's property.\textsuperscript{239} Indeed, the regulation in \textit{Belle Terre} was enacted for the very same reasons that our hypothetical township wants to change its zoning—to preserve the "character" of the town.\textsuperscript{240} Finally, even Professor Epstein conceded that some regulatory reductions in the market value

\textsuperscript{235} See Fischel, Regulatory Takings, supra note 8, at 351-53 (stating that anything above the community's norm should be compensable); see also Ellickson, Suburban Growth Controls, supra note 76, at 422-23 (arguing that the community norm should be the measuring standard).

\textsuperscript{236} See supra notes 233-235 and accompanying text.

\textsuperscript{237} See supra notes 233-235 and accompanying text.

\textsuperscript{238} The Court's response to the theater's argument about the regulation's significantly increasing costs was that the First Amendment did not guarantee sites at "bargain prices." City of Renton v. Playtime Theatre, Inc., 475 U.S. 41, 54 (1986) (citing Young v. American Mini-Theaters, 427 U.S. 50, 78 (1976) (Powell, J., concurring)).

\textsuperscript{239} See Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1979) (admitting the regulation's impact on Boraas's property values but discounting its constitutional significance).

\textsuperscript{240} See supra notes 225-226 and accompanying text.
might be so slight as to be *damnnum absque injuria* and thus not compensable under the Takings Clause.\textsuperscript{241} If the value reduction is so slight that compensation is not owing, it is hard to suggest that the regulation impacts on mobility.\textsuperscript{242} Without that impact there is little reason for the Court to distinguish takings claims from other individual liberties claims where state autonomy is considered in determining whether state action has violated the Fourteenth Amendment.\textsuperscript{243}

To review, we can intuit that some amount of cost imposed by land use regulation, maybe less than a complete "wipe-out," will be so significant that exit opportunities are indeed illusory. In that case, deference to local policy making will merely exacerbate the harm by increasing "demoralization costs." We also know that some regulatory costs are so slight as to have no effect on mobility. In that instance, there is no unfairness to the landowner from the Court's deferring to the rational conclusions of local legislatures regarding the amount of individual sacrifice that can be demanded of its citizens in the name of the "general welfare." Between those two extremes, can the Court decide where any given regulation falls? More specifically, can the Court determine that a fifty percent reduction in the speculative value of A's farm\textsuperscript{244} is sufficient to remove local autonomy concerns from

\textsuperscript{241} See Epstein, Takings, supra note 25, at 102 ("The basic point is that where those diminutions are not so overwhelmingly large, the harm suffered by the individual landowner should be regarded as *damnnum absque injuria*, and hence not compensable by the state." (footnote omitted)). Epstein, however, argued that simply because the monetary impact of a regulation is so slight that no compensation is due does not mean that no taking has occurred; it has. There is, however, no monetary remedy. See id. at 103 (explaining that, for example, in cases that "deal with . . . competition or the blocking of a view, the extent of the damages is quite immaterial," but that such cases still concern, "[b]y any theory . . . the loss of property rights"); see also Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 746-50 (1997) (Scalia, J., concurring in part and concurring in the judgment). Epstein is correct as a conceptual matter. On the other hand, because compensation is the only constitutionally prescribed remedy for a taking, it would be a hollow victory indeed for a plaintiff to spend the money to litigate a takings claim only to discover that his victory carried with it nothing but the joy of principle vindication.

\textsuperscript{242} See, e.g., Fischel, Regulatory Takings, supra note 8, at 271 (noting the problem of a landowner's inability to "withdraw immobile assets from jurisdictions whose laws threaten to devalue those assets").


\textsuperscript{244} I use the phrase speculative value because that is what it is. Prior to the Village's discussion of what to do with their excess water and sewage treatment capacity, A's property would presumably be valued at its current use, agricultural. It is only because single family home development may be on the horizon that the value has increased. Some states have enacted special provisions to allow agricultural land at its use value as opposed to its market value as developable land. See, e.g., Ohio Rev. Code Ann. §§ 5713.31-37 (Anderson 1994) (stating that "an owner of agricultural land may file an application with the county auditor of the county in which such land is located, requesting the auditor to value the land for real property tax purposes at the current value such land has for agricultural
the balancing equation? How, if at all, does the Court account for the fact that the farm is still profitable, meaning that it is returning a "fair return" on investment? Would it matter if, because the farm has been in the family for generations, its sunk costs might have already been recovered thus making the proposed zoning changes much like an ordinance that requires removal of a nonconforming use?\textsuperscript{245} I do not think that the Court is any more capable of answering those and similar questions about how much cost is too much than it is in determining the "degree of necessity" that will sustain Congress's exercise of its commerce powers.\textsuperscript{246} The Court is thus left with the choice of choosing between extremes. It can either assume that all regulatory costs imposed on land restrict mobility, meaning that values of local autonomy are irrelevant to takings claims, or that federalism requires deference to local land use decisions whatever the cost imposed on the landowner. Neither choice is terribly satisfactory because both, in their own way, ignore mobility as the \textit{sine qua non} for deferring (or not deferring) to local policy making. The only sensible way out is for the Court to avoid the problem altogether by limiting \textit{Lucas} to its language. Only those regulations that deprive the landowner of all economic value will justify a lack of deference to local determinations of harm. In all other cases, local land use regulations, at least those that do not amount to a physical taking,\textsuperscript{247} should be judged according to the standard used in \textit{Rodriguez, Belle Terre, Renton, etc.—rational basis}.\textsuperscript{248}

\textsuperscript{245} Ordinances that require removal of nonconforming uses have been upheld against takings claims when they allow enough time for the landowner to recover his investment and a reasonable return thereon. See, e.g., New Castle v. Rollins Outdoor Adver., Inc., 475 A.2d 355, 359 (Del. 1984) (en banc) (finding that "the forced termination of a nonconforming use over a specified period of time is a reasonable exercise of the police power and does not constitute a taking of property").

\textsuperscript{246} See \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 423 (1819). \textit{But see Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922) (finding that regulations that go "too far" may be considered takings).


III. FEDERALISM AND THE PROBLEM OF EXCLUSION

The group so far ignored is potential purchasers whose views have no voice in the policy formulation of local legislative bodies. For those who, like Professor Epstein, view the Takings Clause as prohibiting all uncompensated wealth transfers, the problem is that non-nuisance preventing zoning raises the cost of housing of some to confer private benefits on others. The Takings Clause ought to protect against this form of rent seeking legislation. Those who view the Takings Clause as a process-based counterweight to an inherently self-serving legislature also conclude that vigorous enforcement of the Takings Clause is necessary to protect those who have no ability to protect themselves. As Justice Scalia pointed out in *Lucas*, it is too easy for a local governing body to recite a variety of “harms” posed by any development plan simply to mask discrimination against racial and ethnic minorities, people whose religious views do not fit the mainstream of the community or, more generally, those who are not perceived as “fitting in.” The question, however, is whether it is necessary to federalize the law of property through the Takings Clause to protect those interests. It is not that the Takings Clause is terribly ill-suited to protecting the interests of the disenfranchised. Indeed, the New Jersey Supreme Court, in providing for a builders’ remedy to contest the exclusion of minorities and the poor resulting from large lot zoning, minimum floor area requirements and the like, properly recognized that landowners and housing producers can be effective surrogate advocates for the those nonresidents excluded by a community’s land use decisions. Rather, given the federalism objections

249. See supra notes 233-234, 241 and accompanying text.
250. See Fischel, Regulatory Takings, supra note 8, at 131-35, 251-52 (stating that “independent judicial review of legislation . . . is a protection for popular sovereignty over time”); Treanor, supra note 76, at 873-74, 887 (arguing that judicial review offers procedural protection to minority groups). There is no doubt that their concerns are legitimate. See 2 ANDERSON, supra note 2, at §§ 8.01-8.03 (discussing “[t]he use of governmental power to protect private interests by preserving the status quo, at the expense of preventing the solution of problems which involve the public welfare”); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 780-98 (1969) (arguing that the problem with the “due process approach” is that “[i]t is an equation formulated to express and resolve the tension between the interests of the planning policy and the individual landowner; what it omits is the interest of the low-or moderate-income households whose access to the area is banned by the zoning ordinance in question”).
251. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-26, 1025 n.12 (1992) (insisting that the “Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations”).
252. See Southern Burlington County NAACP v. Township of Mount Laurel (II), 456 A.2d 390, 452-53 (N.J. 1983) (finding that a builder’s remedy was available on a case-by-
THE TAKINGS CLAUSE AND LOCAL LAND USE

raised above, the Takings Clause is not needed for this purpose. State law, if utilized appropriately, is adequate to protect those whose voices are largely ignored.

To start with, those to whom the Court has extended the full mantle of judicial protections, racial, ethnic, and religious minorities, do not need the Takings Clause. The Fourteenth Amendment protects against the use of zoning as an intentional device to exclude racial and ethnic minorities. Additionally, Title VIII of the Civil Rights Act of 1968 protects against zoning that has the effect of excluding racial minorities.

Admittedly, there remains a wide gap in the protective blanket provided by federal law. Neither the Fourteenth Amendment nor Title VIII will have any impact on the proposed zoning like that described in the preceding part. Depending upon racial and economic demographics of the surrounding area, the effect of the proposed zoning changes on racial and on ethnic minorities or, indeed, on those trapped by poverty in inner-city neighborhoods, whatever their racial or ethnic background, is problematic at best. Consequently, the only federal protection for those excluded from residing in our hypothetical township is the surrogate remedy afforded by the Takings Clause. Assuming for purposes of argument that those who can afford, for example, a four bedroom home on upwards of two acres of

_253._ See _Village of Arlington Heights v. Metropolitan Hous. Dev. Corp._, 429 U.S. 252, 265-66 (1977) (requiring proof that a discriminatory purpose was a motivating factor). See _generally_ Daniel R. Mandelker, _Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights_, 55 _Tex. L. Rev._ 1217, 1219-23 (1977) (explaining the extent to which the Fourteenth Amendment’s prohibition of racial discrimination forbids exclusionary municipal zoning). This is not to underestimate the difficulty of demonstrating that any given zoning ordinance or land use plan is intentionally designed to limit residency by racial and ethnic minorities. Indeed, it is just that difficulty which seemingly moved Professor Treanor in the direction of the Takings Clause to remedy the problem of environmental racism. See _Treanor_, _supra_ note 76, at 875-78 (stating that the “[l]imitation of heightened Takings Clause scrutiny of governmental actions that affect discrete and insular minorities to environmental justice cases cabins the judiciary’s ability to overturn majoritarian decisions”). It is not, however, impossible. _See United States v. City of Parma_, 494 F. Supp. 1049, 1097-1101 (N.D. Ohio 1980) (holding that actions by city officials were done to perpetuate the city’s all-white character), _aff’d_, 661 F.2d 562 (6th Cir. 1981).


land need the courts to provide the voice that they are denied, why
must the courts be federal courts and why must that protection be the
Takings Clause? Why are not state remedies adequate?

A number of states have held that local zoning must look beyond
the boundaries of any particular local government to the region of
which it is a part. The theories supporting that requirement track
along two lines. New Jersey and Pennsylvania rely on state individual
liberties restraints to limit a local community's zoning authority.

In the famous (or infamous as the case may be) Mt. Laurel litigation,
the New Jersey Supreme Court held that Article I of that state's consti-
tution created a substantive due process and equal protection right
to affordable housing and that a community had a regional responsi-
bility to make that right a reality by contributing their "fair share" of
low and moderate income housing. In Pennsylvania, the court re-
lied on what appeared to be a substantive due process rationale to
strike down a four acre zoning restriction. In doing so, it noted
that communities may not "prevent the entrance of newcomers in or-
der to avoid future burdens, economic and otherwise."

Other jurisdictions, such as New York and New Hampshire, have
relied more generally on proper police power authority to demand
that communities consider the housing needs of those who reside be-
yond their borders. The New Hampshire Supreme Court relied on
the state's zoning enabling act to demand that the "community," which
zoning regulations must look to is not limited by the boundaries of
the regulating municipality; it must consider not only what is good for
their own residents but the housing needs of potential residents who

256. See infra notes 257-261 and accompanying text.
257. Southern Burlington County NAACP v. Township of Mount Laurel (I), 336 A.2d
713 (N.J. 1975).
258. Article I of New Jersey's Constitution states: "All persons are by nature free and
independent, and have certain natural and unalienable rights, among which are those of
enjoying and defending life and liberty, of acquiring, possessing, and protecting property,
259. See Southern Burlington County NAACP, 336 A.2d at 734 (finding that Mount Laurel
must fulfill "its fair share of the regional need for low and moderate income housing").
261.

261. Kohn, 215 A.2d at 612. Five years later the Pennsylvania Supreme Court struck
down two and three acre zoning on the same substantive due process theory. See Appeal of
Kit-Mar Builders, Inc. 268 A.2d 764, 769-70 (Pa. 1970); see also Kasparek v. Johnson County
Bd. of Health, 288 N.W.2d 511, 513 (Iowa 1980) (en banc) (striking down, for the same
reasons, a requirement to have a five acre tract to install a septic tank); Board of County
Supervisors v. Carper, 107 S.E.2d 390, 396 (Va. 1959) (striking down two acre zoning on
the same theory).
reside in other political subdivisions.\textsuperscript{262} New York relied more generally on police power principles in \textit{Berenson v. New Castle}\textsuperscript{263} to hold that a community's zoning plan must balance its needs against the impact of its land use proposals on people and localities in the broader region.\textsuperscript{264} The lesson from these cases is that the Takings Clause is not needed to provide a surrogate voice to those potential housing consumers who are excluded by a community's land use policies.

Admittedly, state constitutional and statutory attempts at forcing local governments to recognize their obligations to the broader region are highly imperfect. First, the reach of these cases is limited in terms of the uses excluded. \textit{Berenson}, for example, upheld an ordinance that limited growth of a suburb in Westchester County except for the restriction on multifamily dwellings.\textsuperscript{265} Five years later, the New York Court of Appeals upheld five acre residential zoning because there was no proof that the municipality either intentionally acted to exclude low and moderate income persons or did not in fact consider the housing needs of the broader region.\textsuperscript{266} Second, those protected by these rulings would appear to be limited to low and moderate income persons, a far narrower category of individuals than would be protected under the conventional Takings Clause jurisprudence. On the other hand, limiting judicial protection to low and moderate income individuals may simply reflect a widespread intuitive sense of who can fend for themselves, economically and/or politically, and who cannot.

Most problematic with state court approaches has been the remedy. Volumes have been written criticizing the New Jersey court's "take-over" of local government zoning in that state.\textsuperscript{267} As a result,

\textsuperscript{262} See Britton v. Town of Chester, 595 A.2d 492, 495-96, 498 (N.H. 1991) (finding that the zoning ordinance "was never conceived to be a device to facilitate the use of governmental power to prevent access to a municipality by 'outsiders of any disadvantaged social or economic group'" (quoting Beck v. Town of Raymond, 394 A.2d 847, 852 (1978))).

\textsuperscript{263} 341 N.E.2d 236 (N.Y. 1979).

\textsuperscript{264} See id. at 241-43 ("Our concern is not whether the zones, in themselves, are balanced communities, but whether the town itself, as provided for by its zoning ordinances, will be a balanced and integrated community.").

\textsuperscript{265} See id. at 243.

\textsuperscript{266} See Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 414 N.E.2d 680, 684-85 (N.Y. 1980) (holding that the plaintiffs did not meet their burden "of proving exclusionary purpose or noncompliance with the Berenson criteria").

\textsuperscript{267} See, e.g., John M. Payne, Re-thinking Fair Share: The Judicial Enforcement of Affordable Housing Policies, 16 REAL EST. L.J. 20, 27-32 (1987) (criticizing the judicial forum for intervention); Ronald H. Silverman, Housing for All Under Law: The Limits of Legalist Reform, 27 UCLA L. Rev. 99, 111-30 (1979) (arguing that cases, such as the Mount Laurel case discussed supra, "challenge . . . [the courts'] ability to assess cost and more intangible consequences or impacts"); Developments in the Law—Zoning, 91 HARV. L. Rev. 1427, 1694-1708
both the New Hampshire court in *Britton*\(^{268}\) and the post-*Berenson* New York court\(^{269}\) have declined to enter the remedial thicket traversed by New Jersey.\(^{270}\) No doubt a broad reading of the Takings Clause advocated by Professors Epstein, Fischel and others would eliminate the difficulties posed by on-going judicial supervision of local zoning. Either the regulation is a taking or it is not. If it is, the municipality owes the landowner compensation up to the point that the regulation is changed. The voice of the unrepresented is thus heard without embroiling the judiciary in constant supervision of a recalcitrant local polity. The same is true, however, of the Pennsylvania court's state constitutional due process approach in *Kohn*, in which the Pennsylvania Supreme Court declared four acre zoning to be a violation of Pennsylvania's due process clause.\(^{271}\) Moreover, the Pennsylvania approach permits the kind of balancing of community welfare and regional housing needs that is necessary if protection of unrepresented nonresidents is to be anything more than a make-weight argument for a strict (nonbalancing) application of the Takings Clause.\(^{272}\) And the balancing is done by a state court, presumably more familiar than a federal court with how that balance ought to be drawn.\(^{273}\)

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\(^{268}\) *Britton v. Town of Chester*, 595 A.2d 492, 497 (N.H. 1991) (refusing to adopt the Mt. Laurel analysis because of its "arbitrary mathematical quotas").

\(^{269}\) *Suffolk Hous. Servs. v. Town of Brookhaven*, 511 N.E.2d 67, 70-71 (N.Y. 1987) (holding that unless the plaintiff has presented a specific housing plan, no judicial relief can be provided, even if the zoning plan might otherwise be exclusionary).

\(^{270}\) *See supra* note 267 and accompanying text.

\(^{271}\) *See supra* notes 260-261 and accompanying text.


\(^{273}\) *See id.* at 601-02.
Finally, the claim that the Takings Clause is necessary to protect the voice of nonresidents rings strange when applied to small homogeneous communities like the hypothetical township described above. These communities are less likely to possess home rule authority than their larger and more heterogeneous counterparts to whose land use policy judgments process theorists like Professor Fischel are willing to defer. Consequently, the zoning authority of these smaller and more suspect communities derives not from sources like charters, that may be immune from state legislative revision or override, but from zoning enabling laws enacted by the state legislature. Additionally, what the state legislature gives, it can take away. Even if some small homogeneous communities, villages for example, do possess home rule authority, if their zoning has the external impact claimed, they would not be shielded from preemptive state legislation in any event. Nonresidents, both developers and prospective housing consumers, are certainly represented in pluralistic state capitals where the ability to form

274. See, e.g., OHIO CONST. of 1851, art. XVIII, §§ 1, 3 (1912) (classifying municipal corporations as either cities or villages, and granting both categories "authority to exercise all powers of local self-government").

275. See, e.g., Denver v. Colorado, 788 P.2d 764, 767 (Colo. 1990) (finding that in matters of statewide concern, the state legislature may adopt legislation and preempt the power of home rule municipalities); Kelley v. McGee, 443 N.E.2d 908, 913-15 (N.Y. 1982) (holding that home rule provisions do not operate to restrict the state legislature in acting upon matters of statewide concern); Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1377 (Ohio 1980) (deciding that the enactment of zoning laws by a municipality may not conflict with the general laws of the state); City of La Grande v. Public Employees Retirement Bd., 576 P.2d 1204, 1211 (Or. 1978) (en banc) (finding that state legislation can preempt a home rule ordinance if the subject is of state wide concern); Humphrey v. City of Phoenix, 102 P.2d 82, 88 (Ariz. 1940) (finding that general state laws pertaining to matters of statewide concern override conflicting city charters). See generally Osborne M. Reynolds, JR., LOCAL GOVERNMENT LAW 536-39 (1982) (discussing local restrictions). It is conceivable then, that in any dispute over whether a local zoning ordinance constitutes a taking, there is a potential state law issue about whether the local regulating government has exceeded the authority delegated to it either by the state's constitutional or statutory home rule provisions or its zoning enabling act. Where there exists a question of which level of state government possesses the authority exercised, the Supreme Court has held that lower federal courts should abstain, pending an authoritative interpretation of state law by the state courts. See Louisiana Light & Power Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959) (noting that when a case "concerns the apportionment of governmental powers between City and State," it is more proper for a federal judge to "ascertain the meaning of a disputed state statute from . . . the Courts of the State" than to "himself make a dubious and tentative forecast."); see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (plurality opinion) (stating that an abstention is required "where there [has] been presented difficult questions of state law bearing on policy problems of substantial public import").
alliances with other pro-development interest groups could negate any majoritarian bias that might exist at the local level.276

CONCLUSION

Professor Rose is unquestionably correct when she pleads that the Takings Clause must be interpreted so as to find an acceptable balance between the property rights of landowners and the ability of local communities to conserve what is probably the community’s most valuable resource—land.277 Yet, the Supreme Court in Lucas does not recognize any role for deference to local land use policy when interpreting the Takings Clause. While it is true that the Court may allow some room for deference when a land use regulation does not extract all the land’s economic value, there are indications that it is only one or two votes away from extending the presumptive takings holding of Lucas to cases in which substantially less than all economic value is taken. Lower federal courts, by tinkering with the denominator of the regulated land fraction, are already well down that road.

276. This is not an argument that Justice Harlan was correct and that the Court was wrong when it extended the one-person/one-vote requirement to local governments in Avery v. Midland County, 390 U.S. 474 (1968). Given the breadth of local governing authority, even under a statutory delegation of authority to legislate for the health, safety, and welfare of the community, see State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980) (“When the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power . . . .”), it is unreasonable to require individuals to go to the state legislature every time they think that a local government is acting improperly. In fact, a state’s constitutional provision prohibiting special legislation might bar piecemeal recourse to the state legislature. See Reynolds, supra note 275, at 85-88. The argument, rather, is that the state legislature, by general law, is fully able to ensure that local zoning gives voice to the interests of those outside its boundaries. See generally State Sponsored Growth Management as a Remedy for Exclusionary Zoning, 108 Harv. L. Rev. 1127, 1128 (1995) (suggesting that “state-sponsored growth-management statutes . . . might be used to counter exclusionary zoning”).

277. See Rose, Takings, Federalism, Norms, supra note 24, at 1148 (stating that “ takings jurisprudence has to take into account communities’ need to deal with shrinking resources.”). Property absolutists, like Richard Epstein, do not even make an attempt to achieve that balance. For him, governments are established to protect an individual’s private property, not to diminish it. The only benchmark for deciding whether it is doing one or the other is the common law. Process theorists, like William Fischel, wink at a balance by their willingness to approve zoning changes that reflect the community’s norm. That is, however, more of an accommodation to a landowner’s investment-backed expectations than it is to a community’s ability to respond to increasing urbanization pressures. Moreover, the analytical shift from the substance of the proposed land use regulation to a set of a priori assumptions about the ability of political minorities to have their views accounted for necessarily ignores the substantive legitimacy of the land use policies formulated.
My argument is that the failure to account for the state’s interest in protecting its citizens from nonnuisance-related harms (or even granting them the benefits of a variety of “lifestyle” amenities) is both normatively improper and inconsistent with the Court’s approach to analyzing the scope of nonproperty-based individual liberties claims, textual and nontextual alike. Even accepting that landed property rights ought not to be treated as a constitutional stepchild, there is no reason to treat them as the constitutional patriarch (or matriarch). The proposal is simple. Retain the presumptive takings rule of Lucas. All other land use regulations, excepting those that are true physical takings, should be judged according to a rational basis standard. This is not a call to return to the “muddle-creating,” ad hoc balancing test of Penn Central. It is only an appeal that the Court apply to property rights the same distinction it seems to apply to other rights, even so-called fundamental rights—the distinction between the imposition of a cost and a denial of the right.

278. Despite all of the apparent dissatisfaction with the indeterminacy of Penn Central’s ad hoc balancing, the Court has not abandoned that approach. See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-47 (1993) (applying a Penn Central style balancing test to a claim of taking of property rights under a pension plan). Indeed, Professors Heller and Krier argued that the Supreme Court’s “muddle” of the Takings Clause has continued more or less unabated since Mahon in 1922. See Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 HARV. L. REV. 997, 1022-24 (1999) (explaining that the “demolition” of the Takings Clause has been the Court’s doing for the last seventy-five years).