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Federalism, Convergence, and Divergence in Constitutional Property

GERALD S. DICKINSON[*]

Federal law exerts a gravitational force on state actors, resulting in widespread conformity to federal law and doctrine at the state level. This has been well recognized in the literature, but scholars have paid little attention to this phenomenon in the context of constitutional property. Traditionally, state takings jurisprudence—in both eminent domain and regulatory takings—has strongly gravitated towards the Supreme Court's takings doctrine. This long history of federal-state convergence, however, was disrupted by the Court's controversial public use decision in Kelo v. City of New London. *In the wake of* Kelo*, states resisted the Court's validation of the economic development justification for public use, instead choosing to impose expansive private property protections beyond the federal minima. This resistance thus raises a fundamental puzzle: despite the fracturing of public use doctrine following* Kelo*, states continue to converge around the force of and be lured by the Court's regulatory takings jurisprudence. Why is this? This Article argues that the most persuasive explanation is the political economy; that is, where homeowners are perceived to be underprotected by Supreme Court decisions, state actors are more likely to diverge from federal doctrine to grant greater*

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*protections as opposed to when the challenger is a developer-landowner. The Court has not underprotected a homeowner in a regulatory takings challenge in a manner that would spark a similar post-*Kelo *state resistance. Few scholars have explored this mystery and offered conceptual and doctrinal explanations on the value of state divergence from federal takings doctrine in our federalist regime.*

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INTRODUCTION

The American system of federalism has created a phenomenon known as "the gravitational force of federal law."[1] This phenomenon influences state actors to behave in ways that usually conform to, rather than diverge from, Supreme Court jurisprudence.[2] Many state legislatures have enacted statutes that mimic congressional acts.[3] Further, state constitutions imitate the federal Constitution,[4] and state courts regularly decide cases by following Supreme Court precedent.[5] Even the Supreme Court's interpretive methodology of statutory and constitutional provisions has been reproduced into state laws and constitutions.[6] These methodologies deeply influence

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1 Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 725–26 (2016) (explaining that state courts have a tendency to decide issues of state law by mimicking federal court interpretations of analogous federal law).

2 In this Article, I refer to state actors as state legislatures and state courts.

3 *See infra* Section I.A.

4 State constitutions do, of course, differ from the federal Constitution in many ways. State constitutions, unlike their federal counterpart, are often far more detailed, and include quite a bit of policy-related provisions that the federal Constitution ignores, such as public education and family law. Still, state constitutions include fundamental rights and the core amendments of the federal Constitution. *See generally* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005); Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006); Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211 (2006) (reviewing GARDNER, *supra*); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014).

5 *See* Dodson, *supra* note 1, at 711–19.

6 *See* Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 478 (2006) (examining state interpretation of "borrowed" federal employment statutes).

state court decision-making frameworks and tiers of scrutiny in constitutional jurisprudence.[7]

Although this much is relatively well known, scholars have paid little attention to this phenomenon in the context of constitutional property.[8] States prefer to follow, rather than diverge from, the Supreme Court's takings jurisprudence.[9] This Article offers empirical evidence to suggest that this phenomenon exists within both veins of the Takings Clause[10]—regulatory takings and eminent domain.[11] For example, the Supreme Court's regulatory takings jurisprudence, with all its imperfections, seems to lure states into its doctrinal orbit. *Pennsylvania Coal Co. v. Mahon* was the catalyst for state courts'

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[7] *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE. L.J. 1898, 1915–16 (2011).

[8] James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 35 (2016).

[9] *See infra* Section II.A.

[10] U.S. CONST. amend. V. The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." *Id.*

[11] This Article's inquiry focuses primarily on some state appellate court rulings, but mostly state supreme court rulings on regulatory takings and eminent domain challenges, to substantiate the claim that conformity to federal takings doctrine is the rule, and that *Kelo v. City of New London*, 545 U.S. 469 (2005) is a rare exception in constitutional property that caused states to diverge from longstanding Supreme Court public use jurisprudence. *See* Krier & Sterk, *supra* note 8, at 39 (2016) (finding that "in certain circumstances state courts tend to provide less protection to private property than Supreme Court doctrine requires, though they, and some state legislatures, occasionally provide more"); *infra* Part II. There are several other cautionary observations to note in this Article. Many cases are never appealed to state appellate courts. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 94 n.105 (1986); *see also* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2 (1984) (noting that surveys show that between 0.09% and 0.2% of claims are pursued through appeal). I focus on eminent domain challenges regarding public use since *Berman v. Parker*, 348 U.S. 26 (1954) from 1954 to 2017 and regulatory taking challenges since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) from 1922 to 2017. Admittedly, this is not an exhaustive empirical study of regulatory takings or "implicit takings" of the kind that Krier and Sterk conducted. *See* Krier & Sterk, *supra* note 8, at 50.

embrace of Justice Holmes's doctrinal prescription for overly burdensome regulations.[12] Later takings rulings from the Court compounded the complexity of the doctrine.[13] Still, state actors have preferred to follow[14] the doctrinal script like a thematic play that only seems to get more confusing with each passing Supreme Court term.[15] Likewise, the public use vein of the Takings Clause has also had a preeminent influence over state actors.[16] The Supreme Court's ruling in *Berman v. Parker* defined the modern-day takings doctrine; it gave broad discretion to local governments to take private property for almost any conceivable public use.[17] The Court followed years later with *Hawaii Housing Authority v. Midkiff*, which af-

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[12] 260 U.S. 393, 415 (1922); *see* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 615–16 (1996).

[13] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting) (stating that barring a landowner from constructing habitable structures on land after the landowner purchased it can constitute a taking because it "denies [the landowner] economically viable use of [the] land" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 532 (2005))); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that statute allowing a cable company to place permanent cable facilities on landowner's property constitutes a taking because it is "a permanent physical occupation of property"); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136–38 (1978) (holding that designating landowners' train station as a historical landmark is not a taking because it "does not interfere in any way with the [land's] present uses" or prevent landowner from "obtain[ing] a 'reasonable return' on its investment").

[14] *See infra* Part II.

[15] Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 154 (2017) (noting that "with each new doctrinal tweak, the level of gloom and confusion only increases as the Justices struggle to fit each new piece of the puzzle into a framework that has become less tidy and less satisfactory with each new iteration").

[16] *See infra* Part II.

[17] 348 U.S. 26, 32 (1954) ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .").

firmed and strengthened its deferential treatment of physical seizures.[18] State actors have rarely resisted or diverted from the doctrinal rubrics offered by the Supreme Court.[19]

This Article offers new insight into federalist dimensions in takings jurisprudence by exploring why this omnipotent convergence of state actors to federal takings doctrine exists. Part of the narrative of conformity is that the Court's takings doctrine, like other areas of constitutional law, sets the constitutional baseline.[20] But takings doctrine, unlike other areas of constitutional law, measures the constitutional bottom against the background of state property law.[21] Thus, at a minimum, all state takings law presumably starts at the bottom and may, if state actors choose, go below the floor (few have done this),[22] raise the ceiling, or conform to the existing baseline.[23] States are not preemptively bound by or tied to the Court's constitutional floor.[24] The Supreme Court expressly offers states "extraordinary latitude" in implementing law and defining and developing doctrine that goes above and beyond the baseline.[25] States are by no means coerced into cautious legislative and judicial behavior.[26]

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[18] 467 U.S. 229, 239–42 (1984).

[19] *See infra* Part II.

[20] *Id.*

[21] Krier & Sterk, *supra* note 8, at 38; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206 (2004).

[22] *See* Krier & Sterk, *supra* note 8, at 39 (noting that "[o]ur review indicates that in certain circumstances state courts tend to provide less protection to private property than Supreme Court doctrine requires, though they, and some state legislatures, occasionally provide more"). However, it should be noted that choosing to go below the floor of protections set by the Supreme Court is constitutionally impermissible. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 357 (2002). Yet, as Krier and Sterk explain, some state courts regularly "reflect ignorance of—or indifference to—Supreme Court teachings, which in any event place virtually no significant constraints on state activities regarding property." Krier & Sterk, *supra* note 8, at 39.

[23] *See infra* Part I.

[24] *See* Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991) (explaining that the Framers contemplated "a healthy balance of power between the States and the Federal Government").

[25] Krier & Sterk, *supra* note 8, at 50.

[26] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

Nevertheless, while state actors may divert from federal takings doctrine by providing more or less protections to landowners, many do not.[27]

Instead, many state courts seem to take the safest route to dispositions by evaluating state takings actions using the interpretive methodologies and tests set forth by the Supreme Court, but decline to provide protections above the federal minima.[28] Meanwhile, legislatures craft state takings statutes in conformity with the Court's constitutional commands.[29] In other words, it is one thing for states to copy and paste federal takings provisions into state constitutions or to mimic the Supreme Court's takings jurisprudence by applying it to state takings provisions. It is another for state takings legislation to decline to enact laws that offer more private property protections to landowners and for state courts to rarely apply the Court's doctrinal tests in a manner that expands protections to landowners.[30]

This Article is equally concerned with a rare schism in the longstanding conformity in public use doctrine at the state level. *Kelo v. City of New London* is the notable exception where state divergence from this longstanding gravitational conformity caused a rift in constitutional property immediately following the Supreme Court's ruling. It is in *Kelo* that we find state conformity to takings doctrine to rupture along the *public use* line of the doctrine, as opposed to *regulatory takings*.[31] The ruling famously triggered a widespread political and judicial backlash.[32] This centrifugal episode marked a distinct moment in constitutional property. The majority

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[27] *See infra* Part II.

[28] *Id.*

[29] *Id.*

[30] *See* Krier & Sterk, *supra* note 8, at 39.

[31] *See infra* Section II.B.

[32] There is no need to revisit the backlash in state legislatures and state courts here, as Ilya Somin has already provided excellent coverage of the ongoing developments since the *Kelo* decision. *See generally* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 254 n.373 (2007) [hereinafter Somin, *Grasping Hand*]; Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. COLLOQUY 195, 196–200 (2007) [hereinafter Somin, *Post-*Kelo *Reform*]; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108–54 (2009) [hereinafter Somin, *Limits of Backlash*].

of states concluded that the Supreme Court got it wrong,[33] that economic development justifications for eminent domain underprotected landowners,[34] specifically homeowners, and that the Court applied its jurisprudence "without the slightest nod to [the] original meaning [of the Takings Clause]," as Justice Thomas put it.[35] Such widespread resistance was followed by a string of state supreme court rulings, along with state constitutional amendments, banning or limiting economic development takings, effectively announcing widespread state resistance to federal takings law.[36] Indeed, we arrive at this unusual episode of divergence in light of decades of conformity to federal takings doctrine. Prior to *Kelo*, there were few instances where states specifically granted greater protections to private property beyond the "constitutional bottom" constructed by the Supreme Court and contemplated in the Takings Clause.[37]

This rare instance of divergence raises a fundamental puzzle: despite the fracturing of *public use* doctrine following *Kelo*, states continue to converge around the gravitational force of the Supreme Court's *regulatory takings* jurisprudence.[38] Nothing in the *Kelo* decision spurred state legislatures nor state courts to revisit their regulatory takings legislation and doctrine.[39] Given *Kelo* was a physical seizure and not a regulatory taking,[40] this legislative inaction is not surprising, but it is still telling. Why has convergence in regulatory takings doctrine continued despite massive resistance in public use? The chaotic fissure in constitutional property created by the *Kelo* decision offers an opportunity to sketch some of the reasons and explanations for the abrupt divergence. Indeed, some preliminary explanations abound.[41]

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[33] *See* Somin, *Limits of Backlash*, *supra* note 32, at 2101–02 ("[F]orty-three states have enacted post-*Kelo* reform legislation to curb eminent domain.").

[34] Somin, *Grasping Hand*, *supra* note 32, at 223 (noting "the unpopularity of economic development takings").

[35] Kelo v. City of New London, 545 U.S. 469, 506 (Thomas, J., dissenting).

[36] *See* Somin, *Limits of Backlash*, *supra* note 32, at 2114–54.

[37] John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 853 (2006) (noting that Supreme Court prescriptions create a constitutional bottom that leaves room for more rights-protective action by the states).

[38] *See infra* Part II.

[39] *See Kelo*, 545 U.S. at 477–90.

[40] *Id.* at 475–76.

[41] *See infra* Section III.B.

Might it be that states, like those lured by the Court's *Berman* and *Mahon* rulings, were simply influenced (or swept up) by countervailing waves of resistance in the moment?[42] Or perhaps it is just a question of legislative loyalty and state court deference to the many amendments by legislatures that restricted or banned economic development takings.[43] It could also be state actors preference for horizontal uniformity over vertical uniformity in the public use vein to give the impression of institutional legitimacy in takings doctrine.[44] Similarly, one argument is that the divergence post-*Kelo* was a nod to state and local institutional competence to deal with questions of public use rather than federal actors.[45]

This Article argues that the most persuasive explanation, however, is that the divergence and convergence dichotomy post-*Kelo* boils down to the political economy.[46] That is, where homeowners are perceived to be underprotected by Supreme Court decisions, such as Ms. Kelo from the *Kelo* decision, states may be more likely to diverge from federal doctrine to grant greater protections as opposed to when the plaintiff is a developer-landowner in a regulatory takings challenge.

Indeed, a lack of protections to the "home" has caused, at least in the post-*Kelo* era, divergence, while failure to vindicate other property interests maintains conformity at the state level.[47] This yields a dichotomy in the gravitational force of federal constitutional property between strong conceptions of "core" property rights for homeowners and lesser protections from regulation for commercial developers or owners of undeveloped land.[48] It is unlikely that states will engage in a countervailing resistance movement against federal regulatory takings doctrine without a seismic ruling by the Supreme

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* To the best of my knowledge, this Article is the first to argue that political economy is the defining explanation for the state divergence that has subsequently led to a schism between regulatory takings doctrine and public use doctrine in constitutional property post-*Kelo*.

[47] *See infra* Section II.B.4.

[48] *Id.*

Court that upholds a regulation that underprotects a plaintiff homeowner.

This Article proceeds in four Parts. Part I explains the concept of the gravitational force of federal law to provide a framework and some background on the influence that federal law has on the states.

Part II explores the empirical evidence of whether Supreme Court takings doctrine lures states into its orbit. The answer is yes, for the most part. State actors have responded to the Court's regulatory takings and public use doctrine since *Berman* and *Mahon* by generally following the Court's jurisprudential commands. But, this Part also unpacks one notable exception—a rupture of sorts—in the longstanding convergence in takings that occurred after the *Kelo* ruling. The ruling and subsequent nationwide backlash raises a unique dichotomy in constitutional property, where states have shown a willingness to diverge from the Court's public use doctrine, but slavishly continue to follow its regulatory takings vein.[49] This Part also explains that the political economy—perceived underprotection of homeowners—is most likely the reason for divergence in public use post-*Kelo*.

Part III offers additional conceptual and doctrinal explanations for why state courts tend to follow the Court's takings jurisprudence when that is by no means required. Part III also offers alternative explanations beyond political economy for why the *Kelo* ruling caused one of the great state departures from federal doctrine in constitutional law.

Part IV unpacks normative implications for the contemporary disequilibrium between regulatory takings and public use doctrine at the state level. Many areas of constitutional law have experienced some variation of convergence and divergence amongst the states.[50] Yet, the breadth and depth of the divergence after the *Kelo* decision separates constitutional property from other areas of constitutional law. While scholars have debated the merits of the *Kelo* decision and weighed the ruling's doctrinal and historical implications,[51]

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[49] *Cf.* Dodson, *supra* note 1, at 726 ("But, for the most part, state courts construe their own state constitutional protections in lockstep with the Supereme Court's interpretation of analogous federal provisions, slavishly incorporating the Supreme Court's doctrinal standards and buzzwords.").

[50] *See infra* Section II.B.

[51] *See, e.g.*, Krier & Sterk, *supra* note 8, at 35; Somin, *Grasping Hand*, *supra* note 32; Somin, *Limits of Backlash*, *supra* note 32.

none has ever offered explanations for both the convergence and the unusually chaotic episode of post-*Kelo* divergence that reveals such a stark disequilibrium in constitutional property. This Article concludes that more divergence of the sort witnessed post-*Kelo*, especially in the regulatory takings vein, is healthy for federalism and may be more appropriate in areas of constitutional property than other veins of constitutional law given the strong theme of background state laws.

I. GRAVITATIONAL FORCE OF FEDERAL AND CONSTITUTIONAL LAW

A. Federal Statutes and State Following

Federal law exerts a certain force that lures states into governing, regulating, and administering laws using federal law as the blueprint.[52] This gravitational pull has a peculiar influence over state constitutional law and state legislative enactments, particularly where obedience is not compelled or required by Congress or the Supreme Court.[53] It is a pervasive force that extends to both procedural and substantive state law.[54] While states, as sovereigns, may experiment and exercise independence in constitutionalism, they have seemed timid and cautious in exercising their latitude to divert from federal pronouncements, and often times simply comply with federal law, even when it is not mandated.[55] Scholars have offered competing explanations for uniformity and convergence in federal and constitutional law.[56] Constitutional autonomy, once promoted

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[52] *See* Dodson, *supra* note 1, at 705.

[53] *Id.*

[54] *See id.* at 707–29.

[55] *Id.* at 725 (citing James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 34 (2014) (noting that the United States Constitution and state constitutions "tend to converge strongly")).

[56] *See id.* at 729–30 ("The most benign explanation is that federal law gets the law right first, and state actors, realizing this, follow as a matter of agreement and judgment. . . . [But,] explanations for state isomorphism generally, and in specific instances, need deeper theorizing.").

by the likes of Justice Louis Brandeis[57] and Justice William Brennan,[58] simply has not materialized.[59]

Federal employment discrimination laws are a primary example. They tend to generate state behavior that cautiously mimics interpretive methodologies for federal statutory law and federal case law.[60] Soon after Title VII of the Civil Rights Act of 1964 ("Title VII") was enacted, "all . . . states that previously lacked antidiscrimination statutes adopted them,"[61] thus setting the stage for federal law to become the standard-bearer "for individual rights in the employment context, with state legislatures and courts taking their cues from federal law."[62] The passage of these laws caused states to engage in a high level of mimicry by enacting substantially similar laws that imitated the provisions of Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA").[63] There are also examples of how states have mimicked federal procedural laws. For example, the adoption of the Federal Rules of Civil Procedure in 1938 "wrenched the states off their traditional courses" to either mirror or mimic the federal rules.[64] The Federal Rules of Evidence, likewise, also permeate throughout the states.[65]

Indeed, where legislation is similarly drafted, state courts tend to interpret state legislation along the same lines as federal courts.[66] In fact, some state legislation "*require[s]* conforming interpretation

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[57] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 440–21 (1922) (Brandeis, J., dissenting).

[58] *See* William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) [hereinafter Brennan, *State Constitutions*].

[59] Dodson, *supra* note 1, at 725.

[60] Scholars have explored this federal-state relationship. *Id.* at 720 n.79 (citing Long, *supra* note 6; Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545 (2013)).

[61] Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 91 (2002).

[62] Long, *supra* note 6, at 478.

[63] *Id.* at 424–25.

[64] Dodson, *supra* note 1, at 710.

[65] *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, at T-1 (Joseph M. McLaughlin ed., 2d ed. 2015).

[66] *See* Dodson, *supra* note 1, at 721 (citing Long, *supra* note 6, at 473).

with federal precedent."[67] As Scott Dodson notes, "state courts typically conform to federal court interpretations of federal statutes with relatively paltry analysis of countervailing considerations."[68] And, as Alex Long mentions, "state courts sometimes appear to bend over backwards in construing state antidiscrimination statutes in order to keep state and federal law on the same track."[69] Even when the language and text of state legislation is different from federal statutes, states tend to "finesse the textual differences where they exist."[70] However, this phenomenon is not universal or uniform across the board. There are plenty of examples of states diverging from federal law.[71] Some states, for instance, provide greater protections to employees claiming discrimination.[72] From a methodological standpoint, a number of state appellate courts have declined to follow federal court interpretations of employment discrimination statutes when interpreting identical state statutes.[73] Indeed, while there is significant conformity, it is prudent to note that there does not exist wholesale conformity across the spectrum of federal and state law. There are exceptions, but on the whole scholars have found substantial convergence between federal doctrine and legislation at the state level.

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[67] Dodson, *supra* note 1, at 721 n.87 (emphasis added) (citing Long, *supra* note 6, at 477).

[68] Dodson, *supra* note 1, at 721 (citing Long, *supra* note 6, at 477).

[69] Long, *supra* note 6, at 477; *see also* Dodson, *supra* note 1, at 722–23 (discussing the doctrinal nuances of state conformity to federal courts' interpretations of antidiscrimination doctrine).

[70] Long, *supra* note 6, at 495.

[71] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988) (identifying many federal programs that have origins at a state level); Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1375 (2015) (identifying and discussing states with broader constitutional protections of civil liberties, including free speech and privacy rights); Benjamin J. Beaton, Note, *Walking the Federalist Tightrope: A National Policy of State Experimentation for Health Information Technology*, 108 COLUM. L. REV. 1670, 1688–93 (2008) (explaining the development of health information technology policy at the state level where federal action had been lacking).

[72] *See* Goldfarb, *supra* note 61, at 91.

[73] *See* Long, *supra* note 6, at 473–74.

B. *The Federal Constitution and State Constitutionalism*

Federal constitutional law also emits a certain preeminent influence over state constitutions and state court interpretations of federal doctrine.[74] This has been a bit puzzling to some scholars.[75] Almost every state has an equal protection clause that is analyzed using the same levels of scrutiny that the Supreme Court has developed to analyze the federal Equal Protection Clause.[76] Some state supreme courts simply do not distinguish between state and federal constitutions in their analysis of the guarantee of freedom of speech.[77] Thus, the First Amendment analytical framework provided by the Supreme Court provides the backbone standards against which state and local enactments are to be measured.[78]

In the 1990s, several scholars explored whether state doctrine complied with federal doctrine and the interpretive methodologies of the United States Supreme Court.[79] These scholars found that state courts had been "engag[ing] in an analysis in lockstep with their federal counterparts,"[80] except in the areas of free exercise of religion, right to trial by jury, and search and seizure.[81] In these three areas, more than half of the state court rulings departed from traditional convergence, and instead chose to grant greater protections to certain rights.[82] In other words, the majority of state courts, on most

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[74] Dodson, *supra* note 1, at 724.

[75] *See, e.g.*, *id.*

[76] *See id.* at 726. There are, however, some "pockets of state independence, . . . such as discrete areas of constitutional criminal law." *Id.*

[77] *See, e.g.*, Pick v. Nelson, 528 N.W.2d 309, 317 (Neb. 1995) ("[W]e do not distinguish between the two constitutions in our analysis of this issue.").

[78] Sterk, *supra* note 21, at 206.

[79] Solimine, *supra* note 22, at 338.

[80] *Id.*; *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) [hereinafter Gardner, *Failed Discourse*]; Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 190 (1991).

[81] Solimine, *supra* note 22, at 338–39.

[82] James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1196 (2000). The study examined 627 state supreme court decisions chosen from a randomized selection of states that covered states' Bills of Rights in nineteen issue areas. *Id.* at 1191–94. But, criminal procedure is one area where there is divergence with federal law. *See* David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75, 79 (2002) (finding that that

issues, engaged in an analysis that was the same or substantially similar to their federal counterparts.[83] Michael Solimine notes that "when presented with the opportunity, [state courts] have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions."[84] Invariably, the American federalist system has allowed the Supreme Court's interpretations of the Constitution to have an "overwhelming gravitational pull" on state decisions.[85] One reason for this overwhelming magnetic force is that federal law "has a degree of visibility and persuasiveness that state law lacks."[86]

There are, however, other areas of the law in which states and state courts have diverged from Supreme Court jurisprudence. For example, prior to the series of Supreme Court cases legalizing same-sex marriage, a number of states diverged from the long-standing federal restrictions on gay rights.[87] Additionally, the Fourth Amendment's exclusionary rule differs from federal law among some states.[88] These exceptions provide a caveat throughout this Article: the gravitational force does not influence *every* state in *all* areas of state law. Nonetheless, the depth of state conformity to congressional acts and Supreme Court doctrine is noteworthy and deserves

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the laws of forty-one states provided greater protection than federal law in at least one area, while four states provided greater protection in nine areas).

[83] Cauthen, *supra* note 82, at 1194–96.

[84] Solimine, *supra* note 22, at 338 (emphasis in original).

[85] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 185 (2009).

[86] *See* Dodson, *supra* note 1, at 739 n.197 (quoting Goldfarb, *supra* note 61, at 92).

[87] Dodson, *supra* note 1, at 741–42; *see, e.g.*, Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (finding gay marriage restrictions presumptively unconstitutional under the Hawaii constitution); Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (finding limitations of civil marriage to individuals of opposite sexes lacked rational basis and violated state constitutional equal protection principles); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (finding exclusion of same-sex couples from benefits and protections incident to marriage under state law violated common benefits clause of State Constitution).

[88] *See* Mapp v. Ohio, 367 U.S. 643, 651–52 (1961); Dodson, *supra* note 1, at 744 n.237.

greater exploration in other areas of constitutional law, such as takings law.[89]

One might assume that given the structural and governmental differences between the federal Constitution and the state constitutions, as well as the sensitive policy matters reviewed by state supreme courts, "states should exercise independence in state constitutionalism."[90] But the gravitational force to which Dodson, Long, Goldfarb, Williams, and Solimine speak still results in a judicial culture of "go with the flow unless some countervailing force enables resistance."[91] This has produced a phenomenon where state constitutions are being interpreted to mimic Supreme Court interpretations of the federal Constitution, leading to the adoption and application of the Court's interpretive methodologies.[92] The concern, of course, is that such blind following might have the effect of confusing interpretations of the analogous state constitutional provision.[93]

Indeed, independent state constitutionalism, for which Justice William Brennan once advocated,[94] arguably failed to materialize. The tendency is for state constitutions and state constitutional law to converge with the language and body of the federal Constitution and Supreme Court jurisprudence.[95] This is partially a result of the "often unstated premise that U.S. Supreme [C]ourt interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions."[96] Even if the state constitutional provision is different from the federal one, states tend to apply the Supreme Court's doctrinal scripts,[97] largely because state bills of rights

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[89] *See infra* Part II for a discussion of state conformity to federal takings doctrine.

[90] *See* Dodson*, supra* note 1, at 725.

[91] *Id.* at 727; *see* WILLIAMS, *supra* note 85; Goldfarb, *supra* note 61; Long, *supra* note 6; Solimine, *supra* note 22.

[92] Solimine, *supra* note 22, at 338.

[93] WILLIAMS, *supra* note 85, at 151–52 .

[94] *See* Brennan, *State Constitutions*, *supra* note 58, at 420–21.

[95] Gardner, *Failed Discourse*, supra note 80, at 764–66; *see also* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783–84 (2011).

[96] WILLIAMS, *supra* note 85, at 135 (arguing that this premise is wrong); *see also* Dodson, *supra* note 1, at 724–26 (arguing that states should exercise independence in interpreting their constitutional provisions).

[97] GARDNER, *supra* note 4, at 6–7; Gardner, *Failed Discourse*, *supra* note 80, at 791–92.

reproduce in some form or another the full list of rights protected under the federal version.[98] This, of course, has led state courts to adopt the tests and doctrines of the Supreme Court as their own.[99] The influence of the gravitational force of federal law on state actors is well recognized in the literature, but scholars have paid little attention to this phenomenon in the context of constitutional property.

II. CONVERGENCE AND (RARE) DIVERGENCE IN CONSTITUTIONAL PROPERTY

This Part offers empirical evidence regarding whether states experience a similar gravitational pull—a centripetal force—that lures the drafting of state legislation and establishment of state court doctrine towards the United States Supreme Court's takings jurisprudence.[100] Indeed, the empirical evidence bears out the reality that state legislatures have enacted statutes that conform to the Court's doctrine and state courts have applied the Court's doctrinal tests. However, the one major exception to this conformity is the post-*Kelo* centrifugal episode that has created today's rupture between continued state convergence in the Court's regulatory takings vein and state divergence in Court's public use vein.

A. Convergence in Takings Doctrine

The federal regulatory takings and public use doctrine have greatly influenced state actors. But what is the extent of this conformity amongst state courts and their state constitutions?

1. STATE COURTS AND STATE CONSTITUTIONS

Scholars tracking the extent to which states have followed federal law have said little, if anything, about this relationship as applied to takings.[101] Unlike the constitutional facets of, for example,

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[98] Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 332–33 (2011).

[99] *Id.* at 334.

[100] *See also* Merrill, *supra* note 11, at 67 n.24 (discussing survey evidence "that most challenges to state condemnations are based on state constitutional provisions rather than on the fourteenth amendment").

[101] *See* Dodson, *supra* note 1, at 707–29 (examining the state law trend in tracking analogous federal laws to decide issues of state law in areas like rules of

the First Amendment and the Equal Protection Clause, the Takings Clause "furnishes no comparable constitutional baseline."[102] The difference? The Takings Clause "protects primarily against *change* in background state law."[103] Thus, landowners' protections from physical or regulatory takings are determined by background principles of state legislation and common law.[104] While Supreme Court doctrine establishes "a floor below which state courts cannot go to protect individual rights," states have wide latitude to afford greater protections under state constitutions.[105] Of course, states can provide protections above the federal minima where appropriate.

But more to the point, as a baseline, the federal Takings Clause is widely represented within state constitutions.[106] An overwhelming majority of states have a takings clause that parallels the federal Constitution's, although some states offer additional protections by adding a "damages" clause.[107] Moreover, in the majority of states, regulatory takings claims are treated identically under both constitutional texts.[108] On the whole, it thus seems that judicial pronouncements from many different states have simply copied the Supreme Court's interpretation of the Takings Clause.[109] For example, the Arizona Constitution provides protection "like" that provided for by

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evidence and employment discrimination). *But see* Sterk, *supra* note 21, at 215–18 (examining how state law provides the starting point of a regulatory Takings Clause analysis); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 423–24 (2007) ("[T]he Federal Constitution says [property rights] cannot be 'taken' without just compensation, but they are generally created in the first instance by state law.").

[102] Sterk, *supra* note 21, at 206.

[103] *Id.*

[104] *Id.*

[105] *See* State v. Sieyes, 225 P.3d 995, 1003 (Wash. 2010) (en banc).

[106] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1061 n.2 (7th ed. 2010) (noting that nearly all state constitutions contain a takings clause worded similarly to the Fifth Amendment Takings Clause).

[107] *See* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1175 n.19 (2016) (listing state constitutions that added expansions to state takings provisions, including damage considerations).

[108] Phillips v. Montgomery County, 442 S.W.3d 233, 240 (Tenn. 2014); *see infra* note 136.

[109] *See* Sterk, *supra* note 21, at 205.

the federal provision.[110] The Maryland Constitution has the "same meaning and effect" as the federal Takings Clause.[111] And Vermont's takings clause demands "virtually the same test."[112] Thus, state courts have developed, like other provisions of the Bill of Rights, some form of a "takings" jurisprudence.[113] To be clear, state courts recognizing or identifying substantially similar language between the state and federal constitutional takings provisions is nothing extraordinary. It seems that the vast majority of state courts are, indeed, adopting federal takings jurisprudence.[114] While adoption of the doctrinal rubric is well-known, the actual application of the doctrine at the state level still raises questions.

As Stewart Sterk notes, state takings regulations are simultaneously measured by both federal doctrine *and* background state law.[115] That can make for some murky applications of the takings doctrine at the state level, and may be the reason why a national takings standard is unlikely.[116] Because takings doctrine is a muddle of confusing tests and complex categorical rules, the manner for which state courts follow the Supreme Court's takings jurisprudence is curious.[117]

The Court's decision in *Lucas v. S.C. Coastal Council* is indicative of the complexity of regulatory takings. There, the Court established the longstanding test that a regulation will only be considered a "taking" if it denies the landowner of "all economically beneficial use" of the property.[118] Thus, if the regulation leaves owners with

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[110] Wonders v. Pima County, 89 P.3d 810, 814 (Ariz. Ct. App. 2004) (finding Arizona Constitution provided "like" protection to the federal Takings Clause and state's application of *Lucas* test "consistent" with constitutional requirements).

[111] Neifert v. Dep't of the Env't, 910 A.2d 1100, 1118 n.33 (Md. 2006).

[112] Ondovchik Family Ltd. P'ship v. Agency of Transp., 996 A.2d 1179, 1184 (Vt. 2010) (quoting Conway v. Sorrell, 894 F. Supp. 794, 801 n.8 (D. Vt. 1995)).

[113] *See* Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 145–42 (1969) (comparing state bills of rights provisions to guarantee in the federal Bill of Rights and finding substantial similarities).

[114] Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014).

[115] *See* Sterk, *supra* note 21, at 203–26.

[116] *Id.* at 226–37.

[117] Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562–63 (1984).

[118] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

some viable use of the land, it would likely still be deemed constitutional.[119] Another example of the complexity of regulatory takings is the Court's ruling in *Lingle v. Chevron U.S.A. Inc.*, which rejected a blend of the due process substantial advances test into the regulatory takings analysis.[120] This decision, too, has been widely adopted by state courts.[121] Furthermore, with the Court's *Penn Central* test, which provides protections where less than all economic benefit is lost,[122] state courts "almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings."[123]

State courts seem to employ the federal analytical frameworks in examining state constitutional takings claims and rarely offer greater protections. In California, for example, one court noted that "even if we did intend to interpret the state right more narrowly than the federal right," the federal Takings Clause would still apply to protect the property owner.[124] In Iowa, courts note that because of

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[119] *See* Krier & Sterk, *supra* note 8, at 63.

[120] 544 U.S. 528, 548 (2005).

[121] *See, e.g.*, Lockaway Storage v. County of Alameda, 156 Cal. Rptr. 3d 607, 623 (Cal. Ct. App. 2013); Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 639 (Minn. 2007); Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 737 S.E.2d 601, 611 (S.C. 2013).

[122] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

[123] Krier & Sterk, *supra* note 8, at 62. Some scholars argue that there tends to be little variation and divergence in interpretations of the Supreme Court's exaction tests described in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) by state and lower federal courts. *See* Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 259–69 (1999) (discussing Takings Clause cases). Other studies found that state courts cite *Nollan* and *Dolan* relatively frequently (two-thirds of the time) and state courts appear "to be aware of [the *Nollan* and *Dolan*] mandates." Krier & Sterk, *supra* note 8, at 68. But, another empirical study has found that "few state court decisions even mentioned [*Nollan* and *Dolan*] in reaching decisions subject to them." *Id.* at 68 n.129; *see also* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 537–56 (1995) (analyzing state court decisions interpreting the Supreme Court's regulatory takings cases).

[124] Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997).

the similarities of the two provisions, "we consider federal cases interpreting the federal provision persuasive in our interpretation of the state provision."[125] Maryland courts follow suit, noting that the Supreme Court's takings jurisprudence is "practically [a] direct authorit[y]" for analyzing takings challenges in *both* state and federal claims.[126] The Massachusetts Supreme Judicial Court expressly declined to adopt more expansive protections beyond the federal baseline.[127] Minnesota has usually followed the standards set forth in *Penn Central* as the "best analytic framework" to evaluate regulatory takings under the state constitution.[128] In Maine, the Supreme Judicial Court has preferred to analyze state and federal takings claims together.[129] Arizona, for example, tends to equate its state takings clause with the federal.[130] Some, like California, are reluctant, even though they could, to depart from the federal doctrinal script.[131] Others are more general in their approach to comparing both documents.[132]

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[125] Kingsway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6, 9 (Iowa 2006).

[126] Neifert v. Dep't of the Env't, 910 A.2d 1100, 1118 n.33 (Md. 2006) (quoting Green Party v. Bd. of Electors, 832 A.2d 214, 237 (Md. 2003)).

[127] Blair v. Dep't of Conservation & Recreation, 932 N.E.2d 267, 274 (Mass. 2010).

[128] Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 633 (Minn. 2007).

[129] *See, e.g.*, MC Assocs. v. Town of Cape Elizabeth, 773 A.2d 439, 443 (Me. 2001).

[130] *See* Mutschler v. City of Phoenix, 129 P.3d 71, 72 n.1 (Ariz. Ct. App. 2006) (noting that the Arizona takings clause "provides that '[n]o private property shall be taken or damaged for public or private use without just compensation having first been made'" and that "[f]or purposes of this case, the analysis of appellants' Takings Clause claim is the same under both the Federal and Arizona Constitutions" (alteration in original) (quoting ARIZ. CONST. art. II, § 17)); Wonders v. Pima County, 89 P.3d 810, 814–16 (Ariz. Ct. App. 2004) (finding Arizona constitution provided "like" protection to the federal Takings Clause and state's application of *Lucas* test "consistent" with constitutional requirements).

[131] Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997) (stating that "[e]ven if we did intend to interpret the state right more narrowly than the federal right, the federal Constitution would nevertheless apply here to protect" the plaintiff landowner).

[132] Leone v. County of Maui, 284 P.3d 956, 962–63 (Haw. Ct. App. 2012) (reviewing inverse condemnation claim under Hawaii and federal Takings Clause); Boise Tower Assocs., LLC v. Hogland, 215 P.3d 494, 503 (Idaho 2009)

Some states, like Iowa, are explicit in the level of protections afforded under the state and federal clauses, often times finding the state does not go further.[133] Some prefer to rely upon both federal

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(evaluating state takings claim exclusively under federal takings doctrine); N. Ill. Home Builder Ass'n v. County of Du Page, 649 N.E.2d 384, 388 (Ill. 1995) (examining plaintiffs' takings claim under both the state and federal takings clauses); Kan. One-Call Sys., Inc. v. State, 274 P.3d 625, 638 (Kan. 2012) (relying on Supreme Court distinction of two types of regulations that are considered per se takings); Baston v. Cty. of Kenton *ex rel.* Kenton Cty. Airport Bd., 319 S.W.3d 401, 406 (Ky. 2010) (explaining that both the Kentucky Constitution and the U.S. Constitution require just compensation for a taking); Annison v. Hoover, 517 So. 2d 420, 423 (La. Ct. App. 1987) (assessing a takings claim under both the Louisiana Constitution and U.S. Constitution); Neifert v. Dep't of the Env't, 910 A.2d 1100, 1118 n.33 (Md. 2006) (stating that the Supreme Court takings cases are "practically direct authorities" for the federal and Maryland takings clauses, and that the takings clauses of the federal and Maryland Constitutions "have the same meaning and effect" (internal citations omitted)); Tolksdorf v. Griffith, 626 N.W.2d 163, 165 (Mich. 2001) (stating that "[t]he Taking Clause of the state constitution is substantially similar to that of the federal constitution"); Adams Outdoor Advert. v. City of East Lansing, 614 N.W.2d 634, 638 (Mich. 2000) (drawing on Supreme Court's regulatory takings jurisprudence and similarities between federal and state takings clause); K & K Constr., Inc. v. Dep't of Nat. Res., 575 N.W.2d 531, 534–35 (Mich. 1998); Kafka v. Mont. Dep't of Fish, Wildlife & Parks, 201 P.3d 8, 18 (Mont. 2008); Scofield v. State Dep't of Nat. Res., 753 N.W.2d 345, 358–59 (Neb. 2008); *MC Assocs.*, 773 A.2d at 443 (preferring to analyze state and federal takings claims together); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1062–70 (N.Y. 1989) (finding local regulations effect takings under New York and federal constitutions); Manufactured Hous. Cmtys. of Wash. v. State, 13 P.3d 183, 187–88 (Wash. 2000) (noting that under existing Washington and federal law, a police power measure can violate the state and federal constitutions and thus be subject to a categorical "facial" taking challenge).

[133] Harms v. City of Sibley, 702 N.W.2d 91, 97 (Iowa 2005) (noting that "[b]ecause the Harms have not asserted and 'we have not found a basis to distinguish the protection afforded by the Iowa Constitution from those afforded by the Federal Constitution under the facts of this case, our [takings] analysis applies equally to both the state and federal grounds'" (quoting State v. Carter, 696 N.W.2d 31, 37 (Iowa 2005))); Blair v. Dep't of Conservation & Recreation, 932 N.E.2d 267, 274 (Mass. 2010) (declining to adopt more expansive protections beyond what the federal takings clause affords and instead following its "long-standing precedent" to interpret state Takings Clause to provide property owners the same protections as under federal law); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1121 (Nev. 2006) (following federal takings precedent, but arguing that state takings clause has expansive protections); Mansoldo v. State, 898 A.2d 1018, 1023–24 (N.J. 2006) (stating that "protection from governmental takings

and state clauses to make a determination, but rarely go beyond the federal even if the state clause provides such flexibility.[134] Others will explicitly follow the *Lucas*, *Palazzolo*,[135] and *Penn Central* tests without much explanation for why.[136] Even in the exactions

under the New Jersey Constitution is coextensive with protection under the Federal Constitution"); Moongate Water Co. v. City of Las Cruces, 302 P.3d 405, 410 (N.M. 2013) (explaining that in evaluating takings claims under the New Mexico Constitution, the court turns to both the federal and state takings cases for guidance, since the state takings clause provides "similar" protection to the federal).

[134] Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs, 38 P.3d 59, 63–65 (Colo. 2001) (relying on both Colorado and federal case law for guidance, and concluding that by "[r]eading [Palazzolo v. Rhode Island, 533 U.S. 606 (2001),] together with the Court's prior precedent, it is apparent that the level of interference must be very high," drawing its conclusions from several Supreme Court sources); A. Gallo & Co. v. Comm'r of Envtl. Prot., 73 A.3d 693, 701 (Conn. 2013) (assessing both the federal and state constitutions' Takings Clauses); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 856 (N.D. 2005) (noting that state supreme court "looked to both state and federal precedents in construing takings claims under the state constitution," but that the state takings clause is "broader in some respects" than the federal Takings Clause); Ondovchik Family Ltd. P'ship v. Agency of Transp., 996 A.2d 1179, 1184 (Vt. 2010) (determining that since the Federal and Vermont Constitutions "use virtually the same test for takings review," the "analysis and result in this case are the same" under both provisions (quoting Conway v. Sorrell, 894 F. Supp. 794, 801 n.8 (D. Vt. 1995))).

[135] *See infra* notes 297–98 and accompanying text for more information on *Palazzolo*.

[136] Forest Glade Mgmt., L.L.C. v. City of Hot Springs, No. CA 08-200, 2008 WL 4876230, at *2–3 (Ark. Ct. App. Nov. 12, 2008) (following the reasoning of *Lucas* to adjudicate a takings claim); Salem Church (Del.) Assocs. v. New Castle County, No. 20305-NC, 2006 WL 4782453, at *16 (Del. Ch. Oct. 6, 2006) (relying on and applying *Penn Central* test in evaluating state takings claim); Embassy Real Estate Holdings, L.L.C. v. D.C. Mayor's Agent for Historic Pres., 944 A.2d 1036, 1052–55 (D.C. 2008) (applying *Penn Central* test to state takings claim); Greater Atlanta Homebuilders Ass'n v. DeKalb County, 588 S.E.2d 694, 697–98 (Ga. 2003) (dismissing appellants' takings claim on grounds that *Penn Central* test was not satisfied); Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n, 903 P.2d 1246, 1272–73 (Haw. 1995) (analyzing and deciding takings claim under *Lucas* test); Frick v. City of Salina, 235 P.3d 1211, 1223 (Kan. 2010) (noting that "to determine whether the moratorium imposed in this case was a taking, we must apply the *Penn Central* standards"); DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 305 (Minn. 2011) (noting that the court has "often applied *Penn Central* to decide a regulatory takings case under the Minnesota Constitution"); *Wensmann Realty*, 734 N.W.2d at 631–33 (noting

context, some state courts have also resorted to the federal baseline and "appeared to be aware of" the Court's exactions mandates.[137]

that the court had "relied on cases interpreting" the federal Takings Clause in interpreting the Minnesota Takings Clause, and agreeing that "the standards set forth in *Penn Central* provide the best analytic framework to determine whether the city's actions resulted in a regulatory taking under the Minnesota Constitution"); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 762 (Pa. 2002) (applying Supreme Court's *Palazzolo* reasoning to takings claim, stating "[a] similar result should follow in this case"); Bd. of Supervisors v. Greengael, L.L.C., 626 S.E.2d 357, 369 (Va. 2006) (evaluating state takings claims under Supreme Court's *Penn Central* loss of less than all economic value test); McFillan v. Berkeley Cty. Planning Comm'n, 438 S.E.2d 801, 809 (W. Va. 1993) (analyzing takings claim under state and federal takings clause applying *Lucas* test); R.W. Docks & Slips v. State, 628 N.W. 2d 781, 786 (Wis. 2001) (noting that Wisconsin courts follow and apply a version of the *Lucas* test); Eberle v. Dane Cty. Bd. of Adjustment, 595 N.W.2d 730, 737 (Wis. 1999) (noting that Wisconsin applies the same regulatory takings rules as the federal courts, such as the *Lucas* test, which state that regulations that deny a landowner of all or substantially all of the land's practical use constitute a taking); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 728–32 (Wyo. 1985).

[137] Krier & Sterk, *supra* note 8, at 68; *see* Clay Cty. *ex rel.* Cty. Comm'n v. Harley & Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo. Ct. App. 1999) (considering the same factors as the Supreme Court in evaluating a takings claim under the Missouri Takings Clause and adopting the Supreme Court's *Nollan* test).

Some courts will peer into the plain text of both documents to determine differences.[138] South Carolina once revised its position on takings by conforming to the Supreme Court reasoning.[139] Few have expressly elected the state approach over the federal approach.[140] Other state courts acknowledge that the legislature may confer greater protections than those offered by takings clauses, but rarely have those courts extended further protections.[141] And, of course, state supreme courts are choosing to follow, rather than lead, based on the precedent set by lower state appellate courts which also slavishly follow the Supreme Court's doctrine.[142]

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[138] State v. Kimco of Evansville, Inc., 902 N.E.2d 206, 210 (Ind. 2009) (noting that "the state and federal takings clauses are textually indistinguishable and are to be analyzed identically"); Kingsway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6, 9 (Iowa 2006) (stating that "[b]ecause of [the state and federal] similarity regarding takings, we consider federal cases interpreting the federal provision persuasive in our interpretation of the state provision"); Walters v. City of Greenville, 751 So. 2d 1206, 1210 (Miss. Ct. App. 1999) (stating that "Mississippi case law gives no distinct definition of a 'taking' of property; therefore, we turn to federal case law which has given such definition"); Hallco Tex., Inc. v. McMullen County, 221 S.W.3d 50, 56 (Tex. 2006) (explaining that "[a]lthough our takings provision is worded differently than the Takings Clause of the Fifth Amendment to the United States Constitution, we have described it as 'comparable' and the parties here agree that it is appropriate to look to federal cases for guidance"); Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 669 (Tex. 2004) (analyzing takings claim by applying Texas Takings Clause to "federal jurisprudence for guidance," even though "it could be argued that the differences in the wording of the two provisions are significant").

[139] Byrd v. City of Hartsville, 620 S.E.2d 76, 79 n.6 (S.C. 2005) (revising state takings doctrine to conform and comply with Supreme Court reasoning and noting that "[t]akings analysis under South Carolina law is the same as the analysis under federal law" (citing Westside Quik Shop v. Stewart, 534 S.E.2d 270, 275 (S.C. 2000))).

[140] State *ex rel.* R.T.G., Inc. v. State, 780 N.E.2d 998, 1008 (Ohio 2002) (declining to invoke *Lucas*' dicta on how to define the relevant parcel for the takings analysis, instead "determining the relevant parcel in a takings analysis pursuant to the Takings Clause of the Ohio Constitution").

[141] *See Kimco*, 902 N.E.2d at 212 ("Constitutional doctrine is not the end of the matter. Legislatures may confer greater rights to compensation for government action than those afforded by the constitutional takings clauses.").

[142] Wonders v. Pima County, 89 P.3d 810, 814 (Ariz. Ct. App. 2004) (finding Arizona's constitution provided "like" protection to the federal Takings Clause and the state's application of the *Lucas* test "consistent" with constitutional requirements); Forest Glade Mgmt., L.L.C. v. City of Hot Springs, No. CA 08-200,

In short, not only do state supreme courts mimic federal regulatory takings doctrine, they usually decline to apply the doctrine in a way that would offer more protections for landowners and rarely go beyond or modify the Supreme Court's doctrinal baseline.[143] Indeed, the narrative in constitutional property seems to fit the gravitational narrative in other areas of constitutional law that are subject to a constitutional bottom.[144] However, there are a few examples of divergence, and we should be cautious not to claim wholesale conformity across the board.[145]

2008 WL 4876230, at *2–3 (Ark. Ct. App. Nov. 12, 2008) (following the reasoning of *Lucas* to adjudicate a takings claim); Salem Church (Del.) Assocs. v. New Castle County, No. 20305-NC, 2006 WL 4782453, at *16 (Del. Ch. Oct. 6, 2006) (relying on and applying *Penn Central* test in evaluating state takings claim); *Walters*, 751 So. 2d at 1210 (stating that "Mississippi case law gives no distinct definition of a 'taking' of property; therefore, we turn to federal case law which has given such definition"); Annison v. Hoover, 517 So. 2d 420, 423 (La. Ct. App. 1987) (assessing a takings claim under both the Louisiana Constitution and U.S. Constitution); *See* Mutschler v. City of Phoenix, 129 P.3d 71, 72 n.1 (Ariz. Ct. App. 2006) (noting that the Arizona takings clause "provides that '[n]o private property shall be taken or damaged for public or private use without just compensation having first been made'" and that "[f]or purposes of this case, the analysis of appellants' Takings Clause claim is the same under both the Federal and Arizona Constitutions" (alteration in original) (quoting ARIZ. CONST. art. II, § 17)); *see also* Twain Harte Assocs. v. County of Tuolumne, 265 Cal. Rptr. 737, 749 (1990); G & A Land, LLC v. City of Brighton, 233 P.3d 701, 706 (Colo. App. 2010); *Clay County*, 988 S.W.2d at 107; Beroth Oil Co. v. N.C. Dep't of Transp., 725 S.E.2d 651, 661 (N.C. Ct. App. 2012).

[143] *See infra* Section III.A. The recent decision by the Tennessee Supreme Court in *Phillips v. Montgomery County*, discussed at length in Section III.A, seems to suggest, from the vantage point of a state supreme court, that sister state courts have been pulled by the gravitational force of the federal regulatory takings analytical framework, but also notes the few exceptions where states provided greater protections or developed their own tests. 442 S.W. 3d 233, 240 n.10 (Tenn. 2014).

[144] However, some state courts have said otherwise, noting that "there is no reason why [the state constitution] cannot be interpreted to provide *fewer* protections than the Federal Constitution," even though "[o]f course, . . . [where] the Federal Constitution is more expansive, it must override contrary state law." Sanders v. State, 585 A.2d 117, 146 n.25 (Del. 1990); *see* Davis v. Brown, 851 N.E.2d 1198, 1204 (Ill. 2006) (applying general principles of whether regulation "goes too far" under Supreme Court's *Penn Central* test).

[145] R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 n.11 (Alaska 2001) (stating that "[t]he inclusion of the term 'damage' affords the property

owner broader protection than that conferred by the Fifth Amendment to the Federal Constitution" (quoting Ehrlander v. State Dep't of Transp. & Pub. Facilities, 797 P.2d 629, 633 (Alaska 1990))); San Remo Hotel, L.P. v. City & County of San Francisco, 41 P.3d 87, 100–02 (Cal. 2002); Herzberg v. County of Plumas, 34 Cal. Rptr. 3d 588, 595 (Cal Ct. App. 2005) ("The California Constitution also requires just compensation when private property is 'damaged for public use.' 'By virtue of including "damage[]" to property as well as its "tak[ing]," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision.' Apart from that difference, however, the California Supreme Court has construed the state clause congruently with the federal clause" (alterations in original) (citations omitted)); DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 305–06 (Minn. 2011) (holding that an airport zoning ordinance which diminished the value of nearby property located in a runway safety zone by as much as six percent (6%) was a compensable regulatory taking under the Minnesota Constitution, which requires compensation where private property is "taken, destroyed or damaged for public use" because the regulation benefited a specific governmental purpose and caused the owners to suffer a "substantial and measurable decline" in the market value of their property; while Minnesota courts had previously followed the Supreme Court's *Penn Central* decision, which interpreted the less broadly-phrased federal takings clause, the court noted that *Penn Central* was "not the only test" and declined to apply it where a regulatory action would be considered a taking under the Minnesota takings clause because of damage to property value caused by a regulation); Interstate Cos. v. City of Bloomington, 790 N.W.2d 409, 413–14 (Minn. Ct. App. 2010) (explaining that the Minnesota state constitution provides more protection because it requires compensation when property is "damaged" or "destroyed," as well as "taken," and thus "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations" (quoting McShane v. City of Faribault, 292 N.W.2d 253, 258–59 (Minn. 1980)); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 856 (N.D. 2005) (explaining that "[under North Dakota Constitution article I, section 16], '[p]rivate property shall not be taken or damaged for public use without just compensation.' This Court has said our state constitutional provision is broader in some respects than its federal counterpart because the state provision 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable'" (alteration in original) (quoting Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987))); Estate & Heirs of Sanchez v. County of Bernalillo, 902 P.2d 550, 553 (N.M. 1995) (noting that New Mexico, unlike the United States, requires compensation when property is damaged, but not taken, but in order to require compensation, the damage must affect some property right that is not generally shared or enjoyed by the public); Krier v. Dell Rapids Township, 709 N.W.2d 841, 846 (S.D. 2006) ("Article VI, section 13 of our Constitution differs from the Fifth Amendment of the Federal

A few state courts have taken steps to interpret their takings clauses to offer greater protection to property owners in regulatory takings challenges than would be required by the federal takings doctrine.[146] A handful of states have developed their own takings tests that offer stronger protections, or declined the Court's doctrine altogether.[147] For example, the Washington Supreme Court has stated that its state constitution has a history of extending greater protections from governmental interference with private property; it declined to follow the Supreme Court's regulatory takings doctrine, instead choosing to follow a state-formulated regulatory takings test.[148] The Nevada Supreme Court has suggested that its takings clause "contemplates expansive property rights" beyond the federal Takings Clause, and that a regulatory takings analysis under the

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Constitution in two key respects. First . . . we impose 'public use' requirements that are more strict than the federal baseline. Second, our Constitution requires that the government compensate a property owner not only when a taking has occurred, but also when private property has been 'damaged.' The Federal Constitution does not contain a 'damage' clause." (internal citations omitted)).

[146] *See, e.g.*, *R & Y, Inc.*, 34 P.3d at 293 (acknowledging that the Alaska Constitution provides property owners broader protection than the United States Constitution); Avenal v. State, 886 So. 2d 1085, 1104 (La. 2004) (noting that the Louisiana Constitution requires compensation for property "damaged" as well as "taken"); Gilich v. Miss. State Highway Comm'n, 574 So. 2d 8, 11–12 (Miss. 1990) (holding that the Mississippi Constitution provides broader protection than the United States Constitution for property "taken or damaged" (emphasis omitted)); *Krier*, 709 N.W.2d at 846 (recognizing that the South Dakota Constitution imposes stricter requirements than the United States Constitution, such as compensation when property is "taken" or "damaged").

[147] *See, e.g.*, Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 12, 49–50 (Ala. 2012) (declining to recognize regulatory takings under the state constitution and rejecting federal precedents); Coast Range Conifers, LLC v. State *ex rel.* State Bd. of Forestry, 117 P.3d 990, 996 (Or. 2005) (en banc) (noting that a regulatory taking occurs under the Oregon Constitution only when there is no economically viable use of the property); Utah Dep't of Transp. v. Admiral Beverage Corp., 275 P.3d 208, 215 (Utah 2011) (explaining that Utah's just compensation clause is triggered when there is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed" (quoting Stockdale v. Rio Grande W. Ry. Co., 77 P. 849, 852 (Utah 1904))); Manufactured Hous. Cmtys. of Wash. v. State, 13 P.3d 183, 187–88 (Wash. 2000); Guimont v. Clarke, 854 P.2d 1, 5–11 (Wash. 1993) (en banc) (developing a series of tests to determine if a compensable taking has occurred, drawing upon both state and federal precedents).

[148] *Manufactured Hous. Cmtys.*, 13 P.3d at 189, 196–97.

state constitution, unlike federal doctrine, occurs when the state fails to "follow . . . procedures" under state law and "appropriates or permanently invades private property."[149] North Dakota has found that the state takings provision is broader "in some respects" than the federal provision "because the state provision 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'"[150] Most extreme is the Alabama Supreme Court, which has declined to recognize regulatory takings under state constitutional law and rejects federal precedents.[151] There, the Alabama Supreme Court looked to the plain language of the Alabama constitution's takings clause, finding that the clause "does not make compensable regulatory 'takings'" and that the language of the federal and state clauses were not similar enough to give rise to a regulatory takings claim under state constitutional law.[152] And what about state actors' approaches to the federal public use doctrine? It is mostly the same—mimicry.

The Supreme Court's ruling in *Berman* spurred the broader, modern-day takings conception.[153] Justice Douglas stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[154] The Court held that takings for the underlying purpose of clearing slums and blighted neighborhoods was a valid public use under the Takings Clause.[155] *Berman* not only opened the

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[149] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1127 (Nev. 2006). A persuasive dissent begs to differ based on records of the drafters of the constitution. *Id.* at 1131 n.8 (Becker, J., dissenting in part and concurring in part).

[150] *Wild Rice*, 705 N.W.2d at 856 (noting, however, that "our cases on inverse condemnation under the state constitution bear some similarities to the federal analysis.").

[151] *Town of Gurley*, 143 So. 3d at 12, 49–50 (declining to recognize regulatory takings under the state constitution and rejecting federal precedents)

[152] *Id*. at 13.

[153] Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 432 (R.I. 1969) ("Perhaps the single greatest contribution to the expanded view of a public use came in 1954 with the holding of the United States Supreme Court in the case of [*Berman*].").

[154] Berman v. Parker, 348 U.S. 26, 32 (1954).

[155] *Id.* at 35–36. In *Berman*, the Court was faced with a redevelopment project that sought to ameliorate a blighted area in Washington D.C. *Id.* at 28. The housing was decrepit and uninhabitable. *Id.* Thus, the City condemned the land and

door for urban renewal projects to flourish, but also introduced economic development as a tempting justification for eminent domain.[156] Decades later, the Supreme Court stuck closely, once again, to its broad conception of eminent domain in *Midkiff*, ruling that a Hawaii statute that allowed fee title to be taken from landlords and transferred to tenants in an effort to reduce the concentration of land ownership was a valid public use.[157] The majority of state courts seem to have gravitated to the Court's broader conception of "public use."[158] Even though the *Berman* decision implied federal takings, the ruling has had a formidable influence over state courts.[159] Many scholars have argued that as a result of *Berman*, both state and federal courts have given legislatures and administrative agencies far too much discretion in eminent domain determinations justified only by the Supreme Court saying so.[160] Indeed, following *Berman*

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transferred title to private entities for the public purpose of redevelopment, which also included construction of low-cost housing. *Id.* at 28–32. In upholding this purpose, the Court was unpersuaded that nonblighted property within a blighted neighborhood meant that the creation of a better balanced and more attractive community was not a justifiable public use to exercise condemnation. *Id.* at 35.

[156] *See, e.g.*, People *ex rel.* City of Urbana v. Paley, 368 N.E.2d 915, 921 (Ill. 1977); Green v. City of Mt. Pleasant, 131 N.W.2d 5, 17 (Iowa 1964); Common Cause v. State, 455 A.2d 1, 25 (Me. 1983); City of Pipestone v. Madsen, 178 N.W.2d 594, 600–01, 604 (Minn. 1970); Maready v. City of Winston-Salem, 467 S.E.2d 615, 627 (N.C. 1996).

[157] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233–34, 245 (1984).

[158] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 47–48 (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 228 n.104 (1993); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 9 (2003). Pritchett notes that state courts were ambivalent about the broad conception of public use through many nineteenth century eminent domain battles leading up to the *Berman* ruling. *Id.* While the Supreme Court's early acceptance of economic development as a justifiable public use blossomed, many state courts continued to apply a narrow and limited version of the doctrine. *Id.* at 13. It is also worth noting that in 1923, the Supreme Court exercised a limited role in reviewing public use cases and that state determinations regarding public use would be viewed with "great respect" by the Court. *Id.* at 12 (discussing Rindge Co. v. County of Los Angeles, 262 U.S. 700, 705–06 (1923)).

[159] *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 426 (1983).

[160] Pritchett, *supra* note 158, at 4–5 (citing Stephen J. Jones, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public*

thirty-four state supreme courts adopted the Court's broad interpretation of public use and applied such a rubric to condemnation challenges.[161]

The Court's ruling is buttressed by the fact that state constitutions have copied the federal takings clause, which has led to widespread application of the broader conception of public use by state courts in state eminent domain challenges.[162] As Wendell Pritchett notes, in the nineteenth century, state courts struggled to follow both the broad and narrow conceptions of public use, particularly as their applications by the Supreme Court were occasionally inconsistent.[163] While some surveys suggest that most state challenges to eminent domain by private property owners are based on state constitutional provisions,[164] this finding does not answer whether state courts invariably looked (and still look) to the federal provision for guidance. Neither does it answer to what extent the Court's public use doctrine is applied to resolve a case. Some commentators have noted that state courts were slower than federal courts to conform to the Supreme Court's broad, deferential public use doctrine.[165] Thomas Merrill notes that the delay may have been due to separation of power principles that were weaker at the state level than the federal level, "because interest groups may exert greater control over state governments."[166] Nonetheless, it seems that a majority of state

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Use Requirement of the Fifth Amendment, 50 SYRACUSE L. REV. 285, 289–90 (2000); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 60–61 (1998); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49 (1999); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 18 (1980)).

[161] INST. FOR JUST., FIVE YEARS AFTER *KELO*: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS (2010), https://ij.org/wo-content/uploads/2015/08/kelo5year_ann-white_paper.pdf; Wesley W. Horton & Brendon P. Levesque, Kelo *is Not* Dred Scott, 48 CONN. L. REV. 1405, 1420 (2016).

[162] Merrill, *supra* note 11, at 67 n.24. North Carolina is an exception. *Id.*

[163] Pritchett, *supra* note 158, at 9.

[164] Merrill, *supra* note 11, at 67 n.24.

[165] *Id.* at 68–69 n.30.

[166] *Id.*

actors responded to *Berman* by following the federal public use doctrine, and did so for decades.[167] Indeed, "nearly all courts have settled on a broader understanding that requires only that the taking

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[167] City of Birmingham v. Tutwiler Drug Co., 475 So. 2d 458, 468 (Ala. 1985) (citing *Berman* to explain that "[t]he role of the judiciary in determining whether the legislature is exercising its power for a public purpose is an extremely narrow one," and that "[c]ourts should not determine whether a particular urban renewal or redevelopment project is desirable"); City of Phoenix v. Superior Court, 671 P.2d 387, 393–94 (Ariz. 1983) (relying on *Berman* to determine that "the function of the judiciary in determining whether an area is a slum or blighted area is to review the findings of the governing body, rather than to make an original determination"); Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, 85 P.3d 1066, 1073 (Colo. 2004) (en banc) (explaining that the Court's precedent adopted the *Berman* analysis before and that the "requirement ensures that condemnation actions undertaken pursuant to an urban renewal project do not run afoul of the constitutional requirement that private property be taken only for a public use"); Rabinoff v. Dist. Court, 360 P.2d 114, 119–20 (Colo. 1961) (en banc) (noting that, in light of *Berman*, "[a]lthough the constitutional restriction [at issue] is different, the reasoning of the Supreme Court is persuasive in that it emphasizes that the ultimate private ownership aspect does not render the scheme invalid"); Boise Redevelopment Agency v. Yick Kong Corp., 499 P.2d 575, 579 (Idaho 1972) (noting that *Berman's* interpretation of public use "has been the nearly universal consensus of the courts"); Hous. & Redevelopment Auth. of St. Paul v. Coleman's Serv., Inc., 160 N.W.2d 266, 270 (Minn. 1968) (noting that following *Berman*, the court has in the past "pointed out that Federal and state statutes relating to housing, redevelopment, and urban renewal projects are constitutional in that the acquisition and clearing of blighted areas serve a public purpose"); Mayor of Vicksburg v. Thomas, 645 So. 2d 940, 942–43 (Miss. 1994) (relying on *Berman* as baseline public use analysis); Paulk v. Hous. Auth. of Tupelo, 195 So. 2d 488, 490–92 (Miss. 1967) (holding, in reliance on *Berman*, that it was constitutional for the municipal housing authority to condemn an owner's land that was located within the slum area marked for condemnation to make way for urban renewal); City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 14 (Nev. 2003) (following *Berman*); Urban Renewal Agency of Reno v. Iacometti, 379 P.2d 466, 469 (Nev. 1963) (relying on *Berman* to explain that property may be taken for redevelopment); Wilson v. City of Long Branch, 142 A.2d 837, 842–43 (N.J. 1958) (noting that, based on *Berman*, urban redevelopment and economic development are "intimately related to the public health, welfare, and safety and so are consonant with both Federal and State Constitutions"); Isaacs v. Oklahoma City, 437 P.2d 229, 234 (Okla. 1966) (explaining that the Court has upheld the constitutionality of urban renewal laws that allowed post-condemnation use of the property by private interests); Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 432 (R.I. 1969) (explaining that "[p]erhaps the single greatest contribution" to the public use doctrine is *Berman*); Davis v. City of Lubbock, 326 S.W.2d 699, 703 (Tex. 1959) (explaining that, in light of *Ber-*

yield some public benefit or advantage."[168] This conception drives much of the deference state courts give to state actors, such as state administrative agencies, exercising eminent domain.[169] Between 1954 and 1986, a majority of state and federal appellate court decisions held that a government taking by eminent domain was for a public use, analytically following the Court's jurisprudence.[170] This is unsurprising given the broad deference granted to the Court's public use doctrine. Many states have declined to expand takings protections beyond the Supreme Court's minima and generally have been amenable to the broad deference handed down in *Berman* and *Midkiff*.[171]

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man, "[t]he question of 'public use,' as far as the due process of the federal constitution is concerned, has been settled"); Miller v. City of Tacoma, 378 P.2d 464, 471 (Wash. 1963) (citing *Berman* to explain that "any question of public use or due process under the federal constitution, with regard to [urban renewal] legislation, is settled"); Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 573 (W. Va. 1998) (relying upon the Supreme Court's *Berman* decision as "instructive" on questions related to condemnations for urban redevelopment and blight removal).

[168] DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 196 (2002). However, as Ilya Somin notes, "these postmortems for the narrow view turned out to be premature" as *several* state supreme courts still held a narrow conception of public use despite the *Berman* decision. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 60 (2015).

[169] *See* Jones, *supra* note 160, at 294. The Supreme Court's narrower conception, which gave courts *de novo* review over questions of the public use of eminent domain, continued as late at the 1930s. *See* Paul W. Tschetter, Note, Kelo v. New London*: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of 'Public Use,'* 51 S.D. L. REV. 193, 220–21 (2006).

[170] *See* Merrill, *supra* note 11, at 96. Decisions upholding takings as satisfying a public use did decrease slightly when narrowed to only state court decisions. *Id.* (noting that "[l]ooking at the state appellate decisions alone, we find that 16.2%, roughly one in six, held that a proposed taking did not serve a public use").

[171] *See, e.g.*, Wright v. City of Palmer, 468 P.2d 326, 330–31 (Alaska 1970); People *ex rel.* City of Urbana v. Paley, 368 N.E.2d 915, 921 (Ill. 1977); Green v. City of Mt. Pleasant, 131 N.W.2d 5, 17 (Iowa 1964); Common Cause v. State, 455 A.2d 1, 25–26 (Me. 1983); City of Frostburg v. Jenkins, 136 A.2d 852, 855-56 (Md. 1957); City of Pipestone v. Madsen, 178 N.W.2d 594, 600–01 (Minn. 1970); Maready v. City of Winston-Salem, 467 S.E.2d 615, 627 (N.C. 1996); McKinney v. City of Greenville, 203 S.E.2d 680, 690 (S.C. 1974).

Most courts that have reviewed the issue of public use under state constitutions have adopted a broad interpretation, which is similar to the interpretation of the Supreme Court's public use vein.[172] Indeed, the "consensus of modern legislative and judicial thinking [was] to broaden" the public purpose of takings, pursuant to *Berman* and *Midkiff*, and include economic development.[173] As the New Jersey Superior Court explained, "[c]ourts that take the broader and more liberal view in sustaining public rights at the expense of property rights hold that 'public use' is synonymous with 'public benefit,' 'public advantage,' or 'public utility.'"[174] In New York, the prevailing notion has been to reaffirm the longstanding doctrine of deference to the broad conception.[175] Many states also take the position that ultimate use by the public is not necessary.[176] For example, the

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[172] *Pappas*, 76 P.3d at 10; *see also* 2A JULIUS L. SACKMUN, NICHOLS ON EMINENT DOMAIN § 7.02[3], at 7-33, 7-36 (Matthew Bender ed., 3d ed. 2017).

[173] Faulconer v. City of Danville, 232 S.W.2d 80, 83 (Ky. 1950).

[174] County of Essex v. Hindenlang, 114 A.2d 461, 469 (N.J. Super. Ct. App. Div. 1955).

[175] Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 730 (N.Y. 2010) (reaffirming the longstanding doctrine of legislative deference in New York, meaning that so long as the legislature makes rational, nonarbitrary determinations as to blight and public purpose, the judiciary will not substitute its judgment for that of the legislative body).

[176] The majority of state courts take this broader view. *See, e.g.*, Cohen v. Larson, 867 P.2d 956, 958 (Idaho 1993) ("The proposed use need not be strictly public, but it must at least benefit the public welfare or the economy *of the state*. The notion of public use is a flexible one depending on the needs and wants of the community." (emphasis added) (citation omitted)); Green v. High Ridge Ass'n, 695 A.2d 125, 129 (Md. 1997) (noting that "'public use' is not limited to circumstances where 'the public . . . literally or physically [is] permitted to use the property taken by eminent domain.'" (omission and alteration in original)); *Pappas*, 76 P.3d at 11; Township of West Orange v. 769 Assocs., L.L.C., 800 A.2d 86, 91 (N.J. 2002) ("[I]t is not essential that the entire community or even any considerable portion of the community directly enjoy or participate in the condemned property for the taking to constitute a 'public use.'"); *Hindenlang*, 114 A.2d at 468 ("The number of people who will participate in or benefit by the use for which the property is to be condemned is not the determinant of whether the use is or is not a public one."); Carolina Tel. & Tel. Co. v. McLeod, 364 S.E.2d 399, 402 (N.C. 1988) ("[I]t is 'immaterial' if the use is limited to citizens of a certain location or that few people will in fact exercise the right to use. The key point . . . is that the use is 'open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual . . . will not deprive it of its public character.'" (citations omitted) (second omission in original) (quoting Dyer v. Tex. Elec. Serv. Co., 680 S.W.2d 883, 885 (Tex. App. 1984))); Grice v.

Colorado Supreme Court, in *Rabinoff v. District Court ex rel. Denver*, noted that the *Berman* decision was persuasive in emphasizing that ultimate private ownership does not render a redevelopment scheme invalid.[177] Similarly, the Rhode Island Supreme Court has called *Berman* the "single greatest contribution to the expanded view of" public use doctrine.[178] The Idaho Supreme Court has stated that *Berman* has the "near[] universal consensus of the [state] courts."[179] As for economic development as a justifiable public use, courts have consistently found that the removal of economic stagnation satisfies the public use test under both federal and state constitutions.[180] Of course, economic development was rejected by most states post-*Kelo*.[181] Eminent domain for economic development purposes became the most recent heavy-handed legislative supplement to provide greater constitutional protections than the federal baseline.[182]

As in regulatory takings, there are, of course, exceptions to public use conformity. While most state courts rule in accordance with the Supreme Court's broad interpretation of the federal Takings Clause, there are a few states that still take a narrower approach.

Vt. Elec. Power Co., 956 A.2d 561, 571 (Vt. 2008) ("It is not necessary to a public use that the whole public, or any considerable portion of it, participate in it; the use may be, and frequently is, limited to a small locality, and yet be public in a constitutional sense." (quoting Deerfield River Co. v. Wilmington Power & Paper Co., 77 A. 862, 864 (Vt. 1910))).

[177] 360 P.2d 114, 124 (Colo. 1961).

[178] Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 432 (R.I. 1969).

[179] Boise Redevelopment Agency v. Yick Kong Corp., 499 P.2d 575, 579 (Idaho 1972).

[180] City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 369 (N.D. 1996); *see also* State *ex rel.* Tomasic v. Unified Gov't of Wyandotte Cty., 962 P.2d 543, 554 (Kan. 1998) (holding that economic development is a valid public use); City of Duluth v. State, 390 N.W.2d 757, 767 (Minn. 1986) (finding economic development to be a valid public use and noting that "after permitting so much new development in the Twin Cities area where an economic boom may be said to be in progress, it hardly seems appropriate to apply a more stringent rule"); City of Midwest City v. House of Realty, Inc., 100 P.3d 678, 686 (Okla. 2004) (noting that generally, economic development is valid public use).

[181] *See* SOMIN, *supra* note 168, at 178–79 (discussing bans on economic development takings). *See infra* Part III.

[182] *See* Krier & Sterk, *supra* note 8, at 78 n.171.

Some state courts acknowledge that the public use clause in their state constitutions offers greater protections than the federal counterpart.[183] South Dakota, for example, has consistently offered greater protections beyond the federal baseline. Its courts, in interpreting the state constitution's takings clause, have employed the "use by the public" test.[184] This test requires that there be a "use or right of use on the part of the public or some limited portion of it."[185] Prior to *Kelo*, only eight states determined that the Takings Clause placed stricter limitations above the federal baseline.[186] In *Bailey v. Myers*, the Arizona Supreme Court recognized that decisions based

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[183] Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 247–48 (2012).

[184] Krier v. Dell Rapids Township, 709 N.W.2d 841, 846 (S.D. 2006) (citing Benson v. State, 710 N.W.2d 121, 146 (S.D. 2006)).

[185] Ill. Cent. R. Co. v. E. Sioux Falls Quarry Co., 144 N.W. 724, 728 (S.D. 1913).

[186] *See* Bailey v. Myers, 76 P.3d 898, 901 (Ariz. Ct. App. 2003) (holding taking of property was not for "public use" pursuant to "significant limitations on the power of eminent domain" in Arizona Takings Clause); City of Little Rock v. Raines, 411 S.W.2d 486, 494–95 (Ark. 1967) (determining condemnation for the purpose of "industrial development" fails to satisfy the state constitutional public use limitation); Baycol v. Downtown Dev. Auth., 315 So. 2d 451, 457 (Fla. 1975) (construing Florida Constitution's public use clause as prohibiting the exercise of eminent domain for private use); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 7, 11 (Ill. 2002) (holding condemnation for economic development alone would not achieve a legitimate public use and was unconstitutional under the Illinois Takings Clause which provided that private property shall not be taken or *damaged* for public use without just compensation to its owner); Opinion of the Justices, 131 A.2d 904, 907 (Me. 1957) (holding a proposed Maine statute authorizing takings for the purpose of "industrial development . . . [for] the betterment of the economy of the city" was an unconstitutional taking for private use and not a public purpose under Maine takings clause, providing that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require it"); County of Wayne v. Hathcock, 684 N.W.2d 765, 788 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part) (finding eminent domain for purposes of economic development unconstitutional because they do not advance a public use under the Michigan takings clause, providing that "[p]rivate property shall not be taken for public use without just compensation"); Karesh v. City Council of Charleston, 247 S.E.2d 342, 342–44 (S.C. 1978) (stating that South Carolina courts expressly adhere to a "strict interpretation" of state Takings Clause restricting the power of eminent domain to the taking of private property for "public use"); Somin, *Post*-Kelo *Reform*, *supra* note 32, at 196 ("The state of Utah banned both economic development takings and blight condemnations . . . before *Kelo* was decided.").

on the federal Constitution and most state constitutions regarding "the purposes for which private property may be taken and as to what constitutes a public use, *are not controlling in this state, and, indeed, lend us but little aid.*"[187] Relatedly, the Washington State Supreme Court acknowledged that its public use clause differs from the federal one, affording its residents expansive constitutional property rights.[188] So, while a majority of states have followed *Berman*'s broad conception of public use, some have departed to provide property owners more protections from eminent domain.

This much is known: state courts gravitate toward the same public use and regulatory taking analytical frameworks and tests, and decline to venture above the constitutional bottom or pull the floor of protections a little higher.[189] But, do state legislatures that follow the Court's takings doctrine offer greater protections or craft their own regulatory takings formulation? While some may attempt to craft statutory provisions that divert from or provide greater protections to constitutional property, most fail to substantively move the needle (or pull the floor of protections higher).

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187 *Bailey*, 76 P.3d at 903 (quoting Inspiration Consol. Copper Co. v. New Keystone Copper Co., 144 P. 227, 278 (Ariz. 1914)).

188 State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 966 P.2d 1252, 1261 (Wash. 1998) (en banc).

189 The analyses of state appellate and supreme court decisions is not an exhaustive empirical study of state regulatory takings cases. Instead they comprise a review of many state appellate and mostly state supreme court rulings, where courts faced a regulatory takings challenge and, more often than not, seemed to evaluate the claims either under both state and federal takings doctrine simultaneously (giving great weight to the Supreme Court's takings doctrine and tests) or exclusively under the federal test (and declining to apply state doctrine). The Tennessee Supreme Court's opinion in *Phillips v. Montgomery County* and its citations to states that conform to and diverge from federal regulatory takings doctrine is a useful starting point for understanding the extent of the conformity across the states for applying the Court's regulatory takings doctrine. 442 S.W.3d 233, 240 n.10 (Tenn. 2014). More research and studies, like the one conducted by James Krier and Stewart Sterk, are necessary to fully grasp the extent of the conformity argued in this Article. *See generally* Krier & Sterk, *supra* note 8. At the very least, the case law research illustrates the operation of the general gravitational phenomenon of the federal regulatory takings doctrine at the state level.

2. STATE LEGISLATURES AND TAKINGS STATUTES

Frank Michelman and Robert Ellickson have urged state legislators to become more active in shaping takings doctrine.[190] Perhaps state legislatures are "better able than courts to deal with [takings] issues comprehensively" and to "create new procedures."[191] If state courts seem to gravitate to the federal takings doctrine, do state legislatures exercise their sovereign independence to enact takings legislation to provide greater protections? The story is mostly the same as state courts—conformity.

Indeed, conformity with regulatory takings doctrine is the norm, but it is also evident that there is a genuine lack of interest, willingness, and ability (or failed lobbying) on the part of legislators to figure out how best to raise the floor on property protections from regulations.[192] For example, in the 1990s, state elected officials began enacting property rights protections laws in what has become known as the property rights movement aimed at reining in perceived regulatory excesses.[193] At the time, the "regulatory-takings issue" had never been "more legislatively salient."[194] By 1997, fifteen states adopted takings assessment statutes requiring regulatory agencies to prepare an evaluation of state actions and proposed mitigation ef-

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[190] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1245–57 (1967).

[191] Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL'Y 75, 80–81 (1996) [hereinafter, Ellickson, *Takings Legislation*].

[192] Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412–13 (1997) ("Property rights legislation is being introduced and adopted by the states at a dramatic rate . . . . The assessment provisions and the compensation measures present the more distinct and creative statutory approaches . . . . The majority of the 36 adopted statutes take one of these two forms. However, these statutes are increasingly becoming hybrid forms of legislation that combine more than one approach.").

[193] *See id.* Emerson and Wise found that in a five-year period, more than half of the fifty states adopted some form of provision for the protection of private property rights, and since 1991, property rights legislation was proposed in all states. *Id.* at 412. Their research found 250 bills proposed during that time period, approximately 120 of which were introduced in the 1995 session in forty-two state legislatures. *Id.* Twenty-six states have enacted thirty-nine measures since 1991. *Id.*

[194] Ellickson, *Takings Legislation*, *supra* note 191, at 75.

forts for actions that might implicate regulatory takings or other violations.[195] A few other states enacted "compensation statutes," which established tests to identify regulatory takings and when they rise to the level requiring compensation.[196] However, only a handful of state legislatures enacted statutes that granted protections *greater* than the federal takings doctrine.[197] These few states enacted statutes that have turned out to be mostly symbolic; they might, as a matter

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[195] *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L. Q. 187, 204 (1997) ("To date at least fifteen states have enacted some type of assessment statute and assessment legislation has been introduced in numerous other states in the last several years.").

[196] *See, e.g*, Bert J. Harris, Jr., Private Property Rights Protection Act, ch. 95-181, 1995 Fla. Laws 1652 (codified at FLA. STAT. § 70.001 (2017)); Private Real Property Rights Preservation Act, ch. 517, 1995 Tex. Gen. Laws 3266 (codified at TEX. GOV'T CODE ANN. §§ 2007.001–2007.026 (West 1995)). Compensation statutes are analyzed in Recent Legislation, *Land-Use Regulation—Compensation Statutes—Florida Creates Cause of Action for Compensation of Property Owners When Regulation Imposes "Inordinate Burden,"* 109 HARV. L. REV. 542 (1995).

[197] The Mississippi statute applies to any action by the state that "prohibits or severely limits the right of an owner to conduct forestry or agricultural activities on forest or agricultural land." MISS. CODE ANN. § 49-33-7(e) (2018). The Louisiana statute gives a right of action to "[a]n owner of private agricultural property." LA. STAT. ANN. § 3:3610(A) (2018). The Florida statute is not more expansive than the existing federal constitutional doctrine; it applies to government action that "has inordinately burdened an existing use of real property or a vested right to a specific use of real property." FLA. STAT. § 70.001(2) (2018). Texas's statute applies to governmental action that causes "a reduction of at least 25 percent in the market value of the affected private real property." TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii) (West 2017). In Arizona, if the enforcement of a land use law "reduces the fair market value of the property the owner is entitled to just compensation," but all laws that limit land use "for the protection of the public's health and safety" are exempted. ARIZ. REV. STAT. ANN. § 12-1134(A)–(B)(1) (2018). The Oregon statute exempts regulations "[t]hat restrict or prohibit activities for the protection of public health and safety." OR. REV. STAT. ANN. § 195.305(3)(b) (West 2018) (originally codified as OR. REV. STAT. ANN. § 197.352 (West 2005)). The Oregon statute, which was the result of voter initiatives, is an outlier in this group of states to enact symbolic laws providing greater protections to landowners in regulatory takings. The Oregon initiatives have had impacts on land use within the state. The statute provides that "[i]f a public entity enacts one or more land use regulations that restrict the residential use of private real property . . . and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation." OR. REV. STAT. ANN. § 195.305(1) (West 2018).

of text, demand compensation where federal regulatory takings doctrine does not require it, but they have led to few takings victories.[198] For example, Tennessee enacted a law based on an assessment measure specifying the conditions under which a takings judgment would be levied against the state for certain regulatory activities.[199] Based on guidelines prepared by the U.S. Attorney General from a federal executive order,[200] the law, like other state takings legislation language, is more style than substance.[201] It simply states that the guidelines for assessing regulatory activity of the state shall be based "on current law as articulated by the United States Supreme Court and the supreme court of the state."[202] The Tennessee guidelines and other property protection laws seem to simply toe the line and "restate some of the broad principles stated in the . . . Supreme

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[198] Krier & Sterk, *supra* note 8, at 78.

[199] Emerson & Wise, *supra* note 192, at 414.

[200] *Id.* (noting that "most of the assessment laws followed by states are patterned after Executive Order No. 12,630" (citing Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (Mar. 18, 1988), *reprinted in* 5 U.S.C. § 601 (1988))). The order required "federal agencies to analyze policies and actions and to perform a takings impact analysis." Emerson & Wise, *supra* note 192, at 414. These analyses would then be used for decision making in the regulatory review process, ostensibly to prevent unnecessary takings and to budget for those actions that necessarily involve takings. *Id.* "The Attorney General issued guidelines implementing the executive order." *Id.* However, as Emerson and Wise note, the order failed to become fully operational. *Id.*

[201] Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 542–43 n.64 (2000). Tennessee's statute's stated purpose is "not . . . to enlarge or to reduce the scope of private property protection afforded by the constitution of the United States or Tennessee," but to "provide a mechanism for education of, and consideration by, state agencies and the public regarding what government actions may result in an unconstitutional taking of private property," and requiring that guidelines issued under the statute be based "on current law as articulated by the United States Supreme Court and the supreme court of Tennessee." TENN. CODE ANN. §§ 12-1-201–204 (2018). Oswald notes that other states seem to mirror the Tennessee language. Oswald, *supra*, at 542–43 n.64 (citing KAN. STAT. ANN. § 77-704 (2017) (ordering the state attorney general to develop takings guidelines based on "current law as articulated" by the U.S. and state supreme courts); MICH. COMP. LAWS § 24.423 (2018) (ordering the attorney general to "develop takings assessment guidelines" based upon "current law as articulated" by the United States and state supreme courts)).

[202] Emerson & Wise, *supra* note 192, at 414–15; *see* Oswald, *supra* note 202, at 542–43 n.64.

Court [regulatory takings] cases."[203] Additionally, Utah requires that state agencies establish and review their guidelines based on recent takings cases in an effort "to maintain consistency with court rulings."[204]

One notable exception is Idaho, which enacted a property rights protections law that involves assessing state regulatory takings; the law is significantly more protective than the federal standard.[205] The law arguably goes "beyond the extant of the Supreme Court [regulatory takings] doctrine"[206] by prohibiting regulatory actions that "result in an unconstitutional taking of private property."[207] But state agencies, under the law, are to conduct a takings impact assessment, using specified guidelines, prior to taking legal or equitable actions.[208]

Interestingly, there is evidence that states have included local governments in some property protection legislation where assessment guidelines have been imposed.[209] These statutes, however, also encourage local governments to "*follow* property protections afforded by the federal and state constitutions."[210] But, if the statutes rehash the Supreme Court's regulatory takings tests and encourage state and local governments to "follow" the tests, then the statutes provide little legal significance and function only as symbolic gestures.[211]

Even in the context of just compensation legislation, few state legislatures have offered protections beyond traditional avenues of relief, such as constitutional challenges of inverse condemnation, which is when a plaintiff-landowner sues the government for payment because government actions or regulations fail to pay just compensation. In Mississippi, for example, a property owner can seek takings compensation for a state action if the state action reduces greater than forty percent (40%) in the fair market value of, among

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[203] Emerson & Wise, *supra* note 192, at 415.
[204] UTAH CODE ANN. § 63L-3-201 (LexisNexis 2018).
[205] Emerson & Wise, *supra* note 192, at 415.
[206] *Id.*; *see also* Oswald, *supra* note 202, at 542–43 n.64.
[207] IDAHO CODE § 67-8003 (2018).
[208] Emerson & Wise, *supra* note 192, at 415.
[209] *Id.* at 415–16.
[210] *Id.* at 416 (emphasis added).
[211] *See id.* at 416.

other things, personal property rights associated with conducting forestry or agricultural activities on the forest or agricultural land.[212] Texas enacted a statute where a compensable taking constitutes twenty-five percent (25%) diminution in the market value of private property, including groundwater or surface water rights.[213] The Texas statute goes beyond the constitutional floor "and extends the sway of these statutory thresholds considerably."[214] The problem, however, with these statutes—which are the exception and not the rule—is that they "incorporate some consideration of private property rights into existing procedures," but fail to specify definitions and instructions on how to actually quantify the percentage of burdensome regulations imposed on private property.[215] As Ellickson notes, "a percentage threshold poorly reflects the fairness concerns that underlie takings law" because state takings clauses aim (but usually fail) to prevent horizontal inequity caused by state action imposing economic burdens on "a few citizens" rather than dispersing such burdens through the tax system.[216]

The latitude afforded to state courts and state legislatures to protect property rights[217] beyond the constitutional bottom is simply not bearing out the way the likes of Justice Brandeis[218] or Justice Brennan[219] would have envisioned. Instead, state actors seem to adhere to longstanding Supreme Court takings doctrine to resolve takings disputes.[220] Why most state actors have resisted the opportunity to provide *greater* protections beyond the federal minima like the Minnesota Supreme Court or the Texas state legislature is somewhat unclear, but as further explained in Part III, it is probably due to the type of property interest at issue and the landowner litigating the case.[221]

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[212] *Id.*

[213] *Id.*

[214] *Id.* at 417.

[215] *Id.* at 414.

[216] Ellickson, *Takings Legislation*, *supra* note 191, at 82.

[217] *See, e.g.*, Phillips v. Montgomery County, 442 S.W.3d 233, 242 (Tenn. 2014).

[218] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 420–21 (1922) (Brandeis, J., dissenting).

[219] *See* Brennan, *State Constitutions*, *supra* note 58, at 491.

[220] *Phillips*, 442 S.W.3d at 244.

[221] *See, e.g.*, Buhmann v. State, 201 P.3d 70, 88–89 (Mont. 2008) (noting that the Montana Constitution does not provide any greater constitutional protection

Like state courts, state legislatures have also tended to draft and enact eminent domain statutes to fit the mold of the Court's public use doctrine.[222] Prior to the *Berman* ruling, for example, a "majority of states passed redevelopment acts" which authorized local agencies to exercise broad discretion to condemn private property, particularly for blight and slum clearance for private redevelopment purposes.[223] What made these statutes, codified in the 1940s, different from previous eminent domain legislation is that they departed from the rather narrow conception of "public use," such as takings for highways or roads, and instead "required that, after land was set aside for public infrastructure, the cleared property be transferred to private developers."[224] Some statutes went as far as to expressly convince courts of the constitutionality of an eminent domain provision to give urban renewal projects, for example, priority over condemnation for building schools, parks, or other public works.[225] Indeed, the power to condemn was central to many redevelopment acts. The District of Columbia Redevelopment Act, which was at

against the regulatory taking of private property than the Fifth Amendment to the United States Constitution, and thus state courts will not grant more protections beyond).

[222] *See* ALA. CODE § 11-47-170(b) (2018); ALASKA STAT. § 09.55.240 (2017); ARIZ. REV. STAT. ANN. §12-1111 (2018); COLO. REV. STAT. §§ 38-1-101(1)(b)(I), (2)(b) (2017); FLA. STAT. § 73.014 (2018); GA. CODE ANN. §§ 22-1-1(1), (9) (2018); IDAHO CODE § 7-701A (2018); 735 ILL. COMP. STAT. 30/5-5-5 (2018); IND. CODE §§ 32-24-4.5-1, 7 (2018); IOWA CODE §§ 6A.21, .22 (2018) (prohibiting taking of property for private use without owner's consent); KAN. STAT. §§ 26-501a, 501b(e) (2017); KY. REV. STAT. ANN. § 416.675 (West 2018); ME. STAT. tit. 1, § 816 (2017); MINN. STAT. § 117.012 (2017); MO. REV. STAT. § 523.271 (2018); MONT. CODE ANN. § 70-30-102 (2017); NEV. REV. STAT. § 37.010 (2017); N.H. REV. STAT. ANN. §§ 162-K:2.IX-a, 205:1-b (2018); N.M. STAT. ANN. §§ 3-18-10, 60A-10 (2018); N.C. GEN. STAT. § 160A-503(2a) (2017); N.D. CENT. CODE § 32-15-01 (2017); OHIO REV. CODE ANN. §1.08 (West 2018); OR. REV. STAT. § 35.385 (2017); 26 PA. CONS. STAT. § 204 (2018); S.D. CODIFIED LAWS § 11-7-22.1 (2018); TENN. CODE ANN. § 29-17-102 (2018); TEX. GOV'T CODE ANN. § 2206.001 (West 2017); VA. CODE ANN. § 1-219.1 (2018); W. VA. CODE ANN. § 16-18-6a (2017); WIS. STAT. § 32.03(6)(b) (2018); WYO. STAT. ANN. § 1-26-801 (2018).

[223] Pritchett, *supra* note 158, at 32.

[224] *Id.*

[225] *Id.*

issue in *Berman*, was a typical example of how other states expanded the public use doctrine within state legislation authorizing the expropriation and acquisition of substandard housing and blight for redevelopment a "public use."[226]

B. *Divergence in Public Use Vein Post-*Kelo

The real puzzle of this Article's narrative is not conformity. Instead, the main crux of this Article is a rare instance of divergence that upended the collective understanding of state conformity in takings doctrine. There is one notable exception where divergence from this longstanding gravitational conformity caused a schism in constitutional property—*Kelo v. City of New London*.[227] This centrifugal episode marked a distinct moment in constitutional property that has led to a fascinating disequilibrium in takings: regulatory takings doctrine has remained immune from a resistance movement at the state level, while the public use doctrine has experienced perhaps one of the most notable examples of state divergence from federal constitutional law.[228]

1. THE *KELO* RULING

In the five-to-four *Kelo* decision, the Court upheld economic development takings as a justifiable public use.[229] Delivering the opinion of the Court, Justice Stevens stated that a long-standing "policy of deference to legislative judgments in this field" colored the Court's decision to remain above the fray, and where condemnation determinations arise, the Court would defer to the legislature.[230] The majority took the safe route, noting that courts should not second-guess local governments' judgments regarding the efficacy of proposed economic development plans.[231] Justice Stevens noted that the "needs of society have varied between different parts of the Na-

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[226] District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790, 790–91 (1946).

[227] 545 U.S. 469 (2005).

[228] *See infra* Part III.

[229] Somin, *Limits of Backlash*, *supra* note 32, at 2107 (citing *Kelo*, 545 U.S. at 489–90).

[230] *Id.* (citing *Kelo*, 545 U.S. at 480).

[231] *Id.* at 2108 (citing *Kelo*, 545 U.S. at 488–89).

tion" and that courts should exercise "great respect" for state legislatures and state courts in discerning local public needs.[232] Nothing about the decision was a surprise, and it was expected that state courts would continue to gravitate towards federal public use doctrine the same way they had done for decades prior to *Kelo*.[233]

But that is not what happened: state legislatures railed against the decision, arguing that economic development was not a justifiable public use.[234] But, Justice Stevens's opinion reminded states that they were not tied to the decision.[235] He noted that if dissatisfied with the decision, state legislatures could amend or state courts could interpret their eminent domain laws to offer greater protections,[236] citing the Michigan Supreme Court's decision in *County of Wayne v. Hathcock*[237] as an example of a state court bucking the trend to invalidate economic development takings.[238] States took Justice Stevens's reminder to heart, embarking on a historic campaign of resistance.[239]

2. Centrifugal Episode

Following the *Kelo* decision, an unprecedented wave of eminent domain reform that either barred or restricted economic development takings swept the nation. Forty state legislatures amended their

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232 *Kelo*, 545 U.S. at 482.

233 *See supra* notes 162–68 and accompanying text for a discussion of how states gravitated toward the federal framework.

234 *See* Somin, *Limits of Backlash*, *supra* note 32, at 2101–02.

235 *See Kelo*, 545 U.S. at 489.

236 *Id.* Justice Stevens noted:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Id.

237 684 N.W.2d 765 (Mich. 2004).

238 *Kelo*, 545 U.S. at 489 n.22.

239 *See* Somin, *Limits of Backlash*, *supra* note 32, at 2103 (calling the backlash "massive and unprecedented").

eminent domain statutes to restrict or bar the exercise of eminent domain in some capacity.[240] Thirty states redefined "public use" and "public purpose" to distinguish themselves from the broad economic development justifications.[241] Eleven other states followed suit, amending their state constitutions to be more restrictive on public use takings than the federal Constitution and the Supreme Court.[242]

This countervailing influence at the state level continued beyond the state legislatures and into state courts, albeit to a lesser extent. In the three states that did not amend their constitutions or enact restrictive legislation, their highest courts ruled to grant greater protections against takings for private use.[243] State courts in seven other states with statutory amendments to eminent domain codes ruled to impose additional protections beyond the federal public use doctrine.[244] The South Dakota Supreme Court outright rejected *Kelo* altogether, explaining that its constitution offer stricter standards than the federal minima by giving "landowners more protection against the taking of their property."[245] That court concluded that "public use" requires actual use of the condemned property by the government or the general public.[246]

The Missouri Supreme Court, for example, held that an economic development taking was impermissible under its post-*Kelo* statute.[247] The Ohio Supreme Court in *City of Norwood v. Horney* favorably referenced the *Kelo* dissents as more appropriate for interpreting the Ohio Constitution's public use clause, noting "we are not bound to follow the U.S. Supreme Court's determinations of the scope of the Public Use Clause in the federal Constitution."[248] And the Pennsylvania Supreme Court, in *Reading Area Water Authority*

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[240] Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J. FORUM 82, 84 (2015) (citing states that amended their eminent domain statutes).
[241] *Id.* at 85 (citing states that redefined their statutory language).
[242] *Id.* at 84 (citing states that amended their state constitutions).
[243] *Id*. at 88.
[244] *Id.*
[245] *See* Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006).
[246] *Id.* at 163.
[247] State *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 481–82 (Mo. 2013).
[248] City of Norwood v. Horney, 853 N.E.2d 1115, 1136–37, 1140–41 (Ohio 2006) (holding that economic development is not a public use under the Ohio Constitution and also constitutionally limiting the use of redevelopment designations).

v. Schuykill River Greenway Ass'n, relied upon the statutory definition of public use, noting that the federal public use clause was immaterial to the state's determination.[249] The court noted, "we need not decide the constitutional issue because, even if we assume the condemnation can pass Fifth-Amendment scrutiny, to be valid it must also be statutorily permissible."[250] The Oklahoma Supreme Court relied upon its constitutional amendment to the takings clause to reject *Kelo*, noting that to follow *Kelo* would "blur the line between 'public' and 'private' so as to render our constitutional limitations on the power of eminent domain a nullity."[251] Indeed, after the *Kelo* decision, "federalism is alive and well."[252]

3. DISEQUILIBRIUM

The post-*Kelo* rupture in federalism was a significant transformation in constitutional property. While scholars have debated the extent of the *Kelo* "revolution," the decision nonetheless gave rise to an imbalance in federalism and takings doctrine.[253] Reform efforts were counterintuitive and unexpected in light of the historical

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[249] 100 A.3d 572, 582 (Pa. 2014).

[250] *Id.* at 582. The court continued, "[i]n this regard, it may be observed that, in the wake of *Kelo,* the General Assembly enacted PRPA [the Property Rights Protection Act], which contains a salient, affirmative prohibition on the taking of private property 'in order to use it for private enterprise.'" *Id.* (quoting 26 PA. CONS. STAT. § 204(a) (2018)).

[251] Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery, 136 P.3d 639, 652 (Okla. 2006).

[252] *See* Horton & Levesque, *supra* note 161, at 1424.

[253] Bethany Berger, Kelo *and the Constitutional Revolution that Wasn't*, 48 CONN. L. REV. 1429, 1436 (2016). Bethany Berger cautions against the notion that *Kelo* was a revolution. *Id.* She argues that economic development takings are still valid under federal law and the state response has been exaggerated by scholars. *Id.* She points to the blight loopholes, many of which Ilya Somin has identified, as symptomatic of the "facade" of the reforms and argues that *Kelo* had "little impact on the law." *Id.*; *see* Somin, *Limits of Backlash*, *supra* note 32, at 2120. But, this is arguably unpersuasive when viewed in light of the sheer volume of political and legal action by state legislatures and state courts. *See* Somin, *Limits of Backlash*, *supra* note 32, at 2102–02. The extent of state action—legislative reform, constitutional reform, and state court resistance—was quite astonishing. *Id.*

context in which states gravitated towards the Supreme Court's public use jurisprudence on economic development-related takings.[254] The surprise caused by these reform efforts was largely due to the history of state following, especially around broad conceptions of public use.[255] Recall that the Court's *Berman* decision corralled thirty-four state supreme courts to mimic, adopt, and apply the Court's broad interpretation of public use.[256] It was anticipated, based on a history of conformity, that after *Kelo*, states would continue to write the prevailing public use script and slavishly imitate the Supreme Court's jurisprudence much like they did after *Berman* and *Midkiff*.[257] Instead, the very opposite occurred.[258] States quickly dismissed the Court's broad conception in the *Kelo* decision.[259] The public use doctrine, unlike the regulatory takings doctrine, was suddenly anathema.

This is not to say that the entire public use doctrine was undermined or threatened by the post-*Kelo*, state-level reform. Traditional public use takings are permitted in most states.[260] But economic development of the type opposed by states post-*Kelo* was often a key component of the claimed public use for local governments.[261] This was indeed a seismic shift from the traditional understanding of federalism and eminent domain takings.[262] While the legislative reproach to *Kelo* was more significant than the judicial, state court

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[254] *See supra* Section II.B.

[255] *See id.*

[256] *See id.*

[257] *See id.* for a discussion of state conformity in public use doctrine.

[258] *See supra* Section II.B.2.

[259] *Id.*

[260] *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 45–46 (noting that "most states actually utilize 'quick take' procedures in which the government can acquire and demolish a person's home or business before the opportunity for a hearing").

[261] *See supra* Section II.B.

[262] *See* Somin, *Limits of Backlash*, *supra* note 32, at 2102 (explaining legislative reaction to *Kelo*). Some have argued that a trend away from federal public use doctrine began in the 1980s as part of the property rights movement. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 155–70 (3d ed. 2008) (describing increased support for property rights during this period); Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, *in* LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 1, 13–17 (noting that the Ronald Reagan

decisions refusing to apply *Kelo* acted in repudiation of the gravitational force of federal public use doctrine.[263] Nonetheless, the Takings Clause has been ruptured; regulatory takings doctrine and its murky analytical frameworks continue to be followed by the majority of state supreme courts and state legislatures, while the post-*Kelo* backlash against a broad interpretation of public use has caused a disequilibrium in constitutional property.[264]

Why state courts, generally, are reluctant to independently pursue a different doctrinal course than the one offered by the nation's highest court is any one's guess.[265] But, we are not in the business of guessing. Instead, the more interesting question is why did states abruptly dismiss the Court's broad conception of public use in *Kelo*? The regulatory takings muddle created by the Court may be precisely why states prefer to dutifully follow the federal lead. The looming prospect of going it alone to carve out a separate doctrine beyond the Supreme Court's confusing doctrinal baseline may be too risky or daunting.[266] Still, why continue to mimic a doctrinal muddle like regulatory takings when most scholars agree that the level of anxiety the doctrine generates year in and year out is arguably unnecessary?[267] The necessity for analytical and cognitive creativity to carve a new regulatory takings path (or to simply reject

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administration aided the growth of the property rights movement in the 1980s). The inertial resistance against federal public use doctrine was, arguably, beginning to take shape ten years prior to the *Kelo* decision, where state courts started to find that their state constitutions prohibited economic development takings. *See, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9, 11 (Ill. 2002) (holding that a contribution to positive economic growth was not a public use); County of Wayne v. Hathcock, 684 N.W.2d 765, 778–87 (Mich. 2004) (invalidating economic development takings under the Michigan Constitution); City of Bozeman v. Vaniman, 898 P.2d 1208, 1214 (Mont. 1995) (holding that takings that transfer private property to private businesses, unless incidental to a public project, was not a public use); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (holding that a substantial projection of economic benefit could not justify a condemnation).

[263] *See supra* Section II.B.

[264] *Id.*

[265] Dodson, *supra* note 1, at 711.

[266] *Id.* at 744 (reasoning that the history of state following makes following easier and more acceptable).

[267] *See, e.g.*, Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 981 (calling analysis of the regulatory takings doctrine "anxiety-

such a claim altogether) is indeed daunting for state courts, so many may prefer caution over ambition.[268]

Is the disequilibrium, i.e. greater divergence, a result of state courts realization that the *public use* analytical framework is just an easier target to diverge from the Court than regulatory takings doctrine? The sacrificial lamb, so to speak? Indeed, many will agree that the analytical process of determining public use (whether using a broad conception or narrow conception) is a much easier task than a court or litigant winding its way through confusing, inconsistent and arguably needless tests to determine whether government action is a "taking" rather than, say, simply a substantive due process concern like it was prior to *Mahon*.[269] And, why were there the few instances of divergence amidst widespread convergence to federal takings doctrine prior to the *Kelo* rupture? What is it about these few outlier state supreme courts that make them so willing and able to depart from the high court? More importantly, why is there this historic rift post-*Kelo*?

4. A Political Economy Explanation

Perhaps the reason for disequilibrium in public use rather than regulatory takings post-*Kelo*, boils down to the political economy; that is, the specific property interest held by the landowner-challenger and the electorates perception of underprotections to specific forms of property ownership. American law holds the home and homeowners to elevated status.[270] Indeed, the federal Constitution, along with state constitutions and statutory law "recognize the home as a special place worth preserving."[271] Ben Barros explains that the

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inducing"); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 107–29 (2002) (noting the "vagueness in takings doctrine"); Rose, *supra* note 109, at 566 (arguing that the analysis for regulatory takings is "deeply flawed"); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (stating that "[t]akings law is out of joint" and is a "doctrine-in-most-desperate-need-of-a-principle prize").

[268] *See* Dodson, *supra* note 1, at 730, 739.

[269] *See, e.g.*, Fennell, *supra* note 267, at 981.

[270] *See* Gerald S. Dickinson, *The Puzzle of the Constitutional Home* (forthcoming 2019) (manuscript at 36) (on file with author).

[271] John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 787 (2006).

home is "treated more favorably"[272] than other types of property. This is largely a result, as Margaret Radin explains, of the home being held as "inextricably part of the individual, the family, and the fabric of society."[273] Indeed, the "home occupies a special place in the pantheon of constitutional rights."[274] The Supreme Court, likewise, has "manifest[ed] a special concern with the protection of the home."[275] It makes sense, then, that a crucial Supreme Court ruling seemingly disregarding the home and arguably underprotecting the locus, specifically Ms. Kelo's, was enough to arouse the electorates collective conception of the home as a special property interest worth protecting.[276]

Thus, the dichotomy of divergence and convergence post-*Kelo* turns, persuasively, on the profile of the property owner challenging a regulation as a taking or condemnation—*homeowner* or *developer*. Recall *Berman* and *Midkiff.* Arguably, neither the plaintiffs nor the specific takings involved in those cases were conducive for a state-level backlash. Why? One view is that the property owners affected by eminent domain did not concern an involuntary taking from a homeowner.[277] In *Midkiff*, the taking was for the purpose of breaking up a land oligopoly where the transfer resulted in rental homes being taken from landlords.[278] *Berman* dealt with the exercise of eminent domain for urban renewal purposes, and its plaintiff was the owner

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[272] D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006).

[273] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013 (1982).

[274] United States v. Craighead, 539 F.3d 1073, 1077 (9th Cir. 2008) ("Under the First Amendment, the 'State has no business telling a man, sitting alone in house, what books he may read or what films he may watch.' The Second Amendment prohibits a federal 'ban on handgun possession in the home.' The Third Amendment forbids quartering soldiers 'in any house' in time of peace 'without the consent of the Owner.' The Fourth Amendment protects us against unreasonable searches or seizures in our 'persons, houses, papers, and effects.'") (internal citations omitted).

[275] *See* Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 232 (2008); *see also* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, COLUM. L. REV. 1278, 1305 (2009).

[276] *See* Somin, *Limits of Backlash*, *supra* note 32, at 2108–10.

[277] *See* Barros, *supra* note 272, at 296–97.

[278] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–33 (1984).

of a department store for commercial purposes and not to be "used as a dwelling or place of habitation."[279] Indeed, a primary consideration in *Berman* was whether the commercial property owners subject to condemnation would be permitted to repurchase the land for redevelopment in "harmony with the overall plan."[280] In other words, a taking of commercial property with the potential for further private development at a later date was a primary contention in *Berman*, not the taking of a single-parcel home.[281] While public use challenges in state courts did sometimes involve nonhomeowner plaintiffs,[282] the distinction in commercial development and homeowner property rights is important here.

Homeowners' ability to enjoy and preserve their personal interests and financial investments in the home and hearth drive a strong desire to maintain possession.[283] As Jan Cohn notes, "for the vast majority of Americans, house and home coexist; home flourishes most successfully in the privately owned, detached, single-family dwelling."[284] And as Bethany Berger notes, "[a]ll of the plaintiffs [in *Kelo*] shared some characteristics that made them especially easy to sell to the media and public . . . [and] tailor-made to appeal to a wide swath of Americans."[285] They were white homeowners of single-family detached buildings and thus looked like a bastion of "suburban and rural voters."[286] It is here that the distinction between homeowners and developers is a persuasive argument for why states embarked on divergence from federal public use doctrine, yet remain wedded to federal regulatory takings doctrine.

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[279] Berman v. Parker, 348 U.S. 26, 31 (1954).
[280] *Id.* at 34.
[281] *Id.*
[282] *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 433–34 (Cal. 1996) (providing an example of a pre-*Kelo* state court public use challenge involving a commercial plaintiff).
[283] Barros, *supra* note 272, at 297.
[284] JAN COHN, THE PALACE OR THE POORHOUSE: THE AMERICAN HOME AS A CULTURAL SYMBOL 223 (1979).
[285] Berger, *supra* note 253, at 1435. Berger contrasts the *Kelo* picture with that of the recent New Orleans razing of an African American neighborhood where holdouts far exceeded those in *Kelo*, yet the city used eminent domain to acquire forty-two percent of the properties. *Id.*
[286] *Id.*

While developers are in a position to "diversify their investment[s]" and are "repeat players" in many jurisdictions, homeowners simply are not.[287] For developers, the primary risk of overly burdensome regulations is reduction in land value.[288] Such consequences are important for overall business and investment across a potentially large swath of land within a jurisdiction.[289] The extent of a developer's fungible property holdings will probably determine whether burdensome regulations actually do impact its bottom line.[290] However, the primary risk to homeowners is concentrated on a single parcel of land. As Krier and Sterk note, this makes "diversification" in investments more difficult.[291] As Krier and Sterk's research shows, homeowners are much more likely to prevail on takings claims than developers are in state-level regulatory (or implicit) takings challenges.[292]

It might simply be that state courts are less sympathetic to developers in regulatory takings challenges because of their relationship to the underlying property.[293] Another explanation is that state courts may be more sympathetic to homeowners than developers.[294] Developers, who are ordinarily repeat players in the land use and development processes in a particular jurisdiction, probably litigate more often (and thus are prone to lose more often) than homeowners, landlords, or even small business owners.[295]

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[287] *See* Krier and Sterk, *supra* note 8, at 75–76.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.* at 76.

[292] *Id.* at 76. Krier and Sterk include business owners and landlords with homeowners. *Id.*

> Developers add value to land by obtaining regulatory approvals. Their business model is based on the risks and delays inherent in the approval process. Because they are repeat players in the development business, they are in a position to diversify their investment risk over many different development projects. By contrast, the investment of homeowners, business owners, and landlords is more likely to be concentrated in a single parcel of land, making diversification more difficult.

Id. at 75–76.

[293] *Id.* at 76.

[294] *Id.*

[295] *Id.*

The plaintiffs in almost every major regulatory takings case before the Supreme Court were hardly the quintessential holders of core property rights. In fact, the rights the landowners were advancing were broad and diverse, yet atypical of societal collective conceptions of core property rights. The plaintiff in *Penn Central* was the Penn Central Transportation Company, which owned Grand Central Terminal, a designated landmark protected by a New York preservation law.[296] Anthony Palazzolo, landowner of beachfront property, was denied a permit to develop wetlands, and subsequently lost his challenge under a *Lucas* analysis.[297] Yet, his development plans were for no ordinary development, and certainly not one involving a homeowner. His plans included permits necessary to create a private beach club that would include, among other things, parking, picnic areas, and barbecue pits.[298] Jean Loretto was a residential landlord located in the Upper West Side of Manhattan.[299] She challenged a statute barring landlords from interfering with the installation of cable television facilities.[300] This was hardly an earth-shattering result that would irk the typical homeowner's conception of private property. David Lucas—owner of two vacant oceanfront lots on the Isle of Palms in South Carolina—was also not the typical landowner who would be outraged even if the Supreme

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[296] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 115–16 (1978). I leave out the cases *Nollan* and *Dolan* since they can be distinguished as exaction cases. Yet, those plaintiffs would also be distinguishable from the single-parcel traditional homeowner like Ms. Kelo. The plaintiff in *Dolan* was a landowner who applied for, and was denied, a permit to tear down an existing retail building to construct a larger one in an effort to increase and intensify the commercial use. Dolan v. City of Tigard, 512 U.S. 374, 379, 394–96 (1994). The landowners in *Nollan* sought to develop their beachfront lot. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827–28 (1987). The administrative agency decided to deny the permit unless the Nollans allowed people to cross back and forth across the property. *Id.* at 828. This is, again, not a typical story of the average American homeowner.

[297] Palazzolo v. Rhode Island, 533 U.S. 606, 613–16, 626–30 (2001) (holding title acquisition after effective date of regulation did not preclude regulatory takings claim).

[298] *Id.* at 615.

[299] Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419, 421 (1982).

[300] *Id.* at 419–24, 441.

Court had upheld the government regulation outright instead of remanding back to state court.[301] Further, Lucas's land was undeveloped, and he had yet to build or invest in a single-family home.[302] Had the regulation at issue precluded further construction of existing single-family homes, then perhaps states, regardless of the Court's decision to remand, would have been urged to protest the decision and diverge from the *Lucas* test set forth by Justice Scalia.

Lingle's plaintiff was an oil company challenging a statute limiting rent charged to dealers leasing company-owned service stations.[303] The plaintiffs in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* were 400 landowners who were threatened by a moratorium on their undeveloped land, not their physical homes.[304] The landowners lived in one of the nation's most beautiful, scenic, and touristy freshwater lakes in the United States.[305] At best, the plaintiffs in *Tahoe Regional Planning Agency* come closest to the type of plaintiff that *might* have triggered a major state-level resistance movement. There were, however, enough differences between these plaintiffs and Ms. Kelo to make Ms. Kelo appear more vulnerable to a physical appropriation when subjected to regulations on her property than the hundreds of wealthy individuals who owned undeveloped land near Lake Tahoe. These plaintiff landowners' interests in the land were in some ways distinct from typical homeowners.

The Court's most recent ruling in *Murr v. Wisconsin* was in favor of the government.[306] Its narrative probably competes with *Tahoe Regional Planning Agency*, but it still falls short of the kind of ruling that invokes widespread disapproval across the electorate. The challengers in *Murr* were landowners whose use of two lots was intertwined in the "parcel as a whole" dispute under a Wisconsin county regulation.[307] Although the property in dispute was not a single-parcel home, a small family cabin was situated on one of the lots, and strong familial ties to the lots were central to the use and

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[301] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008–09, 1031–32 (1992).
[302] *Id.* at 1008.
[303] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 533 (2005).
[304] 535 U.S. 302, 312 (2002).
[305] *Id.* at 307.
[306] 137 S.Ct. 1933, 1950 (2017).
[307] *Id.* at 1936, 1949.

conveyance of the lots.[308] Still, even the *Murr* narrative lacked the political bite and core property rights element that *Kelo* presented. Perhaps it is too soon to tell what impact the local government's victory will have on state actors' accord with the Court's doctrine.[309]

To understand the importance of these property distinctions, it is useful to note the events that led to the property rights movement in the 1990s targeting, among other things, regulatory takings. The movement targeted perceived government overreach in the regulatory arena, specifically environmental regulation.[310] This was in response to major federal legislation in the 1970s, such as the Resource Conservation and Recovery Act and the National Environmental Policy Act, which arguably limited the rights of landowners in ways unfavorable for property rights advocates.[311] While federal efforts to rein in environmental regulations that purportedly went too far were unsuccessful, state legislators were aggressive in their pursuit of stricter private property protections from regulation.[312] The property rights movement was largely due to a perception that environmental regulations underprotected small landowners.[313] Critics of the movement saw the legislative efforts as an "attack on [the] nation's environmental laws."[314]

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[308] *Id.* at 1940.

[309] It is worth noting that the reaction to *Murr* so far has been less extensive than that to *Kelo*, and more split along ideological lines. *Compare* Ilya Somin, *A Loss for Property Rights in* Murr v. Wisconsin *[Updated with a Link to My Response to Prof. Rick Hills]*, WASH. POST: VOLOKH CONSPIRACY (June 23, 2017), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm_term=.9cd6dcc732e0 (presenting from a libertarian perspective concerns that the decision is likely to create "confusion and uncertainty going forward") *with* Josh Patashnik, *Less than Meets the Eye:* Murr*'s Impact Is Likely Limited*, LAW360 (July 3, 2017, 10:29 AM), http://www.law360.com/articles/940066/less-than-meets-the-eye-murr-s-impact-is-likely-limited ("[I]t is doubtful that *Murr* will actually change the outcome in many cases.").

[310] Nancie G. Marzulla, *State Private Property Rights Initiative As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 613–14, 630–33 (1995).

[311] *Id.* at 615–22, 633–34 (explaining the rise of environmental regulations at the federal, state and local levels, and noting the electoral success of property rights advocates in races for the federal and state legislatures).

[312] Cordes, *supra* note 195, at 189–90.

[313] Marzulla, *supra* note 310, at 614–15.

[314] John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 430 (1995).

But, there is one common theme that seems to thread these arguments: landownership and the industries that benefit from it—agriculture, farming, ranching, etc.—at the core of the 1990s property rights movement. A central issue in the movement to strengthen regulatory takings doctrine at the state legislative level was to protect industries that overwhelmingly benefited from access to potentially large landholdings to be used for commercial and agricultural development purposes.[315] This is in light of the fact that small farmers and agriculturalists occupy an extremely small space in the modern economy.[316] This is a distinction that warrants attention. It would seem that the two movements—1990s property rights movement and 2005 post-*Kelo* reform—were seeking to achieve the same results, ie. greater property protections; however, the results at the state levels differed greatly.[317] The latter movement expanded property protections to homeowners and explicitly diverged from Supreme Court takings doctrine, while the former movement barely expanded property protections as states, for the most part, remained obedient to the federal regulatory takings rubrics.[318]

Regulatory takings legislation in the 1990s indicated a preference for compensation statutes that protected landowners from land use regulations and the imposition of federal takings doctrine as a guide to regulatory disputes at the local and state administrative level.[319] Thus, the movement to redefine and reclaim the regulatory takings doctrine garnered the most support from states where landownership is most concentrated and where nonresidential land use is disproportionate to residential.[320] Indeed, the movement "had little to do with protecting [homeowners or] individual landowners,"

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[315] *See* Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 263–64 (2004).

[316] *Id.* at 259–60.

[317] *See supra* Part II.

[318] *Id.*

[319] *See id.* for a discussion of state conformity in regulatory takings doctrine and public use doctrine.

[320] Charles Geisler, *Ownership: An Overview*, 58 RURAL SOC. 532, 539–40 (1993); *see* Peñalver, *supra* note 315, at 263.

but instead pushed for legislation that lifted regulations on commercial development.[321]

The implications for regulations on developers or landowners of undeveloped land versus homeowners are nuanced but telling. Unlike typical single-parcel homeowners, a developer's interest in its commercial property and undeveloped land is more akin to a fungible asset.[322] The location of property for most homeowners threatened by condemnation makes the home nonfungible.[323] The homeowner is simply less likely to view the asset at the level of fungibility as a developer, who may have many properties spread widely within and across jurisdictions and localities. Thus, overly burdensome land-use regulations that affect several of the developer's properties are inconsequential for the most part when compared to the physical expropriation of a single parcel for a homeowner. The developer is mobile and portable. She can choose the jurisdictions in which to develop based on the regulatory apparatus. Some regulations may seem overly burdensome, but the developer may be content and willing to absorb *some* economic loss, so long as substantial portions of her properties are not equally burdened by regulation. Such mobility and portability are not so easy for homeowners.

In other words, the distinction between *Kelo*'s taking of single-parcel homes and *Penn Central*'s regulation of commercial development may solve the mystery of state conformity and state resistance in constitutional property. The factual descriptions of private property at stake in the Supreme Court's regulatory takings jurisprudence and the reach of the Supreme Court's decisions, usually in favor of the challenger-landowner, did not invoke strong threats to the core protections of the home to a level where state legislatures or courts felt obliged by political pressure to thwart regulatory takings doctrine as underprotecting private property.[324]

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[321] Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 529–30 (1998).

[322] *See generally* Barros, *supra* note 272, at 278; Peñalver, *supra* note 315, at 253.

[323] *See* Barros, *supra* note 272, at 278–82 (evaluating the personal interest in the home).

[324] This line of thinking might lead some to support heightened review of nonfungible single-parcel homeowners in both eminent domain and regulatory takings. *See id.* at 297–98; Radin, *supra* note 273, at 1006, 1012–13.

In effect, the property rights movement in the regulatory takings vein has disproportionately focused on litigating and lobbying for more protections to commercial developers and owners of undeveloped land.[325] As Eduardo Peñalver argues, "it is unsurprising, then, that homeowners have not been the forefront of a property-rights movement focused on the protection of land."[326] In *Lucas*, the Court carved out an exception to the regulatory takings test,[327] thus setting forth an implied preference for regulatory takings doctrine that serves to mostly protect developers as landowners. Molly McUsic also notes that the regulatory takings doctrine greatly favors the notion of protecting land as opposed to other forms of property.[328] Arguably, this view extends to favoring land, whether developed or undeveloped, over traditional homes. Peter Byrne notes that assets other than land receive far less attention and interest under the Court's regulatory takings doctrine.[329] This does not mean that personal property or the typical homeowner cannot benefit from regulatory takings protections. The problem is that the Court's regulatory takings doctrine focuses on regulations burdening land and thus landowners that bring claims "stand a greater chance of prevailing in the Supreme Court" than homeowners.[330] And that seems to have played out consistently in the "vast majority" of regulatory takings cases before the Court,[331] whereas regulations affecting homeowners and residential uses seem neglected.

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[325] Peñalver, *supra* note 315, at 264.

[326] *Id.* at 263. As Peñalver points out, the American mythology surrounding homeownership offers little support for the Supreme Court's creation of, say, a *Lucas* categorical rule in land in regulatory takings jurisprudence. *Id.* at 263 n.196; *see* ALFRED M. OLIVETTI, JR. & JEFF WORSHAM, THIS LAND IS YOUR LAND, THIS LAND IS MY LAND: THE PROPERTY RIGHTS MOVEMENT AND REGULATORY TAKINGS 38–44 (2003).

[327] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

[328] Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 647, 653 (1996).

[329] J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 90, 127 (1995).

[330] Peñalver, *supra* note 315, at 231 (referencing Supreme Court cases dealing with regulatory challenges to landowner-developers instead of personal property).

[331] *See id.* at 231 n.20 ("Indeed, the vast majority of regulatory takings cases in which plaintiffs have prevailed in the Supreme Court have involved suits by landowners.").

Indeed, we find that nonresidential and nonhomeownership uses of land have dominated the regulatory takings vein of the property rights movement.[332] In fact, support for the property rights movement is strongest in states that have a concentration of landownership for nonresidential, mostly commercial purposes.[333] This focus of the property rights movement "had little to do with protecting individual landowners," and instead was about deregulating commercial land use to benefit developers.[334] The regulatory takings vein of the property rights movement, in other words, seems to have pursued the practical objectives of stalling land use regulations so that beneficiaries of the movement, many of whom are commercial developers—not residential homeowners—can freely and profitably exploit the land.[335]

As a result of this dichotomy in takings, it is arguably the case that states may not engage in a countervailing resistance movement against federal regulatory takings doctrine without a seismic ruling by the Supreme Court that upholds a regulation that underprotects a challenger-homeowner. A lack of homeowner litigants in regulatory takings cases at the Supreme Court may be the root of the conformity in regulatory takings jurisprudence and lack of divergence at the state level.

III. CONCEPTUAL AND DOCTRINAL EXPLANATIONS

Having established core property rights, such as homeownership, as the origin of the constitutional schism between state convergence in regulatory takings and state divergence in public use doctrine post-*Kelo*, it is important to acknowledge reasons why states, prior to *Kelo*, followed the Supreme Court's doctrinal script. Further, it is equally important to address alternative explanations, beyond the political economy, for why states abruptly departed from the Court's longstanding economic development justification for public use.

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[332] *See* Geisler, *supra* note 320, at 539–40; Kendall & Lord, *supra* note 321, at 529–30; Peñalver, *supra* note 315, at 231.

[333] Peñalver, *supra* note 315, at 263–64 n.201.

[334] Kendall & Lord, *supra* note 321, at 529.

[335] *See* OLIVETTI & WORSHAM, *supra* note 326, 37–38 (describing that the property rights movement allowed industrial lobbyists to channel public frustration with governmental regulation for their own commercial benefit).

This Part offers some additional explanations for convergence and divergence, before contending in Part IV that divergence amongst the states and, at times, with Supreme Court takings doctrine, is healthy for constitutional property in a federalist regime.

A. *Convergence Account*

On the whole, state courts tend to follow the Court's public use interpretive methodologies, tests, and analytical framework as they do for regulatory takings, with the exception of the post-*Kelo* phenomenon previously discussed. Why toe the vertical line, so to speak? In nonpreemptive areas of constitutional law, states are not coerced or forced to follow the Supreme Court's doctrinal rubrics and analytical frameworks, so long as they do not underprotect individual rights below the constitutional baseline. That leaves states significant discretion to embark on a new doctrinal and analytical path if they so choose.

A passage from the Tennessee Supreme Court's ruling on a regulatory takings claim in *Phillips v. Montgomery County* offers a few clues in explaining the general compliance with takings doctrine and lack of divergence at the state level.[336] There, the landowner brought a regulatory takings claim after the county denied his subdivision plat application.[337] The court, having previously recognized only physical occupation takings and nuisance-like takings, expressly acknowledged, for the first time, the existence of a regulatory takings claim under the Tennessee Constitution.[338] Importantly, the court noted that the federal Takings Clause encompasses regulatory takings to the same extent as the Tennessee constitution, and "[t]o hold otherwise would needlessly *complicate* an already *complex* area of law, increase *uncertainty* for litigants attempting to bring claims under both the federal and state constitutions and *place Tennessee at odds* with the vast majority of states, nearly all of which have already adopted federal takings jurisprudence."[339] The court stated that the "*textual and historical differences*" in the state and

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[336] 442 S.W.3d 233 (Tenn. 2014).
[337] *Id.* at 236.
[338] *Id.* at 243.
[339] *Id.* at 244 (emphasis added).

federal constitutions are insufficient to depart.[340] This passage offers a foundation upon which we can explore some of the explanations and implications for the gravitational force of the federal takings doctrine on state convergence.

1. SIMPLICITY

To interpret the federal Takings Clause and its associated doctrine differently from other states, as the Tennessee Supreme Court found, would "needlessly complicate an already complex area of law."[341] It may be the case that state courts will follow the Supreme Court's takings jurisprudence "as a matter of agreement and judgment" to simplify the exercise of reviewing a complex area of property law.[342] This makes sense to some extent. Takings doctrine is complicated and muddled.[343] It is perhaps easier to simply concede that the Court got the doctrine right and for state courts to try to work their way through the muddle by applying the Court's tests as closely as possible, rather than straining for a different, arguably more complicated (or feasible), state-level alternative.[344] Or, as some might argue, the current doctrine is the best we have, so make the most of it.[345]

Take the Texas Supreme Court as an example. In *Hallco Texas, Inc. v. McMullen County*, the court was inclined to read the federal and state takings clauses as "comparable" and that it was appropriate to look to federal doctrine for *guidance* in regulatory takings analysis.[346] The Montana Supreme Court, likewise, found comfort in the federal script, stating "we have generally looked to federal case law for guidance when considering takings claims brought under [the state constitution]—a practice that is consistent with that of other states with similar or identical language in their state constitutions."[347] The Pennsylvania Supreme Court has said that the U.S.

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[340] *Id.* at 243 (emphasis added) (stating that it "will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences").

[341] *Id.* at 244.

[342] Dodson, *supra* note 1, at 729.

[343] *Phillips*, 442 S.W.3d at 244.

[344] *See* Dodson, *supra* note 1, at 729–30.

[345] *Id.*

[346] 221 S.W.3d 50, 56 (Tex. 2007).

[347] Buhmann v. State, 201 P.3d 70, 85 (Mont. 2008).

Supreme Court's reasoning in *Palazzolo*[348] meant that "[a] similar result should follow" in a similar case.[349] The Minnesota Supreme Court has noted "that the standards set forth in *Penn Central* provide the best analytic framework to determine whether the city's actions resulted in a regulatory taking under the Minnesota Constitution."[350]

In some ways, the simplification of following federal takings doctrine presumes federal doctrine is valid. In other words, states may simply believe there is a presumption of validity when the Supreme Court hands down its newest rendition of confusing rules and elements in takings cases.[351] Because state actors may simply think the Supreme Court tends to get the takings question right, it would seem that conformity provides the path of least resistance.[352] It may just be a little easier to agree "because federal law says so."[353]

2. AVOIDANCE

Simplicity may also just mean "avoidance." It may be the case that state courts actively avoid the tough and complex methodological and analytical questions of federal takings doctrine. It is, perhaps, just "cognitively easier and simpler" for state courts to avoid the big doctrinal questions in a way that would depart from longstanding federal doctrine.[354] The problem, of course, is that avoiding complications in the law and instead just following federal law risks state courts legitimacy, making them look like "simple-minded dependents of their smarter older sibling."[355] In other words, might it be the case that state courts truly are intellectually inferior to federal courts, especially the Supreme Court, and that the intellectual heavyweights just seem to get the hard questions right?

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[348] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
[349] Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 762 (Pa. 2002).
[350] Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 633 (Minn. 2007).
[351] Dodson, *supra* note 1, at 731.
[352] *Id.* at 729–30.
[353] *Id.* at 729.
[354] *Id.* at 730.
[355] *Id.* at 748.

3. Clarity and Certainty

Like simplicity and avoidance, albeit slightly different, are the values of clarity and certainty. As the *Phillips* court noted, diverging from federal doctrine would "increase uncertainty for litigants attempting to bring claims under both the federal and state constitutions."[356] One explanation for complicity in federal takings doctrine may be that doing so is a service to landowners—and their lawyers—litigating the issues. Many lawyers use federal law as a framework "rather than state law in order to take advantage of the national application of federal law."[357] Indeed, federal constitutional arguments may cover more ground amongst the states than solely applying state law.[358] Take, for example, the Court's *Berman* decision in 1954,[359] which has received extensive citations and references where matters of public use were at issue.[360] Logically, then, state judges may have simply become so accustomed to state lawyers' reliance on federal takings doctrine over time that state courts prefer to continue such practices so litigants have certainty. State court lawyers, in some ways, are just as "steeped" in the federal doctrine as lawyers who litigate in federal court, and will tend to raise and address state issues—almost unconsciously—in federal terms.[361] Litigants may find it far more efficient and effective to argue the federal angle as opposed to the state angle.[362] State courts, then, reciprocate as they become familiar with these federally grounded arguments and tailor their analytical frameworks based largely on federal doctrine.[363]

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[356] Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014).

[357] Dodson, *supra* note 1, at 737.

[358] *See* WILLIAMS, *supra* note 85, at 194–95.

[359] Berman v. Parker, 348 U.S. 26 (1954).

[360] *See supra* Part II and accompanying text.

[361] *See* Dodson, *supra* note 1, at 737–38 ("Any state law issues that arise enter a conversation so steeped in federal terms that lawyers and jurists tend to raise and address those state issues in federal terms."); *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403 (1984) [hereinafter Williams, *Supreme Court's Shadow*] (noting the dominance of Supreme Court decisions in thinking about constitutional law).

[362] *See* Dodson, *supra* note 1, at 737–38.

[363] *See id.*; Williams, *Supreme Court's Shadow*, *supra* note 361, at 403.

The dominance of the Supreme Court's jurisprudence in other areas of constitutional law has caused questions of state constitutional law "to be filtered almost exclusively through the federal constitutional law perspective."[364] This may be due to a preference for clarity and certainty in litigation. Who really wants to travel off the beaten path onto a road less travelled when the stakes are so high in litigation, particularly in an area as confusing and muddled as regulatory takings? As for the public use doctrine, it makes sense, in some respects, that a major ruling like *Berman* that espoused judicial deference to legislative determinations on issues so local as condemnation would influence state courts to follow the Court's lead in interpreting takings challenges under the auspice of the Court's public use doctrine. It also seems relevant that state court opinions that do diverge from the Supreme Court tend to contain thorough explanations for doing so, while state court decisions that simply follow federal doctrine may not engage in an extensive discussion of their reasoning at all.[365]

Federal public use doctrine, unlike regulatory takings, provides a manageable and digestible framework that can be applied equally and, arguably, without rivalry among state courts.[366] For the states, it is sensible and economical to lead with *Berman* as the baseline and piggyback off the broad public use conception because this approach lessens the resource burdens necessary to blaze a different path.[367] This strategy bears out in other areas of federal law. Take, for example, civil procedure and the longstanding litigation strategies of removing state claims to federal court, or plaintiffs who file state-federal cases in federal court.[368] The result is that, often times, important state-related questions are formulated and presented as federal questions by lawyers, which may leave a vacuum of underdeveloped state law to be filled at a later date.[369]

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364 Williams, *Supreme Court's Shadow*, *supra* note 361, at 403.

365 *See* Dodson, *supra* note 1, at 711 (noting that a typical state court "tends to treat a federal appellate opinion as presumptively controlling, or at least as highly persuasive authority, without regard to any state policy reason for adherence or divergence").

366 *See id.* at 730.

367 *Id.*

368 *Id.* at 731.

369 *Id.* at 737–38.

4. TEXTUAL AND HISTORICAL DIFFERENCES

As the *Phillips* Court noted, the "*textual and historical differences*" in the state and federal constitutions were simply not enough to seriously decline to follow regulatory takings doctrine.[370] Another possible takeaway, thus, is that a "general lack of historical records on the events and forces that shaped state constitutions creates problems for [state] judges who wish to develop [new] state law[s]" and doctrines.[371] It is perhaps necessary for state courts to engage in deeper and more meaningful historical and textual practices to go beyond the federal minima in takings doctrine.[372] This requires, of course, the willingness of state courts to take the time to research and engage with the historical context of its state constitution.[373] One might argue that "state judges have largely lacked the tools to develop an independent body of state constitutional law."[374] However, despite the lack of historical records regarding state constitutions, "state constitutional history is . . . much more available than federal constitutional history."[375] So, why don't more state courts engage in the historical and textual distinctions to formulate a different approach to takings doctrine?

The Tennessee court's ruling in *Phillips* seemed to imply that divergence would be acceptable only if the textual and historical contexts between the state and federal provisions differed.[376] But, of course, this requires state courts to actually engage with those textual and historical differences. The *Phillips* court did so, noting that "[t]he wording" of the state and federal takings clauses are "similar" and "no textual variances" suggest the clauses should be interpreted

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[370] Phillips v. Montgomery County, 442 S.W.3d 233, 243–44 (emphasis added) (stating that it "will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences").

[371] Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 31 (1994); *see* Dodson, *supra* note 1, at 725 (noting that "states should exercise independence in state constitutionalism, relying on the preferences of their particular populaces," but largely do not).

[372] Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 1060–62 (2010).

[373] *See id.*

[374] *Id.* at 1061.

[375] WILLIAMS, *supra* note 85, at 319.

[376] Phillips v. Montgomery County, 442 S.W.3d 233, 243 (Tenn. 2014).

differently.[377] It is of note, however, that the court in *Phillips* was first faced with the question of whether a regulatory takings framework even existed under Tennessee constitutional law.[378] So, one would expect the court to venture into the history of its constitutional text to find meaning.

The Nevada Supreme Court in *McCarran International Airport v. Sisolak* also employed a textual and historical interpretive methodology.[379] There, the court first acknowledged "states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution."[380] The court then proceeded to engage in a textual and historical analysis of the Nevada Constitution's takings clause, concluding that the drafters of the document contemplated expansive property rights.[381] The dissent disagreed with the broad statement that the state takings clause intended to give landowners greater protections than the federal Takings Clause, noting that such a statement "contradicts over a century of precedent" and that the "broad, sweeping holding, without any reference to Nevada's constitutional debates or other significant supporting analysis, is unwise and unwarranted."[382] Nonetheless, this is not standard interpretive procedure among states analyzing takings claims. The vast majority of states seem to simply rely upon the Supreme Court's jurisprudence and apply the doctrine in lockstep.[383] Might it be the case that the robust state constitutionalism and independence envisioned by Justices Brandeis and Brennan will require state courts to begin to engage in a textual and historical approach to analyzing takings claims?

If, as the proponents of New Federalism insist, independent analysis of state constitutions should provide the primary tool for constitutional interpretation, then why have the majority of state courts and state legislatures preferred to follow the Supreme Court's

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[377] *Id.*

[378] *Id*. at 243–44.

[379] 137 P.3d 1110, 1121–23 (Nev. 2006).

[380] *Id.* at 1126 (quoting State v. Bayard, 71 P.3d 498, 502 (2003)).

[381] *McCarran*, 137 P.3d at 1126–27.

[382] *Id.* at 1131 (Becker, J., dissenting in part, concurring in part).

[383] *Phillips*, 442 S.W.3d at 244. *See* Section III.B.6 for a discussion of Alabama's Supreme Court as another example.

public use jurisprudence?[384] Louisiana is a leading state (although enveloped by its civil code) for those seeking an example of independent analysis of the state constitution.[385] In considering an issue involving the eminent domain provisions of the state constitution in *State Department of Transportation and Development v. Dietrich*,[386] the Louisiana Supreme Court engaged in an interpretive and analytical methodology that considered "the text of the . . . provision . . . , that provision's predecessor in the previous constitution, and some judicial precedent relevant to the construction of the provision."[387] But the ruling makes no mention of the Fifth Amendment's Takings Clause or the Supreme Court's eminent domain doctrine.[388] As James Gardner notes, the Louisiana Supreme Court

> provides some guidance to participants in the legal system concerning the proper way to talk about the meaning of the constitution; presumably, a litigant will be able in a future case to craft an argument, if one is available, based on the text of a provision of the current constitution and its counterpart in the previous constitution.[389]

Additionally, the Indiana Supreme Court held in *State v. Kimco of Evansville, Inc.* that condemnation of a shopping center owner's property for reconfiguration of a road did not constitute a compensable taking.[390] The court noted that the state and federal takings clauses are "textually indistinguishable and are to be analyzed identically," allowing the court to harmonize its state takings doctrine with the federal approach spelled out in *Lingle* and *Penn Central*.[391] Indeed, where a state court finds no textual differences, it is more likely to follow the trodden path of the Supreme Court's doctrine.[392]

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[384] *See infra* Section IV.C for a discussion of New Federalism.
[385] *See, e.g.*, State Dep't of Transp. & Dev. v. Dietrich, 555 So. 2d 1355, 1358 (La. 1990); Gardner, *Failed Discourse*, *supra* note 80, at 799.
[386] *Dietrich*, 555 So. 2d at 1356.
[387] Gardner, *Failed Discourse*, *supra* note 80, at 799 (citing *Dietrich*, 555 So. 2d at 1358–59).
[388] *See Dietrich*, 555 So. 2d 1356–60.
[389] Gardner, *Failed Discourse*, *supra* note 80, at 799.
[390] *Id.* at 208.
[391] *Id.* at 210–11.
[392] Dodson, *supra* note 1, at 711.

5. VERTICAL AND HORIZONTAL UNIFORMITY

Another explanation for state courts' reluctance to diverge from federal doctrine is that such a path would place a state "at odds with the vast majority of states, nearly all of which have already adopted federal takings jurisprudence."[393] This raises the concepts of vertical and horizontal uniformity.[394] Vertical uniformity involves state courts and state legislatures conforming to federal law because it is either the best approach or it enables "states to claim equal footing with federal law."[395] Horizontal uniformity, on the other hand, is when states across the nation uniformly treat, interpret, and apply the federal law and doctrine the same.[396]

As Dodson explains, "[a]n obvious rationale for state following is to reap the benefits of uniformity."[397] In other words, uniform interpretation and application of federal takings doctrine may give the impression that institutions have legitimacy.[398] Horizontal uniformity seemed to be a major consideration for the *Phillips* court in determining whether to decline to follow the federal takings doctrine. The court there seemed to confirm its fidelity to horizontal and vertical uniformity in holding that the state takings clause encompasses regulatory takings to the same extent as the federal provision, and that such an alternative finding would otherwise be at "odds" with the rest of the nation.[399] State courts, like the Tennessee Supreme Court, may be doing this because it offers predictability within particular geographic areas.[400] This is not hard to imagine given the local nature of property disputes.

Property disputes involving regulations are inherently local given the nature of background legal principles that underlie takings

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393 Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014).
394 Dodson, *supra* note 1, at 732–35.
395 *Id*. at 736.
396 *Id.* at 733 (citing Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–96 (2005)).
397 Dodson, *supra* note 1, at 732.
398 *Id.* at 732 (citing Fallon, *supra* note 363, at 1794–96).
399 Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014).
400 *See* Dodson, *supra* note 1, at 733. Dodson makes reference to these vertical explanations from the procedural perspective. *Id.* But such an explanation also applies to substantive areas of constitutional law. *Id.* at 736.

jurisprudence.[401] Uniformity in the complex area of regulatory takings may help mask some of the underlying anxieties of jurists, litigants, and the public that regulations threaten to economically deprive a landowner's use of property. The *Phillips* court's concern of dissimilarity and disuniformity may also be an effort to provide "simplicity, clarity, and efficiency by reducing [or avoiding] variation" amongst jurisdictions, as well as amongst state trial and state appellate courts.[402] Recall, *Phillips* is a state supreme court ruling setting forth the state's adherence to the federal regulatory takings doctrine in the absence of an identifiable state equivalent.[403]

This may help give the impression that state courts across and within jurisdictions unanimously agree on the direction in which the federal takings doctrine is taking them and are applying it consistently.[404] Indeed, vertical uniformity may give state courts legitimacy when applying takings doctrine from the top down, while horizontal uniformity may give state courts further legitimacy by engaging in interpretive methodologies that would result in consistent applications of the federal takings doctrine across state jurisdictions.[405] Divergence from federal doctrine, in other words, would produce much "confusion and instability."[406] As the argument goes, "landowners . . . deserve the same basic protections under well-settled eminent domain law afforded by other jurisdictions."[407]

6. DEMOCRATIC NATURE OF STATE COURTS

Many state court judges are elected, and the Supreme Court or federal law could easily overturn their decisions.[408] Thus, it might

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[401] *See supra* Part II.
[402] *See* Dodson, *supra* note 1, at 733.
[403] *Phillips*, 442 S.W.3d at 244.
[404] *See* Dodson, *supra* note 1, at 733.
[405] *See* Dodson, *supra* note 1, at 732–33.
[406] Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 55 (Ala. 2012) (Bryan, J., concurring in the result in case no. 1110439 and dissenting in case no. 1110507).
[407] *Id.* at 57.
[408] Dodson, *supra* note 1, at 740.

be better for state judges to be safe and follow federal takings doctrine rather than risk being overturned.[409] The risk of nullity or reversal is high.[410] Wayne Logan argues that state court judges will adopt rights-restrictive positions, because such positions are the "safest."[411] Conforming to the Supreme Court's takings doctrine may also result in state courts shifting responsibility of developing the doctrine to the high court, instead of dabbling with the difficult analytical questions at the state level.[412] State courts pre-*Kelo* may have also been aware that high-profile determinations that diverged from federal law were more likely to be overruled than the rulings that comported with the federal public use doctrine.[413] Post-*Berman* decisions that did not depart from the Court's broad conception may have been partly a result of "political cover."[414]

7. THE URBAN RENEWAL MOVEMENT

Wendell Pritchett has argued that local and state urban elites helped reimagine the public use doctrine to promote revitalization efforts in the inner cities.[415] Local governments sought greater redevelopment of the urban core in the early 1900s.[416] This was done, in part, to protect the business interests of the real estate industry, progressive reformers, urban planners, and politicians.[417] Thus, stakeholders and interest groups had to concoct a feasible legal interpretation of public use that would persuade both state and federal courts to conform to a broad conception of public use.[418] This broad conception meant taking private property, oftentimes located in "slums" and "blighted areas," and transferring it to private interests in the

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409 *Id.*

410 *Id.* at 739.

411 Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 247–48 n.84 (2014) (quoting Robert E. English, *Lawyers in the Station House?*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 283, 283 (1966)).

412 *See* Dodson, *supra* note 1, at 740–41 (noting that state law decisions are more likely to be overturned when they deviate from federal law).

413 *See* Williams, *Supreme Court's Shadow*, *supra* note 362, at 381–84.

414 Dodson, *supra* note 1, at 742.

415 Pritchett, *supra* note 158, at 12–14.

416 *Id.* at 13–15.

417 *Id.* at 14.

418 *Id.* at 12–15.

name of a public benefit—the removal of slums which were health and safety hazards.[419]

This provides a plausible explanation for why state courts—pressured by local and state political interests in light of the *Berman* decision—were reluctant to divert from the broad conception of public use to pursue condemnations for urban renewal purposes.[420] Indeed, urban renewal reshaped the American urban landscape in ways that may not have been possible without state courts complying with a broad conception of public use.[421] These relatively innocuous external forces and the lobbying efforts to reimagine the public use clause yield strong arguments for the conformity at the state level. Indeed, once the Supreme Court weighed in on the issue of the exercise of eminent domain to clear slums, one might have expected state courts to conform to the broad conception because state court judges are oftentimes politically accountable for decisions as a result of judicial elections.[422] Combine this accountability with the rapid transformations of the urban core due to urban renewal in many American cities, and it becomes clear that state following of federal doctrine was essential for reasons perhaps beyond mere doctrinal conformity with federal law and uniformity amongst the states. The health and well-being of urban centers was at stake.

The success of developing a broad public use jurisprudence for urban renewal in state courts depended upon a comprehensive effort of local real estate and housing advocates, which included lobbying in state legislatures, litigating claims in state trial courts, and submitting amicus briefs.[423] The urban revitalization movement may have made state court following of the broad conception of public use all the more necessary.

8. CUSTOM

The Supreme Court's expansion of federal rights under the Supremacy Clause has curtailed state independence in developing their

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[419] *Id*. at 22–24.
[420] *Id.* at 48–49.
[421] *Id.* at 48.
[422] *See* Dodson, *supra* note 1, at 740.
[423] *Id.* at 38–39 .

own jurisprudence on a number of substantive issues.[424] The *Berman* decision, however, did not invoke the Supremacy Clause and mandate that states must follow the decision; instead, the substance of the opinion clearly implied great deference to state and local legislative determinations regarding eminent domain.[425] A push for greater state independence,[426] nonetheless, saw state courts develop a habit in the public use provision that ballooned into widespread conformity. In other words, over time, the *Berman* ruling cast a "long shadow"[427] over state courts and was "extremely influential upon state courts,"[428] which invariably became custom throughout the decades following the decision. The longer states exercised less independence from a major Supreme Court ruling, the easier it became to ride the doctrine overtime as a judicial and legislative custom.[429] Takings doctrine, especially public use, became a staple and solid foundation for state courts to use in condemnation challenges.

All this being said, the link in the chain of conformity in takings doctrine came loose in the 2005 *Kelo* decision, causing an abrupt resistance to the Court's public use doctrine.[430] As I have argued, the most persuasive explanation is the political economy; that is, state actors and the electorate perceived the Court's *Kelo* ruling as an attack on the sanctity of the home.[431] But, are there additional explanations for general divergence? Indeed, there are.

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[424] *See* Brennan, *State Constitutions*, *supra* note 58, at 495 (noting that it was only natural that the federalization of rights by the federal courts caused state courts to have "no reason to consider what protections, if any, were secured by state constitutions"); *see also* Mazzone, *supra* note 372, at 1061 ("[A] legacy of the historical trends . . . has turned state judges into expert and busy administrators of the Federal Constitution . . . .").

[425] *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (explaining that states have the authority to legislate concerning local affairs).

[426] William Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U L. REV. 535, 548 (1986).

[427] *See* Dodson, *supra* note 1, at 729 (discussing "long shadow" of Bowers v. Hardwick, 478 U.S. 186 (1986)).

[428] Pritchett, *supra* note 158, at 2 n.6.

[429] *See, e.g.*, Phillips v. Montgomery County, 442 S.W.3d 233, 243–44 (Tenn. 2014).

[430] *See supra* Section II.B.1.

[431] *See supra* Section II.B.4.

B. *Divergence Account*

Why did *Kelo* spark a counter-gravitational reaction that up-ended decades of convergence with federal public use, and specifically, the economic development branch of Takings Clause doctrine? What was so different about *Kelo* and why has the regulatory takings vein not experienced a gravitational resistance at the state level? After the *Kelo* ruling, the majority of states concluded that the Supreme Court got it wrong; that economic development justifications for eminent domain underprotected property owners.[432] Such widespread resistance was followed by a string of state supreme court rulings and state constitutional amendments banning or limiting economic development takings, effectively announcing wide state resistance to federal takings law.[433] And what about those rare episodes of divergence in regulatory takings at the state level amidst widespread conformity for decades post-*Mahon*? What empowered those state supreme courts to be willing and able to depart?

Indeed, we arrived at this unusual episode of post-*Kelo* divergence in this Article in light of many state courts' tepidness to depart from the doctrines set forth in *Berman* and *Mahon*, while many state legislatures crafted eminent domain laws to stay within the ambit of the Court's doctrine.[434] Prior to *Kelo*, there were few instances where states specifically granted greater protections to private property beyond the "constitutional bottom"[435] constructed by the Supreme Court and contemplated in the Takings Clause.[436] Here, we embark on additional "explanatory vector[s]"[437] for why *Kelo* caused a rupture in conformity in public use doctrine at the state level.

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[432] *See supra* Section II.B.1.

[433] Somin, *Limits of Backlash*, *supra* note 32, at 2102–03.

[434] *See supra* Section II.B.3.

[435] John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 853 (2006) (noting that Supreme Court prescriptions create a "constitutional bottom" that leaves room for more "rights-protective action" by the states).

[436] *See supra* Part II.

[437] Dodson, *supra* note 1, at 729.

1. INFLUENTIAL COUNTERVAILING WAVES

In *Board of County Commissioners of Muskogee County v. Lowery*, the Oklahoma Supreme Court noted that it was guided by the state and federal constitutional takings clauses, especially the state takings clause regarding condemnation.[438] The court then engaged in a brief historical and textual account.[439] Relying upon Justice Stevens's nod to federalism, the court accepted his invitation[440] to depart from federal doctrine by relying upon its "own special constitutional eminent domain provision," which provides more protections above the federal baseline and has a more narrow interpretation of public use and public purpose than the Supreme Court.[441] Noteworthy, however, is the court's acknowledgment that it was joining "other jurisdictions" who reached similar state decisions on state constitutional grounds, including state legislative action.[442]

While the court offered a variety of explanations for departing, such as avoiding the possibility that economic development takings would "blur the line between 'public' and 'private'" or that the state constitution should remain "what [its] framers" intended,[443] might the departure really be that a countervailing force opposite of convergence was simply too strong (or too irresistible) to pass up? While some state courts in other constitutional contexts "erect doctrinal barriers" to ensure they follow federal doctrine,[444] it is possible that state courts post-*Kelo* were constructing similar doctrinal hurdles that precluded them from following the Court's broad conception of public use. The *Lowery* court's opinion in many ways tracks what state courts post-*Berman* were doing; that is, go with the broad public use interpretation "unless some countervailing force enables resistance."[445] Indeed, the *Kelo* decision, and the negative

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[438] Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 645 (Okla. 2006).

[439] *Id*. at 645–47.

[440] *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

[441] *Lowery*, 136 P.3d at 651.

[442] *Id*.

[443] *Lowery*, 136 P.3d at 652.

[444] Dodson, *supra* note 1, at 727.

[445] *Id.*

reaction from other states, may be the countervailing force that enabled other state supreme courts, like Oklahoma's, to join the resistance.

2. LEGISLATIVE LOYALTY

State court divergence post-*Kelo* may simply be an act of legislative fidelity, as most legislatures imposed greater protections, and state supreme courts simply deferred to the legislatures' judgment, even if the state courts agreed with the Supreme Court's broad interpretation. The Supreme Court of Missouri, shortly after *Kelo*, ruled in favor of a landowner's challenge to eminent domain, finding an economic development taking invalid.[446] But, in doing so, the court noted that it "sees no reason at this point to deviate from the holding of [*Kelo*] with regard to the constitutional validity of takings for the purpose of economic development," yet the court proceeded to invalidate the economic development taking under its state eminent domain law.[447] It seems odd, but legitimate, for a state court, amidst a wave of resistance nationwide, to proclaim that "[e]conomic development 'unquestionably serves a public purpose,'" but as a matter of "public policy . . . economic development may not be the *sole* purpose of a taking."[448] As the Supreme Court of Pennsylvania noted in *Reading Area Water Authority v. Schuylkill River Greenway Ass'n*, the federal public use clause was immaterial to its determination and "we need not decide the constitutional issue because, even if we assume the [economic development taking] can pass Fifth Amendment scrutiny, to be valid it must also be statutorily permissible."[449] Indeed, legislative loyalty is a persuasive explanation for deviation from *Kelo*, even if some state supreme courts expressly agreed with the Court's ruling.

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[446] State *ex rel*. Jackson v. Dolan, 398 S.W.3d 472, 482 (Mo. 2013).

[447] *Id.* at 478.

[448] *Id.* at 482. (quoting Kelo v. City of New London, 545 U.S. 469, 484 (2005).

[449] 100 A.3d 572, 582 (Pa. 2014). The court continued "[i]n this regard, it may be observed that, in the wake of *Kelo,* the General Assembly enacted PRPA [the Property Rights Protection Act], which contains a salient, affirmative prohibition on the taking of private property 'in order to use it for private enterprise.'" *Id.* (quoting 26 PA. CONS. STAT. § 204(a)).

3. INSTITUTIONAL COMPETENCE

Resistance to the federal public use doctrine may have been linked to the idea that state actors—especially municipalities and state administrative agencies—have superior knowledge and expertise in weighing competing uses of land, and that state legislatures were responding to this localist approach to eminent domain by enacting statutes.[450] The same year that *Kelo* was decided, the Court handed down its decision applying preclusion rules to takings in *San Remo Hotel v. City & County of San Francisco*.[451] The Court made an interesting through-line in its opinion, stating similarly to Justice Stevens's nod to federalism in *Kelo*,[452] 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."[453]

This superior institutional competence may be a reason why state actors, or non-federal actors, are best positioned to address property rights issues.[454] Why? Because of state actors' intimate institutional knowledge of the land and property rights at the local level.[455] The resistance to federal public use doctrine may have been a message from the states that property and land use disputes arising from overly broad definitions of public use are an area in which the states should take the lead.[456] Roderick "Rick" Hills notes that *Kelo*

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[450] Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 891–92 (2006) (discussing superior institutional competence of state governments).

[451] 545 U.S. 323, 344–45 (2005).

[452] *Kelo*, 545 U.S. at 482.

[453] *Sam Remo Hotel*, 545 U.S. at 347.

[454] *Cf.* Dodson, *supra* note 1, at 750–51.

[455] *See* Hills, *supra* note 450, at 892.

[456] *See San Remo Hotel*, 545 U.S. at 347; Hills, *supra* note 450, at 891–92 (interpreting and defending *Kelo* and other recent Supreme Court property rights decisions as examples of deference to federalism and emphasizing superior institutional competence of state governments); *see also The* Kelo *Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16 (2005) [hereinafter Merrill Testimony] (statement of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia University School of Law) (emphasizing that "property rights have different circumstances around the country" and "[s]tate variation and experimentation should to be allowed to flourish").

"can fairly be characterized as favoring federalism by giving non-federal officials substantial discretion to define constitutional rights that protect private property" because it allows nonfederal actors to determine "what constitutes a public use."[457] And, as Sterk notes, because state law determines the content of property rights, state courts and state legislatures—and by extension local administrative agencies and city councils—may have an advantage over federal entities in land use knowledge and expertise.[458] However, state actors are "insulated from many of the pressures that face local regulators and are consequently in a position to police abusive practices" better than local or federal actors, especially federal courts.[459]

Although eminent domain law itself does not necessarily implicate land use, the exercise of the power of eminent domain is often part and parcel of, and has implications for, land use.[460] Thus, the countervailing resistance to the public use doctrine by the states may be the result of the states' discomfort with federal actors determining state and local matters where expertise is lacking. Perhaps state actors feel that such interpretations do not fit neatly into the local comprehensive planning schemes over which state administrative agencies, municipalities, and even trial courts have more institutional knowledge and power.

4. Resistance to Vertical Uniformity

One popular belief is that states are lured into the orbit of federal law because "federal law gets the law right first, and state actors, realizing this, follow as a matter of agreement and judgment."[461] Before the sweeping post-*Kelo* refutation of the Supreme Court's public use doctrine, states seemed to follow the Court's precedent "because federal law says so."[462] Perhaps it was easier to simply follow

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[457] *See* Hills, *supra* note 450, at 892 (internal quotations omitted).

[458] *See* Sterk, *supra* note 21, at 264.

[459] *Id.* at 206.

[460] For an account on the early history of the use of eminent domain as a central instrument of land use policy, see ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 901 (4th ed. 2013); Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263.

[461] *See* Dodson, *supra* note 1, at 729.

[462] *Id.*; *see also supra* Part II for a discussion of state conformity to federal takings doctrine.

lockstep rather than "blaze a new trail."[463] But, it may also be the case that states post-*Kelo* learned to value horizontal uniformity over vertical uniformity.[464]

The potential problem with vertical uniformity, as the states post-*Kelo* may have been implicitly saying, is that "[i]f each state pursues intrastate uniformity by following federal law, then state law will mimic federal law in all states, stagnating [the arguably preferred] experimentation and evolution at both the intra- and interstate levels."[465] This variation in the law at the state level arguably makes vertical uniformity with federal law less appealing because following federal law at the state level "may lead to disconnects between state policies, state law, and state judicial interpretation."[466] This is somewhat persuasive. As Dodson notes, "uncritical state following of noncontrolling federal law lends credence to the position that states are just not as good at being sovereign as the federal government is."[467] This leads to the perception that states prefer to "slavishly follow[] . . . federal law without considering state variables degrad[ing] both state law and state courts."[468] That perception was somewhat eviscerated after the *Kelo* decision. With less uniformity in the federal public use doctrine and more uniformity across the states, homeowners, in particular, have a menu of jurisdictions from which to choose for obtaining the greatest protections

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[463] Dodson, *supra* note 1, at 730.

[464] *See* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1553–54 (2006) (arguing that federal law should be uniformly interpreted across states and federal courts); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 95 (1990) (arguing that federal courts should strive for "[u]niformity in the interpretation and application of federal law"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1812–13 n.451 (1991) ("[W]e do have a single federal judicial system in which uniformity is a prominent aspiration."). *But see generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569–74 (2008) (questioning the virtues of horizontal federal uniformity).

[465] Dodson, *supra* note 1, at 746.

[466] *Id.* at 746–47.

[467] *Id.* at 748; *see also* Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993) (making an analogous point regarding lower federal courts in relation to the Supreme Court).

[468] Dodson, *supra* note 1, at 751.

from economic development condemnations.[469] In many ways, states' preference for horizontal, rather than vertical, uniformity was a nod to the Rehnquist Court's delegation of "substantial control over takings doctrine to the nonfederal governments that are allegedly confined by [the] doctrine."[470]

5. COMPETITIVE FEDERALISM

Perhaps the post-*Kelo* abrupt divergence was due to state interest in "competitive federalism."[471] Some argue that the post-*Kelo* resistance was a political and market response to homevoter concerns of continued abuses of property rights by eminent domain, and that such political sentiment would result in the loss of business and taxpayers to other jurisdictions that had more protections against eminent domain.[472] Ilya Somin rejects this theory in the takings context because property owners are unlikely to "vote with their feet" against eminent domain or regulatory exactions or takings.[473] He argues that if homevoters move out, they cannot take their land with them.[474] But underlying the concerns of homevoters—those with

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[469] *See* Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 707 (2011) (noting that "[a]pproximately forty states have enacted legislation to limit eminent domain authority since *Kelo*").

[470] Hills, *supra* note 450, at 892.

[471] Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009).

[472] Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 57 (2011) [hereinafter Somin, *Federalism and Property Rights*]; *see* Ellickson, *supra* note 471, at 762–63 n.66 (2009) (arguing that states enact protections for homeowners because they do not want to see their tax bases move away); *see also* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 3–4 (2001) ("The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government."); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 509 (1991) ("[T]he community must compete with other jurisdictions if it wants to encourage development because a developer dissatisfied with a community's . . . policy can take the project to another jurisdiction that offers better terms.").

[473] Somin, *Federalism and Property Rights*, *supra* note 472, at 58.

[474] *Id.*

strong interests and investments in single-parcel homes—are longstanding considerations of protections to core property rights.

6. DISHARMONY

Strict following of federal doctrine and the Court's methodological and analytical frameworks may cause more confusion in interpreting analogous state constitutional provisions.[475] For those states that have chosen to depart (or remain tethered to their textual and historical tradition), the concern is that unequivocal following may produce disharmony between two or more provisions covering similar protections within a state constitution.[476] Take for example the Supreme Court of Alabama's ruling declining to adopt the federal regulatory takings doctrine under its state constitution.[477] There, the court was faced with two similarly worded provisions under the Alabama state constitution dealing with takings, neither of which the court found to include an analytical angle for regulatory takings.[478]

The concurring opinions noted that "[t]o accomplish such an interpretation and apply it in this case . . . the definition of a 'taking' in [section] 23 must be expanded to something *less* than an actual physical taking."[479] Thus, adherence to the federal rubrics would have further confused, rather than clarified, state intraconstitutional text and generated disharmony where such disunity is unnecessary.[480] The real concern for courts, like the Supreme Court of Alabama, is the "inequity" that such "trumping" of one provision over the other would create, "essentially" rendering one state constitutional provision "meaningless" and swallowing other provisions to merely conform with what is already a confusing doctrine.[481] It is unclear to what extent this sentiment permeates other state courts. Alabama seems to be a true outlier; nonetheless, it is an explanation for divergence worth noting.

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[475] WILLIAMS, *supra* note 85, at 150–52.

[476] *See, e.g.*, Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 50 (Ala. 2012) (Shaw, J., concurring specially).

[477] *Id.* at 13 (majority opinion).

[478] *Id.* at 12–13.

[479] *Id.* at 50 (Shaw, J., concurring specially).

[480] *Id.*

[481] *Id.*

IV. TOWARDS DIVERGENCE

A. *States as Laboratories of Property*

The post-*Kelo* resistance is an example of state experimentation with constitutional property. The almost universal derision of and resistance to the *Kelo* decision at the state level was what Justice Brandeis might have envisioned when he wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[482] Of course, post-*Kelo*, it was not just one single courageous state, but nearly fifty states that said "no" to the Court's decision.[483] *Kelo,* in other words, may have exceeded Brandeis's expectations that states would engage in a certain level of autonomy and sovereign independence.

As part of American property law, the post-*Kelo* pushback from federal public use doctrine may be viewed as an additional example of "a giant laboratory in which states vie to develop the most efficient property regime."[484] As Merrill notes, property rights are different around the country, and "[s]tate variation and experimentation ought to be allowed to flourish."[485] And, as Sterk has noted in the regulatory takings context, national conformity is not only impossible, but it is also unhealthy for regulating property at the state level because state background law differs substantially from jurisdiction to jurisdiction.[486] Yet, states have followed the jurisprudence lockstep.

One way to think about state actors taking a more assertive—or divergent—role beyond what federal law requires is the discrete benefits that only states can offer to their citizenry.[487] The very es-

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[482] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[483] *See supra* Section II.B.

[484] Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 75 (2005).

[485] Merrill Testimony, *supra* note 456, at 16.

[486] Sterk, *supra* note 21, at 234.

[487] *See* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324–26 (2004) (cataloguing

sence of federalism is the ability for states—and their municipalities—to implement policy on a gradual basis that fits the local culture.[488] Justice Brandeis's call for innovation at the state level seems to be an important background theme in the post-*Kelo* legislative and judicial backlash. States did not agree with the Supreme Court and wanted to test an iteration of the public use doctrine different from prevailing federal doctrine.[489] And many succeeded to curtail perceived threats to core property rights.[490]

B. *Background Principles Are Fertile Ground for Divergence*

The Takings Clause functions to protect owners of private property against unlawful invasion and dispossession of their property by the state. In this context, "unlawful" means without some public use justification and just compensation.[491] It follows that the lawfulness of a dispossession of a property interest is generally created in the first instance by reference to state background property law.[492]

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reasons traditionally associated with federalism); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–404 (1997) (exploring frequently cited arguments in support of federalism); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551–60 (2005) (categorizing the major strains of federalism theory).

[488] Chemerinsky, *supra* note 487, at 1324–25; Friedman, *supra* note 487, at 389–404.

[489] *See supra* Part II and accompanying text.

[490] *See supra* Part III for a discussion of state judicial and legislative resistance.

[491] Rubenfeld, *supra* note 267, at 1081–82 (1993) ("While the legislative history of the Compensation Clause is sparse, on one point there is no historical doubt: from the beginning of the republic to the present, the '*sacred principle of compensation*' has always been understood paradigmatically to express the state's obligation to indemnify owners of property taken through an assertion of eminent domain.").

[492] *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972))); Young, *supra* note 101, 423–24 (2007). Young makes this analogy to the Civil Rights Act of 1964, the ADEA, and the ADA to show how protections and relief from discrimination based on race, gender, age, or disability are often sought—and more easily challenged—by way of federal statutes codifying such substantive individual rights protections than through the Equal Protection Clause of the Constitution. Young, *supra* note

Justice Scalia famously reiterated these principles in his *Lucas* opinion, explaining that "[a]ny limitation so severe cannot be newly legislated . . . but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[493] Property protections derived from the federal Takings Clause are dependent on extracanonical sources, such as state property rights, that have been created by state courts and state legislatures.[494] Thus, the "Supreme Court cannot develop a comprehensive national takings standard."[495] State actors "are unrepresentative of the nation as a whole" and, therefore, attempts at following a national takings standard could create disharmony, or "disconnects between state policies, state law, and state judicial interpretation."[496] As a result, states attempting uniformity across the nation and conformity up the vertical ladder risk making an already confusing regulatory takings doctrine impossible. Divergence is healthy in our federalist regime, and constitutional property is fertile grounds for such parting from federal commands.

Independent rulemaking by states offers a healthier dose of legitimacy than following lockstep rules established by nine Justices from above. Independence is healthy, especially with the muddle of regulatory takings. Perhaps independent strokes of genius by state supreme courts will influence federal courts, rather than the other way around. Constitutional property seems particularly ripe for divergence at the state level given the nature of background state law principles involved with property. Further, as noted earlier, the Supreme Court in the nineteenth and early twentieth centuries took its cue on public use from state courts' interpretations of the Takings Clause. In other words, states influenced the Court's doctrine as much as the Court influenced states in other areas of the law. If states

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101, at 423–25; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 21–29 (1990) (describing President Franklin Roosevelt's "second Bill of Rights" and the "rights revolution" of the 1960s and 1970s as examples of the federal government conferring a wide range of entitlements on individuals in areas that had traditionally come under states' police powers).

[493] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[494] Young, *supra* note 101, at 425.

[495] Sterk, *supra* note 21, at 206.

[496] *See* Dodson, *supra* note 1, at 746–47.

diverge from the Court's rubrics, like they did after *Kelo*, then perhaps such cooperation—or "controlled experimentation"—will likewise carve out an alternative regulatory takings doctrine that the Supreme Court might find persuasive.[497]

States can and should legislate in a manner that diverges from analogous constitutional provisions,[498] such as expanding property protections beyond the federal minima.[499] In many cases, it is imperative to depart from federal doctrine, as most land use decisions are made at the local level and state courts are, for the most part, the first line of defense against "overly burdensome land use regulations."[500] But more to the point, attempts at conforming to the Court's doctrinal rubrics may be nothing more than trying to fit a square peg in a round hole.

C. States' Embrace of New Federalism in Takings

Divergence also fits neatly in the broader conceptions of New Federalism, a movement spurred by Justice Brennan that urges state courts to play a greater role in controlling the protection of constitutional rights by relying on state constitutions as more effective guarantors of individual rights than the United States Constitution.[501] Where state courts think protections are inadequate, they can expand protections. If legislatures, responding to their electorates' will, impose new tests for regulations that burden private property, then doing so should be welcomed as a reprieve from arguably failed federal doctrine. This is a prominent mode of thinking that envisions the Republic evolving through a well-refined federalist system.[502] As part of the evolution of federalism, supporters of New Federalism have argued that state constitutions ought to serve as the primary

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[497] Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1176 (2005) (conceptualizing state collaboration to form new state civil procedure).

[498] *See* Dodson, *supra* note 1, at 751.

[499] *See, e.g.*, *id.* at 741–42 (noting, for example, that some states diverged from the federal Defense of Marriage Act by expanding same-sex rights under state law).

[500] Sterk, *supra* note 21, at 205–06.

[501] Gardner, *Failed Discourse*, *supra* note 80, at 762–63, 771–74.

[502] *See id.* at 763, 771–74, 812.

protectors of individual rights, calling on states to provide greater protections to individual liberties.[503]

Justice Brennan, acknowledging a gravitational influence of the federal Constitution, noted that even though state constitutions often had similar or even identical language, some state courts occasionally deviated from the Supreme Court's doctrinal tests.[504] Such divergence potentially raises disharmony concerns, as mentioned in Part III, because the "meaning between words which are the same in both the federal and state constitutions" may garner different analysis.[505] But, as the Supreme Court of Hawaii has noted, "the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law."[506] In other words, according to Justice Brennan, protections for individual liberties were best executed under state constitutional provisions when federal protection is weakened.[507] Justice Brennan even called for state judges to critically evaluate federal rulings before applying the federal courts' reasoning to their state constitutions.[508]

But, as explained, this New Federalism has not necessarily borne out in the takings context. The Supreme Court's takings jurisprudence tends to evoke a magnetic force that lures states into its orbit, with widespread conformity. Yet, the *Kelo* backlash is a nod to the New Federalism movement, as states resisted the Court's doctrinal precedent and instead embarked on a different path.[509] That path has led to the transformation of the home into a mainstay reason for political and doctrinal divergence. It is also the reason why greater protections have been granted to those who are single-parcel homeowners, as opposed to owners of commercial property or undeveloped land.[510]

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[503] Brennan, *State Constitutions*, *supra* note 58, at 491.
[504] *Id.* at 500.
[505] State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974).
[506] *Id.* at 58.
[507] Brennan, *State Constitutions*, *supra* note 58, at 502–03.
[508] *Id.*
[509] *See supra* Section II.B.
[510] *See supra* Section II.B.4.

D. *Are State Courts Moving Towards Divergence?*

Are there signs that a *Kelo*-like countervailing force departing from regulatory takings doctrine is afoot? The prospect of a *Kelo*-like countervailing force against the Supreme Court's regulatory muddle might be brewing at the state level. This is a good thing. The *Phillips* court's concerns that state divergence from federal takings doctrine might "increase *uncertainty* for litigants attempting to bring claims under both the federal and state constitutions" may not necessarily bear out at the state level.[511] Recall the exploration into reasons why disequilibrium between public use and regulatory takings doctrine exists post-*Kelo* in Part III. It may have something to do with the political economy and the profile (and property interest) of the litigant bringing the suit against the government. Litigants who are homeowners succeed in challenging takings at rates far higher than litigants who are developers.[512] If state courts are ruling in favor of homeowners more often than developers, then an adverse decision by the Supreme Court that underprotects a homeowner, similar to the ruling that underprotected Ms. Kelo, might trigger a divergence in the regulatory vein. Why wouldn't it?

A Supreme Court decision rejecting a homeowner's regulatory takings claim in favor of the government would arguably clash with state court preferences for favoring plaintiff homeowners over developers. However, resistance to federal regulatory takings doctrine, similar to that experienced under the federal public use doctrine, will probably not occur at the state level until a case comes before the Supreme Court where the Court's ruling underprotects a homeowner from a regulation. With the right litigant profile and the right story, such a case could rupture the state conformity to federal regulatory takings like *Kelo* ruptured federal public use doctrine and economic development takings. While very few states have enacted statutes that offer more protections from regulatory takings beyond the federal takings doctrine,[513] it is still possible that a regulation that goes too far in underprotecting a homeowner could spark a *Kelo*-like backlash.

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[511] Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014) (emphasis added).

[512] Krier & Sterk, *supra* note 8, at 75–76.

[513] *See supra* Part III.

CONCLUSION

This Article has explored the interplay between state conformity and state resistance to federal constitutional property doctrine. This phenomenon can be found in both veins of the Takings Clause, where a certain force of the federal regulatory takings and public use doctrines has led state actors, historically, to uniformly follow and apply the Supreme Court's jurisprudence. State actors rarely resisted or diverted from the high court's doctrinal script. However, convergence was disrupted by the Supreme Court's decision in *Kelo*, which caused a countervailing force that resisted the federal public use doctrine. The response was counterintuitive in light of the historical attraction of the public use doctrine. The result was a seismic rupture that caused a disequilibrium in constitutional property. This has created a unique distinction in constitutional property where the majority of states have uniformly resisted parts of the federal public use doctrine, specifically economic development takings, while continuing to embrace federal regulatory takings jurisprudence lockstep. There are a plethora of reasons for why this might be, but the political economy is the most persuasive.

Today, constitutional property lives in a state of disequilibrium. Moving forward, it seems that a return to a state of equilibrium may require the Supreme Court to hand down a regulatory takings ruling that states would perceive to underprotect core property rights of homeowners, as opposed to developers, which would trigger a familiar backlash that might result in major countervailing doctrinal and legislative changes at the state level. Time will tell if, or when, we see the current gap in constitutional property doctrine close.