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# **FEDERALISM AND PROPERTY RIGHTS**

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# Federalism and Property Rights

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## INTRODUCTION

Both the Supreme Court and leading legal scholars have cited federalism as a reason to severely limit judicial enforcement of constitutional property rights. In *Kelo v City of New London*,<sup>1</sup> probably the most controversial property rights decision in Supreme Court history, Justice John Paul Stevens’s majority opinion argued that “the needs of society have varied between different parts of the Nation,” thereby justifying “a strong theme of federalism [in the Court’s property rights jurisprudence], emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”<sup>2</sup> Similarly, the Court cited federalism concerns as justification for its ruling in *San Remo Hotel v City & County of San Francisco*,<sup>3</sup> a decision that makes it extremely difficult to bring takings claims in federal court.<sup>4</sup>

Leading scholars such as Robert Ellickson, Thomas Merrill, Frank Michelman, and Roderick Hills have made similar claims, arguing that respect for federalism and diverse local needs justi-

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<sup>1</sup> 545 US 469 (2005).

<sup>2</sup> Id at 482, quoting *Hairston v Danville & Western R Co*, 208 US 598, 606–607 (1908). Compare David L. Callies, *Kelo v. City of New London: Of Planning, Federalism, and a Switch in Time*, 28 U Hawaii L Rev 327, 328 (2006) (arguing that *Kelo* represents a “shift in favor of federalism” by the liberal wing of the Court) with Mark Fenster, *The Takings Clause, Version 2005: The Legal Process Of Constitutional Property Rights*, 9 U Pa J Const L 667, 719–26 (2007) (arguing that *Kelo* and other recent decisions deferring to state governments on property rights issues cannot be explained by federalism considerations because the Court is equally deferential in cases involving the federal government).

<sup>3</sup> 545 US 323 (2005).

<sup>4</sup> Id at 346–47.

fies a policy of judicial deference on property rights issues.<sup>5</sup> Defenders of the federalism rationale for judicial deference on property rights issues make two key arguments. One is based on “competitive federalism”—the idea that abuses of property rights by state or local governments will be curbed by interjurisdictional competition.<sup>6</sup> The other is the superior knowledge and expertise of state and local governments in catering to the diverse needs of their communities.<sup>7</sup>

In this article, I criticize both claims. In Part I, I contend that competitive federalism is unlikely to provide effective protection for property rights in land because property is an immobile asset. People who “vote with their feet” by leaving a jurisdiction cannot take their land with them. For this crucial reason, interjurisdictional competition is unlikely to effectively protect property rights in land, though it may be more useful in the case of rights to mobile property. Defenders of the competitive federalism argument obviously realize that much property is immobile. But they have failed to sufficiently consider the significance of this fact.

Part II takes up the issue of diversity and expertise. While state and local governments may indeed have greater expertise

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<sup>5</sup> For examples of such arguments, see generally Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *Tulsa L Rev* 751 (2009); Roderick Hills, Jr., *How Federalism Inevitably Trumps Taking Doctrine—And a Good Thing Too*, Prawfsblawg (June 18, 2010), online at <http://prawfsblawg.blogs.com/prawfsblawg/2010/06/how-federalism-inevitably-trumps-takings-doctrine-1.html> (visited May 14, 2011); Roderick Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 *Geo Wash L Rev* 888, 891–92 (2006) (interpreting and defending *Kelo* and other recent Supreme Court property rights decisions as examples of deference to “federalism”); The *Kelo* Decision: Investigating Takings of Homes and Other Private Property, Hearing before the US Senate Committee on the Judiciary, 109th Cong, 1st Sess 14, 16 (2005) (testimony of Professor Thomas A. Merrill, Columbia University School of Law) (“Merrill Testimony” hereinafter) (asserting that federal action regarding public-use issues is an area where it is important to “remember the issues of federalism and not impose a one-size-fits-all limitation”); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 *Wm & Mary L Rev* 301 (1993) (claiming that Supreme Court enforcement of restrictions on regulatory takings undermines federalism); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 *Md L Rev* 464 (2000) (same); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L J* 203 (2004) (same). For a brief response to Hills’s argument, see Ilya Somin, *Federalism and Judicial Enforcement of Constitutional Property Rights*, Volokh Conspiracy (June 20, 2010), online at <http://volokh.com/2010/06/20/federalism-and-judicial-enforcement-of-constitutional-property-rights> (visited May 14, 2011).

<sup>6</sup> Ellickson, 44 *Tulsa L Rev* at 762–763 (cited in note 5).

<sup>7</sup> See Hills, 74 *Geo Wash L Rev* 888 (cited in note 5); *Kelo*, 545 US at 482; *San Remo*, 545 US at 347 (noting that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations”).

than federal courts in assessing conditions within their jurisdictions, federal judicial protection of property rights ultimately empowers not judges but property owners. It is the latter who will actually get to decide the uses of the land in question in cases where federal courts prevent state or local governments from condemning their property or restricting its use. As a general rule, property owners are likely to have greater knowledge of their land than local government officials do, even if the latter are more knowledgeable than federal judges. This is particularly likely in cases where the local or state government in question rules over millions of people with numerous diverse properties and therefore necessarily has only very limited information about variations in conditions within its domain.

At the outset, it is useful to state the limited nature of my analysis in this article. I do not advance a comprehensive theory of judicial protection for property rights. Rather, I merely reject the view that federalism provides a strong reason for restricting judicial enforcement of constitutional property rights by federal courts. There are other justifications for strictly limiting judicial protection of property rights that I do not consider here, such as claims that this approach is required by adherence to precedent or by fidelity to the original meaning of the Constitution.<sup>8</sup> Likewise, I do not consider the full range of arguments in favor of strong judicial enforcement of property rights, such as those based on natural law theory or economic efficiency.<sup>9</sup> The article does not develop a comprehensive theory of the appropriate level of judicial protection for property rights.

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<sup>8</sup> For arguments that the original meaning of the Constitution justifies heavy judicial deference on property rights issues, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782 (1995); Jed Rubenfeld, *Usings*, 102 Yale L J 1077 (1993). For contrary views, see Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 Mich St L Rev 877, 894–905 (2004) (discussing in detail the limited eighteenth and nineteenth-century conceptions of public use that banned most private-to-private takings); James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42–59 (Oxford 3d ed 2008) (detailing the evidence that protecting property rights was a central purpose of the Constitution at the time of the founding); James W. Ely, Jr., *Can the “Despotic Power” Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 Prob & Prop 31, 32–36 (2003) (describing how nineteenth-century courts generally upheld “private to private” takings only in cases where the new private owner was a common carrier such as a railroad or regulated a public utility).

<sup>9</sup> See generally Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard 1985); Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (Oxford 2008); Ellen Frankel Paul, *Property Rights and Eminent Domain* (New Brunswick 1987).

I also focus on property rights issues arising under the Takings Clause of the Fifth Amendment.<sup>10</sup> These include “public use” cases, which examine whether a condemnation of property by the government serves a purpose that qualifies as a public use, and regulatory takings cases, where courts determine whether a regulation that restricts the use of property is sufficiently onerous to qualify as a “taking” that requires “just compensation” under the Amendment. *Kelo* is, of course, the best-known recent Supreme Court public use decision; it reaffirmed the view that almost any “public purpose” or potential benefit qualifies as a public use. The Court has also decided a number of important regulatory takings cases over the last three decades.<sup>11</sup> In this area as well, the Court has taken a generally deferential approach, imposing only quite weak restraints on state and local governments, though it has been less passive than on public use.<sup>12</sup>

Notwithstanding its limited focus, the Article does examine and criticize an important rationale for judicial deference on property rights issues, one that has been embraced by the Supreme Court and prominent legal scholars. It also resolves a seeming contradiction in conservative and libertarian constitutional thought. Commentators associated with these two viewpoints tend to argue for both strict limits on federal power and strong judicial protection of property rights against interference by local and state governments. This creates an apparent contradiction, one that I briefly considered in my very first article criticizing the Court’s decision in *Kelo*.<sup>13</sup> Is it inconsistent for me and others to support both strong limits on federal power on one hand and robust federal judicial protection of property rights against local government on the other?<sup>14</sup> In this Article, I explain

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<sup>10</sup> US Const Amend V.

<sup>11</sup> For some of the more prominent examples, see *San Remo*, 545 US 323 at 346–47; *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency*, 535 US 302 (2002); *Dolan v City of Tigard*, 512 US 374 (1994); *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992); *Yee v Escondido*, 503 US 519 (1992); *Nollan v California Coastal Commission*, 483 US 825 (1987).

<sup>12</sup> See Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, George Mason Law & Economics Research Paper No 8-53 at 3–26 (2008), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1247854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854) (visited May 14, 2011) (surveying the relevant cases).

<sup>13</sup> See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup Ct Econ Rev 183, 221–23 (2007).

<sup>14</sup> For my work exploring the benefits of decentralization and competition in government, see, for example, Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 Soc Phil & Pol 202 (2011); John McGinnis and Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 Nw U L Rev 89 (2004).

why the inconsistency is more apparent than real. In reality, judicial protection for property rights enhances decentralization more than it undermines it.

### I. Property Rights and the Limits of Interjurisdictional Competition

Some who deploy the federalism argument against judicial enforcement of property rights argue that such intervention is unnecessary because “competitive federalism” will constrain abuses.<sup>15</sup> Advocates claim that state and local governments that abuse the power of eminent domain or engage in excessive regulatory takings will lose business and taxpayers to other jurisdictions, thereby suffering financial losses as a result.<sup>16</sup> Robert Ellickson contends that this factor helps account for what he considers to be the relatively strong political reaction to *Kelo*, under which various states and localities have enacted strong reform laws intended to curb economic development takings.<sup>17</sup> Ellickson’s claim is an extension of standard economic theories arguing that the combination of decentralization and mobility will constrain subnational government abuses and force them to adopt efficient economic policies that benefit citizens.<sup>18</sup>

#### A. The Impact of Immobility

The main difficulty with such competitive federalism arguments is that they fail to take adequate account of the immobility of property rights in land. Property owners are unlikely to “vote

<sup>15</sup> Ellickson, 44 *Tulsa L Rev* at 762 (cited in note 5).

<sup>16</sup> See *id.* at 762–63. See also Vicki L. Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum L Rev* 473, 509 (1991). But see Anup Malani, *Valuing Laws as Local Amenities*, 121 *Harv L Rev* 1273 (2008) (providing evidence showing that the effects of various laws are capitalized into home prices, which local governments have incentives to keep high).

<sup>17</sup> Ellickson, 44 *Tulsa L Rev* at 762–63 & n 66 (cited in note 5).

<sup>18</sup> For examples of some of the better-known works along these lines, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J Polit Econ* 416 (1956); Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* 173–86 (Cambridge 1980); Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (Cambridge 1996); Thomas R. Dye, *American Federalism: Competition Among Governments* (Lexington Books 1990); James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, 25 *Publius* 19 (Spring 1995); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 *J Econ Lit* 1120, 1134–37 (1999); Wallace E. Oates and Robert Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Efficiency Distorting?*, 35 *J Pub Econ* 333 (1988); Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J L, Econ, & Org* 1 (1995).

with their feet” against eminent domain or regulatory exactions because, if they move out, they cannot take their land with them. Exit rights are little help in protecting assets that you can’t take with you when you leave.<sup>19</sup>

This crucial point suggests that competitive federalism is particularly unlikely to protect property rights in land. In some instances, limits on state and local governments’ ability to tax mobile assets such as income might actually incentivize them to target immobile ones such as land, in order to find ways to transfer resources to favored interest groups.<sup>20</sup> In this way, competitive federalism might actually exacerbate rather than alleviate the exploitation of immobile resources. For example, state and local governments are limited in their ability to raise income taxes because of tax competition between jurisdictions. Migration patterns tend to favor low-tax jurisdictions.<sup>21</sup> This factor increases state and local government incentives to target immobile resources such as land instead. Other evidence suggests that local governments generally tend to overexploit immobile capital, while oversubsidizing mobile resources.<sup>22</sup>

1. State and local government incentives to exploit immobile resources.

Even if competitive federalism does not exacerbate state and local government tendencies to exploit immobile resources, it at least is unlikely to protect them from state predation. Individuals might choose to leave a given jurisdiction. But they will have to leave their land behind, still available for the state to take, regulate, or tax. For this very reason, it is unlikely that individuals who fear threats to their immobile property will choose to migrate for that purpose in the first place. After all, doing so in-

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<sup>19</sup> See Richard A. Epstein, *Exit Rights under Federalism*, 55 L & Contemp Probs 147, 154–59 (1992) (explaining limits of exit rights in protecting immobile assets); William Fischel, *Regulatory Takings: Law, Economics, and Politics* 282–88 (Harvard 1995) (explaining ways in which government action involving abusive regulatory takings has adverse consequences for landowners given the immobile nature of real property).

<sup>20</sup> See, for example, David Wildasin, *Labor-Market Integration, Investment in Risky Human Capital, and Fiscal Competition*, 90 Am Econ Rev 73 (2000).

<sup>21</sup> See Elda Pema, *Do State Taxes Affect the Migration of Human Capital?*, Working Paper (2009), online at [https://www.msu.edu/~pemaelda/E\\_Pema-Taxes%20and%20Human%20Capital.pdf](https://www.msu.edu/~pemaelda/E_Pema-Taxes%20and%20Human%20Capital.pdf) (visited May 14, 2011) (summarizing previous studies and providing evidence that higher-income and better-educated taxpayers are particularly likely to gravitate to low-tax jurisdictions).

<sup>22</sup> See Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 Harv L Rev 482 (2009).

curs moving costs,<sup>23</sup> but does not actually accomplish the goal of protecting the threatened property.

The problem is not simply, as Professor Melvyn R. Durchslag puts it, that exit rights “cost money” lost as a result of regulatory impositions.<sup>24</sup> It is that moving fails to accomplish the purpose of freeing the owner from the very burden it was undertaken to avoid. If the owner moves without selling the property, he or she is no better off than before, since the land remains subject to the regulatory mandate in question. If the owner does sell, the price he or she gets will be proportionately lower as a result of the regulation, and the resulting loss will simply take the form of a lower sale value. Either way, the immobility of property prevents the owner from using exit rights as a means of escaping a regulatory burden imposed on land. For this reason, targeting immobile property is unlikely to cost the state by incentivizing the owners to flee and take their mobile assets and income with them.

Landowners who believe that their land is threatened could potentially avoid the danger if they sell the land and move before the threat materializes. For example, if they suspect their land is likely to be condemned by local government, they could try to sell the property before the condemnation actually happens. However, this strategy is only likely to work if the real estate market fails to take account of the risk of condemnation and incorporate it into the price of the land. In reality, the threat of eminent domain tends to drive down land prices in a given area, a phenomenon known as “condemnation blight.”<sup>25</sup> The same is likely to be true for other types of threats to property rights. The owner will only be able to “escape” the threat if he or she has private information unavailable to the market or if she finds an obtuse or highly risk-acceptant buyer. As Professor Ellickson recognizes, “if the abuse [of property rights] were widely known, exiting in this fashion would not enable the landowner to avoid financial loss because most, if not all, of the cost of the abuse would be negatively capitalized in the sale price.”<sup>26</sup>

Obviously, regulatory and tax burdens that affect mobile assets also sometimes impact immobile ones as well. For example, high state income taxes or a weak economy caused by poor regu-

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<sup>23</sup> For a brief discussion of the relevance of moving costs to foot voting, see Somin, 28 Soc Phil & Pol at 214–15 (cited in note 14).

<sup>24</sup> Durchslag, 59 Md L Rev at 511 (cited in note 5).

<sup>25</sup> For the classic analysis, see Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 Notre Dame L Rev 765 (1973).

<sup>26</sup> Ellickson, 44 Tulsa L Rev at 763 n 66 (cited in note 5).

latory policies might reduce land values. However, there is an important distinction between a regulatory burden that primarily affects a mobile asset and one whose impact falls mostly on an immobile one. In the former case, affected individuals still have a significant incentive to move to avoid the burden, since doing so can relieve them of most of it, even if not all.

Consider, for example, a flawed economic policy 80 percent of whose costs come in the form of reduced incomes and 20 percent in the form of reduced home values. Exit rights can still be used to avoid 80 percent of the associated harm. In this scenario, many of the losers from the policy will have an incentive to exit from the jurisdiction in order to avoid it.

By contrast, the costs of eminent domain and regulatory takings mostly fall on immobile assets, and exit therefore cannot be used to avoid most of them. The key point is not so much whether a policy targets immobile assets in a formal legal sense, but whether its effects can be escaped by moving. With most eminent domain and regulatory takings policies, the answer is largely “no.”

Despite recognizing that “[t]he immobility of land reduces political pressures on states and cities to treat landowners fairly,”<sup>27</sup> Ellickson nonetheless claims that competitive pressures will reduce such abuses because their presence is likely to drive down land prices. This in turn gives voters incentives to mobilize against them, and local governments reason to cut back on abuse in order to maintain their tax base.<sup>28</sup> As a class, homeowners wield great influence over local governments, and keeping up the value of their property is usually one of their main objectives.<sup>29</sup>

Ellickson’s point would be an important constraint on local government abuse of property rights if all or most property were equally threatened by such abuses, thereby driving down prices across the board. In fact, however, the use of eminent domain for transfer to private parties generally targets the poor and politically weak.<sup>30</sup> Wealthier and more politically influential groups are rarely targeted for the good reason that they can impose severe political costs on officials who try to take their property.

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<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> See generally William Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government, Taxation, School Finance, and Land-Use Policies* (Harvard 2001).

<sup>30</sup> See Somin, 15 Sup Ct Econ Rev at 195–97, 267–71 (cited in note 13); Dick M. Carpenter and John K. Ross, *Testing O’Connor and Thomas: Does the Use Of Eminent Domain Target Poor and Minority Communities?*, 46 Urban Stud 2447 (2009).

Politically vulnerable groups do indeed suffer declines in the value of their property in jurisdictions that make extensive use of eminent domain and other restrictions on property rights. But there is likely to be little or no impact on the value of other land in the area. For this reason, many jurisdictions can abuse property rights extensively without risking more than a modest erosion of their property tax base. The fact that politically vulnerable groups are the ones targeted also makes it unlikely that they can effectively use their “voice” in the political process to make up for the ineffectiveness of exit rights.<sup>31</sup>

The perverse incentives of local governments are often exacerbated by “time horizon” problems. Even if ill-advised takings and other restrictions on property rights do erode the tax base or otherwise weaken the local economy, the effects usually do not become evident for several years, by which time the political leaders who adopted these policies might well be out of office and public attention will, in any event, have moved on to other matters.<sup>32</sup> By contrast, transferring land to politically favored interests at the expense of the poor or politically weak creates immediate political benefits for politicians.

The relatively short time horizons facing politicians further reduce the impact of competitive federalism in restraining abuses of property rights. Given the immobility of land, any negative competitive effects from such abuses are likely to be modest in size and emerge only slowly. By the time they do, enough time may have passed that the political leaders responsible will escape any political retaliation.

In the case of eminent domain, the effects of immobility are partly offset by the fact that the government must pay “fair market value” compensation for the property it condemns. However, compensation payments do not account for the “subjective value” many owners attach to their property above and beyond its market price, and often do not even fully compensate for market value.<sup>33</sup>

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<sup>31</sup> See also discussion Part II.B, *infra*, explaining how political ignorance limits effectiveness of voice in constraining abuse of property rights by local governments. For the classic formulation of voice and exit as alternative responses to bad policy, see Albert O. Hirschman, *Exit, Voice, and Loyalty* (Harvard 1971).

<sup>32</sup> See Somin, 15 Sup Ct Econ Rev at 202–03 (cited in note 13).

<sup>33</sup> See discussion of compensation in Part II.A, *infra*, and works cited there.

## 2. Why mobile assets are different.

The importance of immobility does suggest that state and local governments should be less likely to threaten the rights of owners of mobile assets. For example, the California Supreme Court has ruled that local governments can use eminent domain to condemn sports teams in order to prevent them from moving, thereby authorizing the City of Oakland to use eminent domain against the Oakland Raiders in order to prevent their planned move to Los Angeles.<sup>34</sup> Such condemnations would also probably be legal in the many other states that define “public use” very broadly, and under federal public use standards.<sup>35</sup> Yet condemnations of sports teams and other mobile assets are extremely rare, probably because the owners of such assets can move them out of state before any condemnation is completed.<sup>36</sup> In 1985, an effort by the City of Baltimore to condemn the NFL’s Baltimore Colts franchise in order to keep it from moving to Indianapolis failed because the Colts were able to depart before the city paid compensation for the taking.<sup>37</sup> The federal district court agreed that “it is now beyond dispute that intangible property is properly the subject of condemnation proceedings,” but refused to up-

<sup>34</sup> *City of Oakland v Oakland Raiders*, 646 P2d 835 (Cal 1982). A California appellate court later ruled that this eminent domain action was barred by the Commerce Clause of the federal Constitution because of the resulting burden on interstate commerce. *City of Oakland v Oakland Raiders*, 174 Cal App 3d 414 (Cal App 1st Dist 1985). However, the basis for the ruling—that the City’s plan would create an injunction preventing the team from moving forever and that it would affect an entire nationwide league rather than just the Raiders—would not extend to most other types of mobile property. *Id.* at 421.

<sup>35</sup> See, for example, *Kelo*, 545 US at 469–77 (concluding that any “public purpose” qualifies as a public use); *Hawaii Housing Authority v Midkiff*, 467 US 229, 241 (1984) (holding that a public use is anything “rationally related to a conceivable public purpose”). For discussions of broad definitions of “public use” at the state level, see, for example, Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn L Rev 2100, 2120–37 (2009) (explaining how many states retain extremely broad public use standards even after the *Kelo* backlash); Thomas Merrill and David A. Dana, *Property: Takings* 196 (2002) (noting that most state courts have “settled on a broader understanding [of public use] that requires only that the taking yield some public benefit or advantage”). Over the last twenty years, many state supreme courts have taken a more restrictive approach to public use. See Ilya Somin, *The Judicial Reaction to Kelo*, 4 Albany Gov’t L Rev 1 (2011). However, the broad view is still widely accepted.

<sup>36</sup> The California court that ultimately invalidated the attempted condemnation of the Oakland Raiders noted that “eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce. Whether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case.” *City of Oakland v Oakland Raiders*, 174 Cal App 3d at 419.

<sup>37</sup> *Mayor & City Council of Baltimore v Baltimore Football Club, Inc.*, 624 F Supp 278, 283 (D Md 1985).

hold the condemnation because the Colts were able to leave the jurisdiction before compensation was paid.<sup>38</sup>

### B. Some Relevant Empirical Evidence

Historical evidence on the use of eminent domain undercuts claims that it can be successfully constrained by competitive federalism. If the theory were true, the takings that inflict great harm on property owners for little or no social gain should be extremely rare, if not nonexistent. In reality, large-scale abuse of eminent domain authority by state and local governments is far from uncommon in American history.

Between World War II and the present, several million Americans, most of them poor or minorities, were forcibly displaced by blight, “urban renewal,” and economic development takings.<sup>39</sup> In most cases, those forced to move suffered substantially greater harm than they were ever compensated for.<sup>40</sup> Over time, most states have expanded the legal definition of “blight” to the point where almost any area can be declared “blighted” and condemned, making it easier to transfer property coveted by influential interest groups.<sup>41</sup> Under these ultra-broad definitions, courts have ruled that even such areas as downtown Las Vegas and Times Square in New York can be declared “blighted” and condemned.<sup>42</sup> In two recent decisions, the New York Court of Ap-

<sup>38</sup> *Id.* at 282–84.

<sup>39</sup> Somin, 15 *Sup Ct Econ Rev* at 268–69 (cited in note 13).

<sup>40</sup> For various accounts, describing these losses see, for example, Herbert J. Gans, *The Urban Villagers: Group and Class in the Life of Italian-Americans* 362–84 (2d ed 1982) (documenting loss of community and economic harms caused by condemnations); Scott Greer, *Urban Renewal and American Cities: The Dilemma of Democratic Intervention* 35–64 (Bobbs-Merrill 1965) (describing harm caused by urban renewal condemnations); Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949–1962* 52–72 (MIT 1964) (describing the enormous social and economic costs of urban development takings); Jane Jacobs, *The Death and Life of Great American Cities* 5, 270–90, 311–14 (Random House 1961) (same); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L & Pol Rev* 1 (2003) (describing use of blight condemnations to force out poor minority populations); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 *U Mich J L Ref* 689, 740–41 (1994) (describing extensive uncompensated losses suffered by victims of urban renewal condemnations); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 *Va L Rev* 745 (1971) (same).

<sup>41</sup> See Ilya Somin, *Blight Sweet Blight*, *Legal Times* 42 (Aug 14, 2006); Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *Fordham Urban L J* 305, 307 (2004). Broad definitions of blight have persisted in many states even in the aftermath of post-*Kelo* reform. See Somin, 93 *Minn L Rev* at 2120–28 (cited in note 35).

<sup>42</sup> See *City of Las Vegas Downtown Redevelopment Agency v Pappas*, 76 P3d 1, 12–15 (Nev 2003) (holding that downtown Las Vegas is blighted); *In re W 41st St Realty v New York State Urban Development Corp*, 744 NYS 2d 121, 125–26 (NY App Div 2002)

peals has upheld major blight condemnations based on an extremely broad definitions of “blight” under which virtually any area qualifies.<sup>43</sup> Both decisions also chose to overlook flagrant bias on the part of condemning authorities in favor of powerful interest groups to which the condemned property was transferred.<sup>44</sup>

In many of these cases, the federal government helped finance or otherwise promote the relevant takings.<sup>45</sup> But state and local governments generally took the leading role and paid most of the costs.<sup>46</sup>

Pure “economic development” takings have resulted in abuses similar to those engendered by “blight” condemnations. In the famous 1981 *Poletown* case, over 4000 Detroiters were expelled from their homes and numerous businesses and schools were destroyed so that land could be transferred to General Motors to build a new factory that turned out to be far less productive than originally promised.<sup>47</sup> In *Poletown* and many other such cases, the condemnations actually ended up destroying far more economic value than was ever created by the new uses of the condemned land.<sup>48</sup>

This extensive record of abuse undercuts claims that competitive federalism is sufficient to provide strong protection for property rights in land and other immobile assets. It is, of course, possible that the situation would have been even worse without

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(holding that Times Square is blighted).

<sup>43</sup> See *Matter of Goldstein v New York State Urban Development Corp*, 921 NE 2d 164, 172–73 (NY 2009) (defining blight as any area where there is “economic underdevelopment” or “stagnation” and holding that, even under this broad definition of blight, a blight designation could only be invalidated if “there is no room for reasonable difference of opinion as to whether an area is blighted”); *Matter of Kaur v New York State Urban Development Corp*, 933 NE 2d 721 (NY 2010) (adopting the *Goldstein* definition of “blight”). For a detailed discussion of these two cases and the abuses involved, see Somin, Albany Gov L Rev at 15–21 (cited in note 35); and Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after Goldstein and Kaur*, Fordham Urban L J (forthcoming).

<sup>44</sup> For a detailed discussion of this aspect of the case, see Somin, *Let There Be Blight* (cited in note 43).

<sup>45</sup> See works cited in note 35.

<sup>46</sup> *Id.*

<sup>47</sup> *Poletown Neighborhood Council v City of Detroit*, 304 NW2d 455 (Mich 1981), overruled by *County of Wayne v Hathcock*, 684 NW2d 765 (Mich 2004). For a detailed analysis of *Poletown* and *Hathcock*, see Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 Mich St L Rev 1005 (symposium on *County of Wayne v Hathcock*).

<sup>48</sup> See Somin, 15 Sup Ct Econ Rev at 190–200 (cited in note 13). For the relevant evidence on the *Poletown* takings, see Somin, *Overcoming Poletown*, 2004 Mich St L Rev at 1011–21 (cited in note 47).

federalism. It is difficult to say what the state of property rights protection in the United States would have been under a less federal or purely unitary political system. At the very least, however, it is clear that competitive federalism has not been enough to prevent massive and persistent abuses of property rights by state and local governments.

Other relevant evidence includes the tendency of some unpopular minority groups to avoid investing in land in order to make it easier for them to flee unfriendly jurisdictions. The tendency of Diaspora Jews to invest in “human capital” instead of land is a classic example.<sup>49</sup> Jews were forced to take such precautions despite the fact that there was widespread freedom of movement throughout Europe until the spread of passport systems in the late nineteenth and early twentieth centuries made migration more difficult.<sup>50</sup> The existence of freedom of movement and dozens of competing independent states in early modern Europe was not sufficient to make it safe for an oppressed minority to invest heavily in immobile property.<sup>51</sup>

To be sure, when members of an unpopular group choose not to acquire immobile assets, they can avoid victimization by local governments who target such assets. But this benefit comes at the cost of losing the advantages of owning land. Thus the tendency of government to overexploit immobile assets still imposes severe costs on these groups, albeit indirectly.

Overall, both economic theory and empirical evidence suggest that competitive federalism is unlikely to provide more than a very modest level of protection for property rights in land and other immobile assets. It seems to be much more effective in the case of mobile personal and intangible property. But that still leaves state and local governments free to target land. So long as property in land continues to be immobile and subject to the ju-

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<sup>49</sup> See Reuven Brenner and Nicholas M. Kiefer, *The Economics of the Diaspora: Discrimination and Occupational Structure*, 29 *Econ Dev & Cultural Change* 517 (1981). For criticism of this view, see Eliezer Ayal and Barry Chiswick, *The Economics of the Diaspora Revisited*, 31 *Econ Dev & Cultural Change* 861 (1983). But see Reuven Brenner, *The Economics of the Diaspora Revisited: A Reply*, 31 *Econ Dev & Cultural Change* 877 (1983) (response to the critics). See also Steven Menashi, *Jews and Money*, *Commentary* 49, 51 (Feb 2010) (“Always under the threat of expropriation or expulsion, it made little sense for Jews to acquire land or other immovable goods; one could more easily relocate wealth gained from trade or finance.”).

<sup>50</sup> See John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* 57–121 (Cambridge 2000).

<sup>51</sup> Germany alone contained over 300 independent states until the Congress of Vienna reduced their number to “only” thirty-nine. See generally Adam Zamoyski, *The Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (Harper Collins 2007).

risdiction of whatever state and local governments govern the area where it is located,<sup>52</sup> this danger is likely to persist. Strong protection for the latter probably requires federal intervention.

## II. KNOWLEDGE, EXPERTISE, AND DIVERSE LOCAL CONDITIONS

The most often cited federalism-based critique of federal judicial protection of property rights is the idea that state authorities have superior knowledge and expertise in weighing competing uses of land. Both the Supreme Court and scholars such as Roderick Hills and Thomas Merrill and have emphasized the superior “institutional competence” of state governments in addressing property rights issues.<sup>53</sup>

It is indeed true that federal judges “mostly innocent of any real knowledge of real estate” have less knowledge of property issues than state and local officials.<sup>54</sup> But this argument for abjuring federal judicial protection for property rights has crucial weaknesses. It ignores the fact that protection for property rights empowers property owners, not judges, to make decisions concerning the use of their land. Owners are likely to be more knowledgeable than government officials about their property, and often have better incentives to find the most efficient use for their land. It also ignores the extent to which the supposed expertise of local officials might serve the agendas of organized interest groups rather than promote efficient use of land.

The problem of externalities from property owners’ use of their land does not undermine the general conclusion that owners have greater local knowledge and expertise than governments do. Although externalities are a genuine problem, they can be created by government policy just as easily as alleviated

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<sup>52</sup> Abraham Bell and Gideon Parchomovsky have proposed allowing landowners to choose to have their property governed by the laws of other jurisdictions with respect to various matters. See Abraham Bell and Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L J 72, 101–13 (2005). Bell and Parchomovsky’s proposal is unlikely to be enacted in the near future. In any event, it explicitly excludes some areas of law, and probably would not allow property owners to opt out of a local jurisdiction’s power of eminent domain or ability to impose regulatory takings. *Id.* at 109–13.

<sup>53</sup> See Hills, *How Federalism Inevitably Trumps Taking Doctrine* (cited in note 5) (emphasizing superior “institutional competence” of state governments); *San Remo*, 545 US at 347 (noting that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations”). See also Merrill Testimony, 109th Cong, 1st Sess at 16 (cited in note 5) (making similar points, and emphasizing that “property rights have different circumstances around the country. I think that this is an area where State variation and experimentation ought to be allowed to flourish”).

<sup>54</sup> Hills, *How Federalism Inevitably Trumps Taking Doctrine* (cited in note 5).

by it. Moreover, property owners have numerous private sector tools for handling externalities on their own without government assistance. Even if local governments need some leeway to address externalities created by property owners, that does not justify an across-the-board policy of judicial deference on property rights issues.

Finally, the argument from expertise and interstate diversity would, if applied consistently, justify eliminating judicial protection of a wide range of constitutional rights, not just property rights. For example, the rights protected by the First and Fourth Amendments also involve factors that vary greatly from state to state and questions on which federal judges are likely to be less knowledgeable than state and local officials.

#### A. Property Rights and Local Knowledge

When federal judicial rulings protect property rights, they necessarily do so through the agency of federal judges, most of whom lack expertise in property law and local land use issues. But it is not the judges who are thereby empowered to determine the uses of the property in question. Rather, it is the private owners of the land. The latter may well have greater knowledge about the property and its possible uses than state officials do.

If courts invalidate a condemnation because it is not for a public use,<sup>55</sup> the result is that the owners can determine the use

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<sup>55</sup> Even after *Kelo*, federal courts can still invalidate takings if the official rationale for the condemnation is a pretext “for the purpose of conferring a private benefit on a particular private party.” *Kelo*, 545 US at 477. See also *id.* at 478 (noting that government is not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit”). For a detailed discussion of the development of pretextual takings jurisprudence, see Somin, *Judicial Reaction to Kelo*, Albany Gov L Rev at 24–37 (cited in note 35). For examples of recent cases where federal courts have invalidated takings as pretextual, see, for example, *Daniels v Area Plan Commission*, 306 F3d 445, 465–66 (7th Cir 2002) (invalidating taking as pretextual because of lack of a clear plan); *Armendariz v Penman*, 75 F3d 1311, 1321 (9th Cir 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for “a scheme ... to deprive the plaintiffs of their property ... so a shopping-center developer could buy [it] at a lower price”); *Aaron v Target Corp.*, 269 F Supp 2d 1162, 1174–76 (ED Mo 2003), *revd on other grounds*, 357 F3d 768 (8th Cir 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Center v Cypress Redevelopment Agency*, 218 F Supp 2d 1203, 1229 (CD Cal 2002) (“Courts must look beyond the government’s purported public use to determine whether that is the genuine reason or if it is merely pretext.”); *99 Cents Only Store v Lancaster Redevelopment Agency*, 237 F Supp 2d 1123, 1125–32 (CD Cal 2001) (invalidating taking as pretextual). Compare *MHC Financing Ltd Partnership v City of San Rafael*, 2006 WL 3507937, \*14 (ND Cal 2006) (ruling that *Kelo* requires a “careful and extensive inquiry” into the question of whether a private-to-private taking was actually adopted for the purpose of benefiting a private party).

of that property for themselves. They can choose to continue their present use of the land, change to a different use, or sell the property to someone else. In making this decision, they have every incentive to exploit their knowledge of the land and its attributes. When courts force government to pay compensation for “regulatory takings,” the result is less straightforward, since the government still ends up determining or at least restricting the use of the land in question. Nonetheless, the requirement of compensation might deter government from undertaking some inefficient regulations at the margin, and might also force it to take greater account of the costs inflicted by regulations.<sup>56</sup>

As F.A. Hayek famously described, participants in the market often have “local knowledge” that is unavailable to government officials and planners.<sup>57</sup> Hayek emphasized the relevance of “the knowledge of the particular circumstances of time and place” with respect to which “practically every individual has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation.”<sup>58</sup> The protection of property rights often facilitates effective use of precisely this kind of local knowledge.

Two types of local knowledge are especially important in considering the effects of judicial intervention to protect property rights: knowledge of the details of a particular lot and its uses, and knowledge of the “subjective value” of the property in question.

It is a standard truism of property and contract law that every tract of real property is unique.<sup>59</sup> For this reason, monetary

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<sup>56</sup> See, for example, Jonathan Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings*, 49 BC L Rev 301 (2008) (arguing that compensation requirements deter inefficient regulation and improve environmental policy). But see Somin, 15 Sup Ct Econ Rev at 214–218 (cited in note 13) (discussing limitations of compensation requirements); Daryl Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 345 (2000) (arguing that “[g]overnment actors respond to political incentives, not financial ones—to votes, not dollars. We cannot assume that government will internalize social costs just because it is forced to make a budgetary outlay”).

<sup>57</sup> F.A. Hayek, *The Use of Knowledge in Society*, 35 Am Econ Rev 519 (1945).

<sup>58</sup> *Id.* at 521.

<sup>59</sup> See, for example, *Rieveman v Burlington Northern Railroad Company*, 618 F Supp 592, 596 (SDNY 1985) (noting that “it is a well-settled principle of equity jurisprudence that every tract of land is considered unique”); *Muehlman v Keilman*, 272 NE 2d 591, 595 (Ind 1971) (“equity regards every tract of land as unique”); *Kay v Vatterott*, 657 SW 2d 80, 82 (Mo App Ct 1983) (“[e]very tract of land is recognized as having a unique value”); Restatement (First) of Contracts, § 360 at Comment (a) (“A specific tract is unique and

damages are usually considered inadequate in cases where a contract requires the delivery of real property.<sup>60</sup> Because each piece of property often has unique or at least unusual characteristics, it is extremely difficult or impossible for any government planning agency to become familiar with all the different tracts within its jurisdiction. This is particularly likely in large jurisdictions such as New York City, where planners preside over a population of millions of people with many thousands of different property tracts. New York City, California, and other large jurisdictions have some of the most permissive eminent domain laws in the country, and make extensive use of condemnation.<sup>61</sup> In massive jurisdictions like these, government planners cannot possibly achieve more than minimal familiarity with most of the land in their area.<sup>62</sup>

By contrast, property owners are far more likely to be knowledgeable about their land. They also have strong incentives to seek out additional information in order to avoid missing opportunities to increase the value of their land by making improvements or switching it to more profitable uses.

In addition to its market value, property often has a “subjective value” to its owners that goes above and beyond the market price.<sup>63</sup> For example, homeowners often feel a sentimental at-

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impossible of duplication by the use of any amount of money. Specific performance is available to enforce a contract the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple.”); Restatement (Third) of Restitution and Unjust Enrichment, § 39 at Comment (e) (“Plainly, a promised conveyance of real property (or any other unique good) is a performance for which there is no market-based substitute.”).

<sup>60</sup> Restatement (First) of Contracts, § 360.

<sup>61</sup> On New York, see Somin, Albany Gov L Rev at 15–21 (cited in note 35) (describing recent major “blight” takings in New York City); Somin, *Let There Be Blight* (cited in note 43) (criticizing recent highly permissive New York eminent domain decisions); Dick Carpenter and John K. Ross, *Empire State Eminent Domain: Robin Hood in Reverse* (Institute for Justice 2010), online at <http://www.ij.org/about/3045> (visited May 14, 2011) (describing extensive use of eminent domain in New York, especially against poor and minority neighborhoods). On California, see, for example, Somin, 93 Minn L Rev at 2131–32 (cited in note 35) (noting weakness of post-*Kelo* reform laws in California); Steven Malanga, *Can California Curb Land Grabs?*, LA Times B13 (Jan 24, 2006) (describing extensive use of eminent domain in the state).

<sup>62</sup> See generally Randal O’Toole, *The Best-Laid Plans: How Government Planning Harms Your Quality of Life, Your Pocketbook, and Your Future* (Cato Institute 2007) (providing extensive evidence of the knowledge limitations of government land use planners).

<sup>63</sup> The problem of subjective value is recognized by a wide range of scholars. See, for example, Richard A. Posner, *Economic Analysis Of Law* § 19.1, at 531 (Aspen 6th ed 2003) (“Many people place a value on their homes that exceeds its market price”); Janice Nadler and Shari Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J Empirical Legal Stud 713 (2008); Somin, 15 Sup Ct Econ Rev at 215–16 (cited in note 13); Daniel B. Kelly, *The*

tachment to their houses, or value the personal, family, and business ties they have in a given neighborhood.<sup>64</sup> Small business owners also sometimes invest subjective value in their commercial property, especially if staying in a particular location is important to the business's continued viability.<sup>65</sup> Property occupied by houses of worship, private schools, and various charitable enterprises might also have unusually high subjective value.<sup>66</sup>

In theory, government planners could take account of subjective value simply by asking owners how much value they attach to their land above and beyond the market price, and compensating them accordingly. In reality, however, owners will have strong incentives to misrepresent that value if compensation payments depend on it. So government officials have no practical way of assessing it accurately.<sup>67</sup> Current compensation payments often fail to compensate owners even for the market value of their land, much less the subjective value.<sup>68</sup> These problems of estimating subjective value and inadequate compensation even for market value undercuts the possibility that local govern-

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*"Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L Rev 1, 25–26 (2006); Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L Rev 531, 569 (2005) ("[E]ven where the object has close substitutes, the development of habit and familiarity, or sentimental connection, may create rational idiosyncratic value."); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 82–85 (1986) (showing how the use of eminent domain systematically imposes "uncompensated subjective losses" because most property owners value their holdings at more than their market value).

<sup>64</sup> See, for example, D. Benjamin Barros, *Home as a Legal Concept*, 46 Santa Clara L Rev 255, 259–85 (2006) (discussing evidence on the subjective value of homes); Margaret Jane Radin, *Property and Personhood*, 34 Stan L Rev 957 (1982) (arguing that property rights in homes deserve special protection from the law because of various subjective and personal factors that influence valuation). But see Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of the Home*, 107 Mich L Rev 1093 (2009) (arguing that both previous scholars and legal rules greatly overestimate the subjective value of homes). However, Stern acknowledges that some subsets of homes do have high subjective value, especially those in "tight-knit communities" and those of the elderly. *Id.* at 1133, 1138–39.

<sup>65</sup> See, for example, Bernard J. Frieden and Lynne B. Sagalyn, *Downtown, Inc: How America Rebuilds Cities* 34–35 (MIT 1989) (describing impact of condemnation on small businesses); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich L Rev 101, 106, 124–26 (2006) (describing how businesses often suffer uncompensated subjective value harms from condemnation).

<sup>66</sup> Churches and other houses of worship are an example of a type of high-subjective-value property that is often threatened by eminent domain. See Brief of Amicus Curiae The Becket Fund for Religious Liberty in Support of Petitioners, *Kelo v City of New London*, Civil Action No 04-108, \*8–11 & n 20 (US filed Dec 3, 2004). But see *id.* at \*12–16 (describing some of the subjective value benefits created by churches).

<sup>67</sup> See Kelly, 92 Cornell L Rev at 25–26 (cited in note 63).

<sup>68</sup> See Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990 – 2002*, 39 J Legal Stud 201 (2010).

ments can use eminent domain to foster efficient use of land by using compensation payments as proxies for the value of current land uses. In making land use decisions for themselves, by contrast, owners have strong incentives to accurately weigh the subjective value of their current use of the land against potential alternatives, including that of selling it to developers.

My argument extends recent work by several prominent federalism scholars who advocate the extension of “federalism all the way down,” empowering local governments in addition to the state governments that are the focus of conventional constitutional federalism theories.<sup>69</sup> Local governments, they contend, can more effectively represent groups that lack political power at the state level, and also often have specialized local knowledge and expertise.<sup>70</sup> The ultimate extension of political decentralization “all the way down” would transfer power not to local governments, but to individual citizens and civil society organizations, including property owners. Especially with respect to immobile assets that are not well protected by interjurisdictional competition,<sup>71</sup> empowering individual property owners might lead to more effective exploitation of local knowledge and greater protection for vulnerable minority groups than deferring to state or local governments.

## B. The Impact of Political Ignorance

Decades of public opinion research shows that most voters have little or no knowledge of politics and public policy.<sup>72</sup> In the immediate aftermath of the recent 2010 election, only 46 percent of Americans realized that the election had resulted in Republican control of the House and Democratic control of the Senate, and only 38 percent could identify John Boehner as the newly selected Speaker of the House.<sup>73</sup> Surveys taken in 2009 revealed

<sup>69</sup> See, for example, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 Harv L Rev 6 (2010); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J L & Pol 147 (2005).

<sup>70</sup> See, for example, Gerken (cited in note 69).

<sup>71</sup> See Part I.A.

<sup>72</sup> See Scott L. Althaus, *Collective Preferences in Democratic Politics* (Cambridge 2003); Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* 69–89 (Yale 1996); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 Iowa L Rev 1287, 1304–06 (2004) (summarizing evidence of extensive voter ignorance). For an account of the data on voter ignorance, see generally Ilya Somin, *Democracy and Political Ignorance* (Harvard forthcoming).

<sup>73</sup> *Public Knows Basic Facts about Politics, Economics, but Struggles with Specifics* (Pew Research Center for the People and the Press Nov 18, 2010), online at <http://people->

that only 24 percent could identify the Obama administration's widely debated "cap and trade" proposal as an "environmental" issue, and a large majority admitted that they did not understand the president's health care bill that was eventually passed in March 2010.<sup>74</sup> Polls conducted around the time of the 2004 election showed that 70 percent of Americans did not know that Congress had recently enacted a massive prescription drug bill, and 58 percent admitted that they knew little or nothing about the controversial USA Patriot Act.<sup>75</sup>

### 1. Rational ignorance and rational irrationality.

Such political ignorance is actually rational behavior because there is so little chance that an increase in any one voter's knowledge would have any impact on electoral outcomes. No matter how knowledgeable a voter becomes, the chance that his or her better-informed vote will actually swing an election is infinitesimally small. There is, therefore, very little incentive for most citizens to acquire information about politics and public policy, at least so long as their only reason to do so is to become better-informed voters.<sup>76</sup>

Voters also have poor incentives to rationally evaluate the limited political information they do possess. Since there is little reason to acquire information in order to become a "better" voter, most of those who do pay substantial attention to politics do it for other reasons, such as entertainment value, or validating their preexisting beliefs. This leads to what economist Bryan Caplan has called "rational irrationality"—a tendency to assess political information in a highly biased way that often leads to irrational and badly flawed conclusions.<sup>77</sup>

Just as sports fans evaluate new information about their favorite team and its rivals in a highly biased way, "political fans"

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press.org/reports/pdf/677.pdf (visited May 14, 2011).

<sup>74</sup> See generally Somin, *Democracy and Political Ignorance* (cited in note 72).

<sup>75</sup> Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, Policy Analysis No 525 at Tbl 1 (Cato Institute Sept 22, 2004), online at <http://www.cato.org/pubs/pas/pa525.pdf> (visited May 14, 2011).

<sup>76</sup> For a more detailed discussion of the theory of rational ignorance, see Ilya Somin, *Knowledge about Ignorance: New Directions in the Study of Political Information*, 18 *Critical Rev* 255 (2006). See generally Somin, *Democracy and Political Ignorance* (cited in note 72). The theory of rational political ignorance was first developed in Anthony Downs, *An Economic Theory of Democracy* 238–59 (Harper & Row 1957).

<sup>77</sup> See generally Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton 2007); Bryan Caplan, *Rational Ignorance versus Rational Irrationality*, 54 *Kyklos* 3 (2001).

tend to be similarly biased in favor of their preferred party and ideology.<sup>78</sup> This is individually rational behavior for the same reason that it is also rational for most citizens to forego acquiring much political information in the first place. Since there is little or no payoff to getting at the truth of political issues, biased “political fans” can enjoy following politics without suffering negative consequences for their errors. But this individually rational behavior can lead to dangerous collective results, as ignorance and irrationality influence election results and policy decisions.

## 2. Implications for property rights and land use policy.

Widespread rational political ignorance and irrationality is relevant to the debate over federal judicial enforcement of property rights in two ways: it reduces the extent to which local and state property rights policies are determined by genuine knowledge and expertise, and it makes it less likely that abuses will be corrected through the political process.

*a) Reducing the quality of government decision-making.* As compared with most other policies, economic development and “blight” condemnations of the sort at issue in many public use cases are unusually difficult for rationally ignorant voters to assess. Their full effects are not evident until years after the fact, and even then it is difficult or impossible for nonexperts to determine whether the development project made possible by the use of eminent domain led to greater economic growth than would have occurred if the previous owners of the land had been able to determine its use themselves.<sup>79</sup> Takings that transfer property to private parties for the purpose of economic development or alleviating blight are more difficult for voters to monitor than traditional “public use” condemnations for government-owned facilities and public utilities. The effects of the latter are generally easier for voters to observe because they are usually embodied in a physical structure such as a road or bridge whose impact can be more readily assessed than an intangible objective such as “economic development.”<sup>80</sup>

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<sup>78</sup> For this comparison and data supporting it, see Ilya Somin, 18 *Critical Rev* at 260–62 (cited in note 76). See also Somin, *Democracy and Political Ignorance* ch. 4 (cited in note 72).

<sup>79</sup> For greater detail on these points, see Somin, 15 *Sup Ct Econ Rev* at 201–03 (cited in note 13).

<sup>80</sup> *Id.*

To the extent that local land-use policy is influenced by voters, it is likely to reflect the impact of political ignorance and irrationality. It therefore is not likely to be guided by any great expertise or insight into local conditions. On the other hand, landowners determining the uses of their own property are not likely to be rationally ignorant, since their decisions on how to use their land will usually be decisive and have a major impact on their welfare. They also have strong incentives to make rational use of any relevant information they may acquire.<sup>81</sup>

The influence of voter ignorance on land use policy can potentially be reduced by allocating more power to government-appointed experts insulated from the political process. Such experts may be more knowledgeable than voters. But, absent democratic accountability, it is not clear why they would use their expertise to promote the welfare of the community as a whole as opposed to their own goals or those of powerful interest group lobbies. Unaccountable bureaucracies tend to be vulnerable to “political capture” by rent-seeking interest groups.<sup>82</sup> At the very least, unaccountable officials have much weaker incentives to make efficient use of land than do private owners, who directly benefit from any increases in the value of their property and bear the full cost of poor land use decisions.

Moreover, even if the experts are more knowledgeable than voters, they are still likely to be less knowledgeable than individual property owners deciding the uses of their own land. For example, they are unlikely to have detailed knowledge of the characteristics of all the different tracts in a large jurisdiction, nor do they have the information needed to assess the subjective value of competing land uses.<sup>83</sup>

Finally, knowledgeable but politically insulated government experts are still vulnerable to rational irrationality. By virtue of their very insulation, they suffer little or no personal cost from making poor policy decisions. As a result, they, like “political fans” in the general population, might assess information in a highly biased way, indulging their preexisting prejudices and ideological preferences rather than seeking truth. Research on public policy experts suggests that many do a poor job of predict-

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<sup>81</sup> See Somin, 28 Soc Phil & Pol at 221–23 (cited in note 14) (describing advantages of private sector decision-making with respect to rational ignorance and rational irrationality).

<sup>82</sup> For a review of the relevant literature on capture and rent-seeking, see Dennis C. Mueller, *Public Choice III*, 347–53 (Cambridge 2003).

<sup>83</sup> See discussion in Part II.A.

ing policy outcomes and other relevant events because of such biases.<sup>84</sup> For these reasons, transferring power to experts is unlikely to “solve” the problem of voter ignorance.

*b) Reducing the ability of the political process to monitor abuses.* In addition to reducing the quality of government decision making, widespread political ignorance also undermines the ability of the political process to prevent abuses of property rights.<sup>85</sup> Voters cannot punish politicians for abusive policies at the ballot box if the voters do not know what the officials are doing or do not understand the policies’ negative effects.

The political reaction to *Kelo* is a dramatic example of the impact of political ignorance. Over 80 percent of the public opposed the Court’s decision and “economic development” takings, and the result was denounced by politicians and activists across the political spectrum.<sup>86</sup> Over the next several years, forty-three states and the federal government all enacted new legislation that purported to restrict the use of eminent domain—a more extensive legislative reaction than that against any other decision in Supreme Court history.<sup>87</sup> Yet, despite the high profile of the issue and the strength of public feeling, the majority of the new laws turned out to be ineffective. They claimed to forbid economic development condemnations, but actually allowed them to continue under other names, usually as “blight” condemnations under definitions of blight that are so broad that virtually any area qualifies.<sup>88</sup> Some states did enact effective reform laws. But

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<sup>84</sup> See generally Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton 2005) (providing extensive evidence showing that policy experts often predict outcomes poorly in large part because of biases in their judgment).

<sup>85</sup> For recent defenses of the view that the political process provides adequate protection for property rights, see Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum L Rev 883 (2007) (arguing that local governments have adequate incentives to provide optimal levels of protection for property rights); Daniel H. Cole, *Political Institutions, Judicial Review, And Private Property: A Comparative Institutional Analysis*, 15 Sup Ct Econ Rev 141 (2007) (advancing institutional arguments for the superiority of the political process as a protector of property rights, especially at the state and federal level). For criticisms other than those advanced here, see Somin, *Taking Property Rights Seriously?* at 28–30 (cited in note 12).

<sup>86</sup> Somin, 93 Minn L Rev at 2108–14 (cited in note 35). See also Janice Nadler, Shari Seidman Diamond, and Matthew M. Patton, *Government Takings of Private Property*, in Nathaniel Persily, Jack Citrin, and Patrick J. Egan, eds, *Public Opinion and Constitutional Controversy* 286 (Oxford 2008) (describing additional survey data on the use of eminent domain for development that demonstrate its unpopularity).

<sup>87</sup> Somin, 93 Minn L Rev at 2101–02 (cited in note 35).

<sup>88</sup> See *id* at 2120–53 (surveying the federal and state laws enacted in response to *Kelo*). For other assessments of post-*Kelo* reform legislation that also find many of them to be ineffective, see Edward J. López, R. Todd Jewell, and Noel D. Campbell, *Pass a Law,*

the majority did not, especially those that had previously engaged in particularly large numbers of condemnations that transferred land to private parties.<sup>89</sup>

Political ignorance played a major role in explaining this pattern. A 2007 Saint Index survey found that only 21 percent of Americans even knew whether their state had enacted property rights reform legislation since *Kelo*, and only 13 percent both knew the correct answer to the former question and also knew whether their state had enacted an effective reform law or not.<sup>90</sup> Even these figures likely overstate the true extent of public knowledge, since some survey respondents probably got the right answer by guessing.<sup>91</sup>

If the effectiveness of the political process was severely limited even in a situation where abuses were highly publicized and public opinion was overwhelmingly supportive of reform, it is likely to be even less effective in cases that are less widely known, and public opinion is more evenly divided. Given the complexity and low public visibility of many restrictions on property rights, it is unlikely that the political process can effectively monitor most of them.

### 3. Information shortcuts.

Some scholars argue that political ignorance need not be a major concern because voters can use “information shortcuts” to make good decisions even if they know very little about politics.<sup>92</sup> Elsewhere, I have explained why information shortcuts are likely to be ineffective if, as is often the case, voters lack even basic political knowledge, and often do not choose their shortcuts in a rational manner.<sup>93</sup> Here, I will only note that the complexity and

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*Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 Rev L & Econ 101 (2009); Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 Sup Ct Econ Rev 237 (2009); Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich St L Rev 709. But see Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 Fordham Urban LJ 657 (2007) (claiming that many of the reforms go too far).

<sup>89</sup> Somin, 93 Minn L Rev at 2117–20 (cited in note 35).

<sup>90</sup> Id at 2155–56.

<sup>91</sup> Id at 2156–57.

<sup>92</sup> For examples of this scholarship, see generally Samuel L. Popkin, *The Reasoning Voter* (Chicago 1991); Arthur Lupia and Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* (Cambridge 1998); Philip E. Converse, *Popular Representation and the Distribution of Information*, in John A. Ferejohn and James H. Kuklinski, eds, *Information and Democratic Processes* 369 (Illinois 1990).

<sup>93</sup> See, for example, Somin, *Knowledge about Ignorance* at 265–67 (cited in note 76) (discussing the flaws of many different shortcut mechanisms); Ilya Somin, *Voter Igno-*

low visibility of most local land use policies make it especially difficult for voters to use information shortcuts to offset their ignorance. These factors exacerbate various other reasons why information shortcuts are often unusually difficult to use effectively in local politics.<sup>94</sup> The failure of shortcuts to enable voters to force through effective post-*Kelo* reform statutes in most states despite the support of overwhelming majorities for such reforms, is a particularly telling indicator of their shortcomings in this field.<sup>95</sup>

### C. The Problem of Externalities

One area where local government officials might have a genuine knowledge advantage is with respect to restrictions on property rights that control externalities. An externality arises when an individual's actions affect others positively or negatively without "internalizing" the costs or benefits that he or she creates.<sup>96</sup> For example, a "negative externality" occurs if a property owner's activities on his land might generate pollution that harms his neighbors. Even if the owner is well aware of the pollution, he might not consider its costs in deciding what to do on his land. Landowners can also create "positive externalities," as, for example, when an attractive-looking house creates aesthetic benefits for neighbors and onlookers.

While landowners are likely to have greater knowledge than government officials of the externalities their activities create, lack of internalization might prevent them from acting on that knowledge. Government officials, meanwhile, might have greater knowledge than federal judges, and may be more willing to act on that knowledge than landowners. For this reason, it could be argued that federal judges should give local governments a free hand in restricting property rights when doing so might diminish negative externalities or promote positive ones.

This argument, however, is subject to several significant caveats. First, the private sector has many effective mechanisms

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*rance and the Democratic Ideal*, 12 *Critical Rev* 413, 419–35 (1998). See generally Somin, *Democracy and Political Ignorance* (cited in note 72).

<sup>94</sup> See David Schleicher, *Why is there no Partisan Competition in City Council Elections? The Role of Election Law*, 23 *J L & Politics* 419, 448–59 (2007) (discussing some of these problems).

<sup>95</sup> For a discussion of this aspect of post-*Kelo* reform, see Somin, 93 *Minn L Rev* at 2160–63 (cited in note 35).

<sup>96</sup> For a helpful explanation, see Bryan Caplan, *Externalities*, in David R. Henderson, ed, *The Concise Encyclopedia of Economics* 169–72 (2008).

for diminishing externalities. Small and medium-size externalities that affect neighbors can often be addressed through bargaining between them, as R.H. Coase explained in a classic article.<sup>97</sup> Real-world neighbors routinely engage in such bargaining and also rely on a variety of social sanctions and norms to effectively control externalities.<sup>98</sup>

Private initiative has also evolved methods for addressing larger-scale externality problems. For example, over 50 million Americans now live in various types of private planned communities, which often effectively take on externality-reducing functions traditionally associated with local government.<sup>99</sup> The private sector has also evolved mechanisms for alleviating the negative externalities caused by “holdout” problems that might make it difficult to assemble land for private development projects—a standard justification for *Kelo*-style takings. Developers can avoid such difficulties by using secret purchases to assemble property.<sup>100</sup> This approach has worked well in many important assembly projects, including those undertaken by Harvard University and the Disney Corporation.<sup>101</sup> Secret assembly has many advantages over the use of eminent domain, including the fact that it takes better account of the “subjective value” of the property in question, and is less vulnerable to interest group capture.<sup>102</sup>

It is important to remember that externality problems are often the result of insufficient reliance on private property rights, not an excess thereof. For example, many environmental externalities affect government-owned resources such as publicly owned lakes and streams, or resources with no clear owner at all. The creation of new private property rights can help alleviate these dangers, often more efficiently than government regulation.<sup>103</sup>

From the standpoint of knowledge and expertise, private sector efforts to alleviate externalities can more effectively take

<sup>97</sup> R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

<sup>98</sup> For a thorough description, see generally Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard 1991).

<sup>99</sup> Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* (Urban Institute 2005).

<sup>100</sup> See Kelly, 92 Cornell L Rev at 25–34 (cited in note 63); Somin, 15 Sup Ct Econ Rev at 203–09 (cited in note 13).

<sup>101</sup> Somin, 15 Sup Ct Econ Rev at 206 (cited in note 13).

<sup>102</sup> See sources cited in Kelly, 92 Cornell L Rev at 25–34 (cited in note 63).

<sup>103</sup> See generally Terry L. Anderson and Donald R. Leal, *Free Market Environmentalism* (Palgrave 2d ed 2001).

advantage of local knowledge than government regulators can. The general analysis of local knowledge presented above applies in this field as well.<sup>104</sup>

Finally, the mere fact that the private sector has failed to address an externality does not mean that government restraints on property rights will necessarily succeed in doing so. Indeed, many restrictions on property rights are likely to exacerbate externality problems rather than alleviate them. For example, *Kelo*-style “economic development” takings often cause negative environmental externalities by subsidizing inefficient development projects and targeting open space and private conservation areas.<sup>105</sup> Given the complexity of externality issues and the presence of extensive voter ignorance, we cannot assume that the political process will effectively confine restrictions on property rights to cases where there are genuine externalities that cannot be effectively handled by the private sector.

Even if the possible presence of externalities justifies some degree of judicial deference to the expertise of local officials, it cannot justify such deference in property rights cases across the board. Since many government restrictions on property rights are driven by interest group power rather than any objective consideration of externality effects and may actually exacerbate externality problems,<sup>106</sup> a degree of judicial skepticism is warranted. At the very least, judges should not use externalities as a justification for deference unless the government has provided substantial evidence showing that an externality exists and that restrictions on property rights are necessary to alleviate it.

#### D. Comparisons with Other Constitutional Rights

If taken seriously, the local expertise argument against federal judicial protection of property rights also applies to other constitutional rights. Fourth Amendment rights against “unreasonable” searches and seizures and First Amendment rights to freedom of speech and religion often involve issues where conditions vary in different regions and local officials often have greater expertise than federal judges.<sup>107</sup> In each of these fields,

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<sup>104</sup> See Part II.A.

<sup>105</sup> See Ilya Somin and Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 Wash U L Rev 623, 641–65 (2006) (giving examples).

<sup>106</sup> See the discussion of interest group dynamics in Part I.A–B, and the related points on the impact of political ignorance in making it difficult to control such abuses.

<sup>107</sup> US Const Amend IV.

federal courts routinely intervene to protect individual rights despite the superior expertise of local officials.

Some scholars have argued that property rights differ from other constitutional rights issues because the content of property rights is determined, in the first instance, by state law.<sup>108</sup> They contend that state officials and courts therefore have an unusually great expertise advantage over federal courts in this field.<sup>109</sup> But the difficulties federal courts confront in this area are no greater than those they face in many other fields where federal judges must interpret state law.

#### 1. Fourth Amendment rights.

The Supreme Court has recognized that the reasonableness of a search often depends on “the facts of a particular case in light of the distinctive features and events of the community” on which local judges and “law enforcement officers” may have specialized “expertise.”<sup>110</sup> Often, local officials and police have far greater knowledge about “the distinctive features and events of the community” relevant to the constitutionality of a particular search than federal judges. Indeed, the “reasonableness” of a search may depend on local conditions to an even greater degree than property rights decisions do. Whether a search is reasonable may depend on conditions that vary from house to house and hour to hour. Yet federal judges routinely address these issues, and do not simply defer to the views of local officials.

There is no reason why deference to local government expertise should be any greater with respect to property rights in a building than with regard to searches of that very same property. As Justice Clarence Thomas noted in his dissent in *Kelo*, the Court takes a nondeferential approach “when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to ‘second-guess the City’s considered judgments,’ ... when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing

<sup>108</sup> See Sterk, 114 Yale L J 203 (cited in note 5); Michelman, 35 Wm & Mary L Rev at 324–28 (cited in note 5); Durchslag, 59 Md L Rev at 494 (cited in note 5).

<sup>109</sup> See Sterk, 114 Yale L J at 226–35 (cited in note 5).

<sup>110</sup> *Ornelas v United States*, 517 US 690, 699 (1996). See also *United States v Brown*, 310 Fed Appx 776, 778 (6th Cir 2009) (noting relevance of “understanding [of] local conditions” in determining whether a search is reasonable); *United States v Atchley*, 474 F3d 840, 847 (6th Cir 2007) (same).

down petitioners' homes. ... Though citizens are safe from the government in their homes, the homes themselves are not."<sup>111</sup>

## 2. The First Amendment's Establishment Clause.

Under the Court's Establishment Clause jurisprudence, whether a religious display on government property violates the Clause depends in part on whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion.<sup>112</sup> Presumably, local and state officials are more likely to be knowledgeable about "the history and context of the community" than federal judges. Yet the latter routinely address these questions.

Recently, a federal district court ruled that the placement of a cross on public property in Utah was not an establishment of religion in part because the majority of Utah's population consists of Mormons who do not consider the cross to be a symbol of their faith.<sup>113</sup> Therefore, a reasonable observer familiar with local conditions would recognize that the Utah state government, heavily influenced as it is by the state's Mormon majority, would not try to "endorse" the cross as a religious symbol.<sup>114</sup> The Tenth Circuit Court of Appeals disagreed with this reasoning, concluding that "the fact that most Utahns do not revere the cross as a symbol of their faith does not mean that the State cannot violate the Establishment Clause by conduct that has the effect of promoting the cross and, thereby, the religious groups that revere it."<sup>115</sup> The appellate court reasoned that Utah Mormons may impute at least some religious significance to the cross, and that religious minorities in Utah might reasonably see the placement of the cross as an endorsement of Christianity.<sup>116</sup>

Presumably, local Utah officials would have greater expertise on such matters than federal judges; they would be in a better position to understand the nuances of Mormon beliefs and the

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<sup>111</sup> *Kelo*, 545 US at 518 (Thomas dissenting).

<sup>112</sup> *Capitol Square v Pinette*, 515 US 753, 777 (1995) (O'Connor concurring).

<sup>113</sup> *American Atheists v Duncan*, 528 F Supp 2d 1245 (D Utah 2007) revd, 616 F3d 1145 (10th Cir 2010).

<sup>114</sup> *Id* at 1258–59.

<sup>115</sup> *American Atheists v Duncan*, 616 F3d 1145, 1163–64 (10th Cir 2010), amended and superseded by *American Atheists v Davenport*, 2010 WL 5151630 (10th Cir Dec 20, 2010) (the relevant portion of the original opinion was not altered).

<sup>116</sup> *American Atheists v Duncan*, 616 F3d at 1164.

perceptions of Utah's religious minorities. Yet federal judges did not hesitate to address these questions and did not defer to the perceptions of local policymakers.

### 3. Freedom of speech.

Variations in local conditions are also often relevant to assessing free speech claims under the First Amendment. The Supreme Court has ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>117</sup> Whether any given speech is likely to incite or produce "imminent lawless action" may well depend on variations in local conditions, such as the state of opinion in the local community and the popularity and influence of the speaker. Local and state officials are likely to be better informed about such matters than federal judges.

Similarly, racially charged speech may be more likely to qualify as an effort at intimidation or threat of violence in a state with a long history racial oppression. In 1995, the Florida Supreme Court upheld the state's ban on cross-burning against First Amendment challenge in part because "[a]n unauthorized cross-burning by intruders in one's own yard . . . has been inextricably linked in *this state's history* to sudden and precipitous violence—lynchings, shootings, whippings, mutilations, and home-burnings."<sup>118</sup> In his dissent in *Virginia v Black*,<sup>119</sup> Justice Thomas cited Virginia's history of racist violence and segregation as a reason for concluding that cross-burning in that state should be viewed as an effort at intimidation rather than speech, and therefore justifying a broad ban on the practice imposed by the state legislature.<sup>120</sup> Presumably, Florida and Virginia legislators are more knowledgeable about their states' particular histories and conditions than most federal judges are. But federal courts have not hesitated to address cases involving racist speech, usually with little or no deference to state officials' judgments.<sup>121</sup>

<sup>117</sup> *Brandenburg v Ohio*, 395 US 444, 447 (1969).

<sup>118</sup> *State v TBD*, 656 So2d 479, 481 (Fla 1995) (emphasis added).

<sup>119</sup> 538 US 343 (2003).

<sup>120</sup> *Id* at 391–95 (Thomas dissenting).

<sup>121</sup> See, for example, *id*; *Brandenburg*, 395 US 444; *RAV v St Paul*, 505 US 377 (1992) (invalidating statutes banning hate speech and advocacy of racially motivated crimes, on grounds that the proscribed speech was not so likely to spur imminent violence as to

As this article goes to press, the state of Montana is arguing in federal court that its campaign finance law restricting spending on political speech by corporations and unions should be judged differently from those of other states because of Montana's specific history of special interest influence in the electoral process.<sup>122</sup> Here too, state officials are likely to be more knowledgeable than federal judges. Yet it will be surprising if the latter decide to defer to the former.

These examples are just a few of the areas where federal courts routinely review the constitutionality of state officials' decisions despite the fact that the latter probably have superior knowledge and expertise on relevant variations in local conditions. The usual justification for this nondeferential posture is that the expertise of state officials is counterbalanced by the danger that state and local governments might infringe on the rights of politically weak groups and minorities, often for the purpose of benefiting the politically powerful.<sup>123</sup> Superior expertise may be a danger rather than an asset if it is put in the service of efforts to repress the politically weak for the benefit of the powerful.

Yet, as discussed above,<sup>124</sup> the same danger exists in the case of state and local government infringements on property rights. Here too, officials often victimize minorities and the politically weak for the benefit of the powerful. Moreover, with property rights—unlike political speech and Fourth Amendment rights—federal judicial intervention often empowers private actors who have greater knowledge of relevant local conditions than government officials do. In that respect, the expertise-based argument for judicial deference is actually *weaker* in the case of property rights than with respect to the enforcement of most other constitutional rights against subnational governments.<sup>125</sup>

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justify the restraint on free expression).

<sup>122</sup> See Jess Bravin, *Election 2010—Montana: A Lone Stance on Ad Spending—One State Is in a Fight to Uphold Curbs on Corporate and Union Funding That Are Threatened by a Supreme Court Ruling*, Wall St J A5 (Oct 12, 2010).

<sup>123</sup> For classic arguments contending that judicial review is needed to protect minority rights, see generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 105–34 (Harvard 1980). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale 2000) (documenting how, during Reconstruction and after, judicial review under the Bill of Rights was recast as a tool for protecting the rights of vulnerable minorities).

<sup>124</sup> See Part I.A and accompanying notes.

<sup>125</sup> It could be argued that state or local governments' reasons for infringing on property rights are more complex than their reasons for violating the Establishment Clause or free speech rights. But that is not systematically true. Throughout history, governments

4. Are property rights special because state law determines their content?

Some scholars argue that property rights differ from other constitutional rights because “[p]roperty . . . owes both its existence and its contours to positive law, local positive law. Property simply does not exist in the absence of state law.”<sup>126</sup> Because the content of property rights is determined by state law, it may be that state courts and legislatures have an unusually great expertise advantage in this field, a point emphasized in an important 2004 article by Professor Stewart Sterk.<sup>127</sup>

Before a federal court can decide whether a newly enacted state or local regulation effects a regulatory taking, it must first determine what rights the landowner had under preexisting state law, which may be a complex undertaking.<sup>128</sup> If the owner did not previously have the right to use the property in ways forbidden by the new law, there can be no regulatory taking. By contrast, other constitutional decisions involving state laws only require federal courts to interpret the meaning of the challenged law itself without having to consider “state law before enactment of the challenged statute”—a possibly easier task.<sup>129</sup> State courts and legislatures are, it is contended, more knowledgeable about the meaning of preexisting state law.<sup>130</sup>

This argument is ultimately unpersuasive for several reasons. First, it only applies to regulatory takings cases where the rights of the landowner under preexisting state law are in dispute. It does not apply to most public use cases, including *Kelo*, which usually arise in situations where the state seeks to take title to property by eminent domain, thereby conceding from the outset the preexisting rights of the owner. It also does not apply to regulatory takings cases where the preexisting rights of the owner are relatively clear.

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have cited a wide range of complex reasons for regulating speech and religion, including improving public morals, preventing the spread of dangerous ideas (heresy, communism, racism, Nazism, and so forth), preventing interference with government policy, building community unity, and numerous others. In many cases, these rationales for government intervention are as much or more complex than government regulation of property rights.

<sup>126</sup> Durchslag, 59 Md L Rev at 494 (cited in note 5). See also Michelman, 35 Wm & Mary L Rev at 305–07 (cited in note 5) (making similar points); Sterk, 114 Yale L J at 326–35 (cited in note 5) (same).

<sup>127</sup> Sterk, 114 Yale L J at 326–29 (cited in note 5).

<sup>128</sup> Id at 326–28.

<sup>129</sup> Id at 228.

<sup>130</sup> Id.

Even in cases where preexisting legal rights are in dispute, it is not clear that the interpretive challenges involved are any greater than those federal courts routinely face in other contexts. For example determining whether a seemingly neutral law is actually an effort to discriminate on the basis of race, sex, or some other forbidden classification requires federal courts to not only interpret the challenged law but also consider whether its enactment departed from standard legislative practices and whether previous laws demonstrate a pattern of efforts to target the group in question.<sup>131</sup> Surely, local and state officials have at least as great an advantage in making such evaluations of previous local laws as they do in determining whether a landowner had certain rights under preexisting state property law.

In diversity jurisdiction cases, federal courts must routinely interpret a wide range of state laws when the parties to the litigation are from different states and one of them chooses to litigate the case in federal court.<sup>132</sup> Some of the state statutory and common law that federal courts must interpret in such cases is extremely complex, as much or more so than that involved in property rights cases. It is true that such cases usually involve only interpretations of current state law rather than previous rules. But interpreting one highly complex law might be more difficult than interpreting two simpler ones.

It is also important to recognize that there is considerable standardization of basic property law across state and local lines. For example, nearly all common law jurisdictions divide property into a few basic types of estates with standardized packages of rights.<sup>133</sup> Standardization is also promoted by the influence of the Restatement of Property Law and various treatises.<sup>134</sup>

Furthermore, the mere fact that a new statute or regulation was thought necessary to constrain a landowner's use of his property is in itself some indication that he had the right to use the land in the now-forbidden manner previously. Otherwise, why could not the government simply impose the same result by using preexisting legal rules? In such cases, it might well be reasonable for judges to put the burden of proof on the state or local

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<sup>131</sup> See *Village of Arlington Heights v Metro Housing Development Corp*, 429 US 252, 264–68 (1977) (explaining standards that apply to such cases).

<sup>132</sup> See US Const Art III, § 2 (creating diversity jurisdiction for federal courts).

<sup>133</sup> See Thomas W. Merrill and Henry M. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L J 1 (2000).

<sup>134</sup> See Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Prune-Yard v Robins*, 64 U Chi L Rev 21, 41 (1997).

government to show that its newly enacted regulations, contrary to appearances, did not abrogate any preexisting rights of the landowner. To the extent that state officials genuinely have superior expertise in analyzing the structure of state law, federal courts can get the benefit of that expertise by requiring them to provide the relevant evidence and analysis.

Finally, the assumption that property rights are merely the creation of state law without any intrinsic meaning in federal constitutional law is a flawed one. In reality, the institution of private property long predates the existence of American states, or indeed modern states of any kind.<sup>135</sup> The text, original meaning, and historical understanding of the Takings Clause are in large part based on natural law notions of property rights that hold that such rights have a moral basis and origin independent of state law.<sup>136</sup> It is true that the Supreme Court has noted that “[p]roperty interests, of course, are not created by the Constitution” but instead “stem from an independent source such as state-law rules.”<sup>137</sup> But it has never held that state authority in this field is unlimited or that state law is the *exclusive* source of the definition of property rights.<sup>138</sup> If it were, a state could cut off all regulatory takings or public use claims by future property owners (though not current ones) simply by passing a statute stating that all property rights in land are subject to whatever regulations the state legislature might choose to enact in the future, without compensation.

In sum, it is difficult to use expertise-based federalism arguments as a justification for judicial deference on property rights without also undercutting the justification for judicial review of many other constitutional rights. One can consistently use such arguments to advocate cutting back on judicial review of state government actions across the board,<sup>139</sup> but not to justify selective deference in the field of property rights.

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<sup>135</sup> See Richard Pipes, *Property and Freedom* 25–63 (Alfred A. Knopf 1999) (describing historical origins of property rights).

<sup>136</sup> See, for example, Claeys, 2004 Mich St L Rev 877 (cited in note 8); Ely, *The Guardian of Every Other Right* at 42–59 (cited in note 8); Epstein, 64 U Chi L Rev at 40; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 103–104, 152–53 (Chicago 1990) (discussing the “conventional wisdom” of the Founding era, that property was a natural right).

<sup>137</sup> *Board of Regents v Roth*, 408 US 564, 577 (1972).

<sup>138</sup> Compare Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 942–99 (2000) (arguing that the constitutional definition of property under the Court’s jurisprudence is a mixture of state and federal doctrines).

<sup>139</sup> For examples of arguments against judicial review generally, see Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Jeremy Waldron, *Law and Dis-*

## CONCLUSION

Federalism is not a good justification for judicial deference to state and local governments on property rights. Interjurisdictional competition often fails to provide effective protection for property rights because of the immobility of land. While state and local officials may well have greater expertise on local land use issues than do federal judges, the protection of property rights by the latter empowers property owners, who generally have more relevant local knowledge than government planners. Moreover, widespread political ignorance and irrationality undercut the extent to which political decision making reflects genuine expertise and diminishes the ability of the political process to prevent abuses.

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

The debate over judicial protection for property rights will no doubt continue. Many of the points at issue do not depend on appeals to federalism. Nonetheless, the federalism argument has been advanced by both the Supreme Court and several prominent scholars.<sup>140</sup> For that reason among others, it is important that we recognize the shortcomings of the federalist case against judicial enforcement of property rights. When it comes to property, the most thoroughgoing decentralization is also often the best.<sup>141</sup> And that means protecting property rights against all levels of government.

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*greement* (Oxford 1999); and Robert H. Bork, *Slouching Towards Gomorrah* 96–119, 196 (ReganBooks 1996).

<sup>140</sup> See cases and works cited in the Introduction.

<sup>141</sup> See the discussion of “federalism all the way down” in Part II.B.