TAKINGS FEDERALIZATION

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ABSTRACT

Federal constitutional law exerts an outsized role and influence over state constitutional law. In takings, Supreme Court jurisprudence has dominated state court interpretations of analogous state constitutional takings provisions. This does not mean, however, that the Supreme Court always leads and the state courts always follow. At times, the opposite is true. There is, indeed, an underappreciated and under addressed role reversal in which the Supreme Court follows the lead of state courts. State takings doctrines have, on limited occasions, influenced federal takings jurisprudence. This federalization of takings is a distinct feature of judicial dual sovereignty where the Supreme Court consults, borrows, and adopts state court doctrine as a primary source to interpret the Takings Clause and establish or clarify existing federal takings jurisprudence.

This Article illuminates how federal takings jurisprudence is developed through the state courts by highlighting a few prominent, and a couple obscure, takings rulings where the Supreme Court formulated its exactions jurisprudence and analyzed intricate just compensation and damages questions by borrowing well-established state constitutional takings doctrines. This Article identifies these often unrecognized examples of takings federalization and suggests that the practice of the Supreme Court looking to state courts and state constitutional law for guidance should be afforded greater attention and recognition in the scholarly literature.

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INTRODUCTION

Historically, the Supreme Court's federal takings jurisprudence has heavily influenced state court interpretations of analogous state constitutional takings provisions. This does not mean, however, that the Supreme Court always leads and the state courts always follow. At times, the opposite is true. There is, indeed, an underappreciated role reversal that occurs when the Supreme Court follows the lead of state courts, and state takings doctrines influence federal takings jurisprudence. This federalization of takings (takings federalization) is a distinct, but rare and overlooked, feature of judicial federalism where the Supreme Court consults, borrows, or adopts state court doctrine as the primary source to interpret the federal Takings Clause and develop federal takings jurisprudence.

This Article illuminates how several lines of federal takings jurisprudence were developed through the state courts by highlighting a few prominent, and a few obscure, takings rulings where the Supreme Court formulated its exactions jurisprudence and analyzed intricate just compensation and damages questions by borrowing well-established state constitutional takings doctrines. For example, the Supreme Court established a new exaction standard in *Nollan v. California Coastal Commission*[1] and *Dolan v. City of Tigard*[2] by borrowing and adopting well-established doctrines shared uniformly by the states.[3] Likewise, in the late 1880s the Supreme Court relied heavily on state supreme court rulings to guide its analysis of federal constitutional questions related to just compensation and damages. This Article identifies these under addressed episodes of takings federalization and suggests that the Supreme Court's practice of looking to state courts and state constitutional law for guidance should be afforded greater attention and recognition in scholarly literature.[4]

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1. 483 U.S. 825 (1987).
2. 512 U.S. 374 (1994).
3. *See id.* at 389–91.
4. I do not purport to offer an exact "head count" of takings federalization cases. There may be others, although to the best of my knowledge, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* are the most prominent, with very few other known examples where the Supreme Court borrows directly from the state courts. Nevertheless, the quantity of instances where the Supreme Court engaged in the practice of federalization is of no concern to this Article. Instead, it is the content and substance of the practice that should be of great interest to scholars of takings jurisprudence.

This Article proceeds in three Parts. Part I briefly surveys the gravitational force of federal constitutional law leading state courts to become perpetual student followers of the Supreme Court's federal constitutional law teachings.[5] A vast and wide body of American law is influenced by federal courts, legislation, and constitutional law, especially Supreme Court jurisprudence. State courts tend to mimic the Supreme Court's analytical frameworks, tests, tiers of scrutiny, standards of review, and substantive decisions on individual rights. Part I also attends to the less recognized but equally important explanation of how state constitutionalism in our modern system of American federalism encourages and facilitates state courts leading federal constitutional law.

Part II explores how state courts are heavily influenced by Supreme Court takings jurisprudence when interpreting state constitutional takings clauses. This pattern of following fits neatly with the dominant trend of lockstep interpretation practices across state constitutional law jurisprudence. There are a few exceptions from lockstep takings, including the Supreme Court's seminal *Kelo v. City of New London*[6] decision. Part II then turns to takings federalization by highlighting how the Supreme Court heavily consulted and outright borrowed from state court doctrines to establish new federal takings doctrines.

Part III explores various observations and implications of takings federalization. For example, takings federalization allows the Supreme Court to rely on an existing market of state-level judicial reasoning and contested ideas across state courts in choosing which approach to adopt. In some cases, the federalization of takings doctrine respects state court innovation and harnesses the creativity associated with the diversity of judicial federalism. When the Supreme Court relies on or outright adopts the laboratory results of state court experiments before federalizing a doctrine, it may placate concerns over federal supremacy. Because existing property rules derive from independent sources of state law, with which state courts are most familiar and best equipped to articulate and develop, takings federalization may also fit aptly with principles of background state law. However, there are also drawbacks to the federalization process. Takings federalization risks inappropriately nationalizing takings doctrines that cannot be properly applied to background state principles across diverse state property laws and rules. Further, if the importance of the Constitution is improperly attributed to state judicial doctrines, federalization may agitate rather than placate federal–state tensions.

5. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705 (2016).
6. 545 U.S. 469 (2005).

I. FEDERAL GRAVITATIONAL FORCE AND STATE CONSTITUTIONALITY

A. The Law of Federal Gravity

There exists a "gravitational force" in federal law and Supreme Court jurisprudence that strongly influences state courts, often leading state legislation to mirror federal legislation in both procedural and substantive areas of law, including those that are non-preemptive.[7] State courts' interpretation and analysis of state statutes often mirrors federal courts' interpretation and analysis of federal statutes.[8] While some state legislation "require[s] conforming interpretation with federal precedent . . . with relatively paltry analysis of countervailing considerations,"[9] other state laws "*require* conforming interpretation with federal precedent."[10] Indeed, it appears "state courts . . . bend over backwards in construing state antidiscrimination statutes in order to keep state and federal law on the same track."[11] Differences in the language between state and federal statutes do not change results: states simply "finesse the textual differences where they exist . . . ."[12]

This gravitational force tugs and pulls at both procedural and substantive areas of federal and constitutional law.[13] Most states "tend to converge strongly"[14] with Supreme Court doctrine, and many state legislatures copy and paste congressional pronouncements into state statutes.[15] The well-known and widespread phenomenon extends to federal constitutional law, which plays an outsized influence over state constitutions and state court interpretations of Supreme Court doctrine.[16] From identical equal protection clauses to carbon copies of the Supreme Court's tiers of scrutiny, the centripetal lure of federal constitutional law plays a significant role in how state constitutions and interpretation methods are shaped.[17]

The gravitational force of federal constitutional law, as Scott Dodson coined, is puzzling considering the long history of state constitutional structures that vastly differs from the federal.[18] Indeed, state courts have mimicked, or even copy and pasted, the language of tests, interpretive methodologies, standards, and doctrines used by the federal judiciary. As

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7. *Id.*
8. *See id.* at 721 n.86.
9. *Id.* at 721 n.86 & n.87 (citing Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 473, 477 (2006)).
10. *Id.* at 721 n.87 (emphasis added) (citing Long, *supra* note 9, at 477).
11. Long, *supra* note 9, at 477; *see also* Dodson, *supra* note 5, at 722–23.
12. Long, *supra* note 9, at 495.
13. Dodson, *supra* note 5, at 710.
14. James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 34 (2014) [hereinafter *Autonomy and Isomorphism*].
15. *See* Dodson, *supra* note 5, at 725 n.118.
16. *Id.* at 724.
17. *Id.* at 726.
18. *Id.* at 725.

Joseph Blocher explains, "Despite their formal interpretive independence, state courts have generally followed the Supreme Court's lead, adopting its tests and doctrines as their own."[19] The same goes for judicial reasoning. States tend to go with the flow of the Court's reasoning on questions of law "as an express matter of course."[20]

The sheer force of federal constitutional law has indisputably supplemented, and arguably supplanted, state constitutionalism and the laboratories of democracy—state legislatures and state courts—urged by Justices Louis Brandeis and William Brennan.[21] Most state constitutions have an equal protection clause that is substantially the same as the federal counterpart.[22] And state courts employ the same, or substantially the same, standards of review and analytical frameworks set forth by the Supreme Court, including tiers of scrutiny.[23] Many state courts do not distinguish between how certain rights are scrutinized under federal and state constitutions.[24] In fact, most state courts tend to apply analytical reasoning "in lockstep with their federal counterparts."[25] Indeed, if and "when presented with the opportunity, [state courts] have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions."[26] It is as if state actors simply "go with the flow unless some countervailing force enables resistance."[27] State actors, blindly following federal interpretations of federal legislation or constitutional provisions, run counter to the concept of states functioning as laboratories of democracy.[28] This behavior conforms with the "often unstated premise that [Supreme Court] interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions."[29]

One would think that state legislatures and courts would exert extraordinary independence in crafting constitutional provisions, doctrines, analytic frameworks, and jurisprudence, but that has not happened. Even though states sometimes experiment with a new state-based law, they all too often capitulate to federal law and Supreme Court doctrine when they

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19. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CALIF. L. REV. 323, 332–34 (2011) (explaining that "[e]very state has a bill of rights, and almost all of them reproduce in some form or another the full list of rights protected by the federal Bill of Rights.").

20. *See* Dodson, *supra* note 5, at 726–27.

21. *See generally* Dodson, *supra* note 5.

22. *See, e.g.*, CAL. CONST. art. I, § 7; N.M. CONST. art. II, § 18.

23. *See, e.g.*, State v. Ortiz, 498 P.3d 264, 273 (N.M. 2021).

24. *See* Dodson, *supra* note 5, at 726; 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.").

25. Michael E. Solimine, *Symposium: Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002); James A. Gardner, *Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992); *see* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 JUDICATURE 190, 197 (1991); *see* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1191–94 (2000).

26. Solimine, *supra* note 25, at 338 (emphasis added).

27. Dodson, *supra* note 5, at 727.

28. *See Failed Discourse*, *supra* note 25, at 762–66; *see also* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN. ST. L. REV. 783, 783 (2011).

29. *See* Dodson, *supra* note 5, at 724 n.115.

are not mandated to do so.[30] Of the possible reasons and explanations for this phenomenon, perhaps "[t]he most benign explanation[s] [are] that federal [constitutional] law gets the law right first, and state actors, realizing this, follow as a matter of agreement and judgment."[31] This brings us to takings, where there is significant convergence between state and federal constitutional law, but one rare moment of divergence.

B. Lockstep Takings

The majority of state constitutions include a takings clause similar to the Constitution's Takings Clause.[32] Under most state constitutions, interpretations of regulatory takings are identical to analysis under the Constitution.[33] As a result, the Supreme Court's construction and interpretation of the Takings Clause has been adopted in lockstep by state courts interpreting analogous state constitutional law questions.[34] Indeed, the Supreme Court's per se and categorical rules and standards have been effectively duplicated into state constitutions. Some state courts have gone so far as to "consider federal cases interpreting the federal provision persuasive in [the] interpretation of the state provision."[35] As a result, the Supreme Court's regulatory takings doctrine is frequently borrowed by state litigants and closely followed by state courts.[36] Other state courts confess that the federal regulatory takings jurisprudence is "practically [a] direct authorit[y]" for analyzing takings challenges.[37] The same goes for the analytical frameworks established by the Supreme Court.[38]A few state courts have concluded that federal regulatory takings schemes are the "best analytic framework" for state takings disputes, while other state courts defend the appropriateness of looking to federal regulatory takings cases for guidance.[39]

The Idaho Supreme Court, for example, evaluated state takings claims exclusively under the Takings Clause.[40] Likewise, the Minnesota Supreme Court "often applied *Penn Central* to decide regulatory takings

30. *Autonomy and Isomorphism*, *supra* note 14, at 34.

31. *See* Dodson, *supra* note 5, at 729–30 (cautioning that "explanations for state isomorphism generally, and in specific instances, need deeper theorizing.").

32. Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1175 n.19 (2016).

33. *Id.*

34. *But see* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 94 (2016) (arguing that state courts frequently provide less protection to takings claimants than the Supreme Court has mandated them to).

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

36. Phillips v. Montgomery Cnty., 442 S.W.3d 233, 240 (Tenn. 2014).

37. Neifert v. Dep't Env't, 910 A.2d 1100, 1118 n.33 (Md. 2006) (quoting Green Party v. Bd. Electors, 832 A.2d 214, 237 (Md. 2003) (Harrel, J., concurring)).

38. *See* Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIA. L. REV. 139, 146 (2018).

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

40. Boise Tower Assocs. v. Hogland, 215 P.3d 494, 503 (Idaho 2009).

case[s] under the Minnesota Constitution."[41] As I have previously explained,

> State courts seem to employ the federal analytical frameworks in examining state constitutional takings claims and rarely offer greater protections . . . [and] state supreme courts . . . 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.[42]

State courts, on the whole, borrow federal takings analyses, adopt the newest federal standards, and consult the Supreme Court's takings case law to decide state level takings cases and create new state court doctrine.

The Supreme Court's interpretation of "public use" under the Takings Clause has been, similar to regulatory takings, universally borrowed and adopted by state courts.[43]At its founding, the Supreme Court did not frequently delineate an interpretation and meaning of public use under the Takings Clause.[44] When it did, the Court read the Takings Clause expansively, approving a "wide variety of condemnations."[45] In the nineteenth century, state courts' attitudes and sentiments on the public use definition oscillated between "support for an expansive use of eminent domain" and "a fear that condemnation would be abused to the detriment of individual property rights."[46] While nineteenth-century state court attitudes seemed ambivalent "towards expansive interpretations" of public use, their rulings were not.[47] State courts takings decisions in the early Republic suggest a broad and expansive reading of public use consistent with the Supreme Court's "amenable" attitude "to the use of eminent domain to support economic development."[48] Even during the Civil War, state courts ruled in favor of governments in "a wide variety of takings."[49] This was largely due to state court recognition of and support for "the expansion of the nascent economy . . . ."[50]

Having established its expansive position on eminent domain, the Court "ceded the authority to determine what constituted a public use to the state courts."[51] The Court announced it would treat state court rulings on public use "with great respect" and that it had a limited role to play in

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41. DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 305 (Minn. 2011) (citing Penn. Cent. Transp. Co. v. City of New York, 428 U.S. 104 (1978)).

42. *See* Dickinson, *supra* note 38, at 158–164; *see also* Phillips v. Montgomery Cnty., 442 S.W.3d 233, 240 (Tenn. 2014).

43. 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).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 11.

48. *Id.*

49. *Id.* at 10.

50. *Id.* at 9.

51. *Id.* at 12.

determining what constituted a public use for the states.[52] This friendly abdication, however, came after the Court imparted its "expansive readings of the Fifth Amendment" to include no requirement that the general public "enjoy or participate" in the condemned property to satisfy public use.[53] This subtle invitation for state courts to apply an expansive reading of public use, cloaked in the veneer of judicial deference, made an indelible mark on how state courts approached takings cases in the twentieth century. Many state courts had adopted broad public use interpretations by the time urban renewal projects were tested under state constitutions.[54]

When the Court handed down its seminal *Berman v. Parker*[55] ruling approving takings for purposes of blight removal and urban development, the ship had sailed and state courts were rapidly moving in the direction of upholding expansive public use. The empirical evidence seems to confirm this phenomenon, as "thirty-four state supreme courts adopted the Court's broad interpretation of public use and applied such a rubric to condemnation challenges."[56] State courts followed lockstep in "nearly all [lower] courts" by settling on the Court's broad reading of public use in *Berman*.[57] The deferential nature of the Court's application of the public use doctrine made takings law a near universal state-focused area of constitutional law. It is of no surprise, then, that "[m]ost courts that have reviewed the issue of public use under state constitutions have[, similar to federal public use doctrine,] adopted a broad interpretation"[58] to ensure that economic development and its broad definition were included in the overarching deferential standard of takings doctrine.[59] It is unclear "[w]hy most state actors have resisted the opportunity to provide greater protections beyond the federal minima . . . ."[60] The state courts' inclination to borrow federal takings doctrine, even though they could interpret their takings clauses differently or craft standards independent of the Supreme Court's tests, is arguably a reflection of obedience and subservience to federal pronouncements. The concept of state courts acting and serving as laboratories of democracy has, historically, failed to flourish in takings law.

The Tennessee Supreme Court, in *Phillips v. Montgomery County*,[61] offers an eloquent explanation for state courts' lockstep behavior of borrowing and adopting federal takings doctrine.[62] The state supreme court, prior to *Phillips*, did not recognize regulatory takings doctrine under the

52. Pritchett, *supra* note 43, at 12.
53. *Id.*
54. *See* Dickinson, *supra* note 38, at 209.
55. 348 U.S. 26 (1954).
56. *See* Dickinson, *supra* note 38, at 169.
57. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 196 (2002).
58. *See* Dickinson, *supra* note 38, at 172.
59. Faulconer v. City of Danville, 232 S.W.2d 80, 83 (Ky. 1950).
60. *See* Dickinson, *supra* note 38, at 180.
61. 442 S.W.3d 233 (Tenn. 2014).
62. *Id.*

state constitution. The court was asked to adopt the doctrine and recognize regulatory takings claims under the state takings clause. The court in *Phillips* determined that the state takings clause should be read the same as the federal version.[63] To decide differently, the court said, "would needlessly complicate an already complex area of law . . . ."[64] The risk of unpredictability concerned the *Phillips* court, noting that declining to interpret takings doctrine in line with federal takings doctrine, would "increase uncertainty for litigants attempting to bring claims under both the federal and state constitutions . . . ."[65] There were little, if any, textual or historical distinctions between the state and federal documents. As a result, the court announced that it "will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences . . . ."[66] To reject a parallel and lockstep interpretation would have, according to the court, placed the state courts and the Tennessee constitution "at odds with the vast majority of [state courts], nearly all of which have already adopted federal [regulatory] takings jurisprudence."[67]

Of course, there are other rationales for following the lead of federal takings law and legislation. The Supreme Court's doctrines may simply have a "presumption of validity" and following the doctrine is the "path of least resistance."[68] It may also be "cognitively easier and simpler" to endorse federal takings doctrine than to muddy the waters by blazing a new path.[69] Of course, this may result in state courts acting as "simple-minded dependents of their smarter older sibling[s]."[70] Likewise, it is perfectly plausible that state courts, like the Tennessee Supreme Court, want to "reap the benefits of uniformity."[71] Perhaps even more practical is that state jurists fear departure from federal takings doctrine because an independent state approach risks nullity by state legislatures, reversal by higher courts, or even criticism of such independent trailblazing from sister state courts. This invariably implicates judicial retention and reelection concerns for some state jurists. While the vast majority of state courts follow federal takings jurisprudence, the gravitational force of federal law is not absolute. There are adequate counterexamples of states deviating from federal constitutional pronouncements, including takings.[72]

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63. *Id.* at 244.
64. *Id.*
65. *Id.*
66. *Id.* at 243.
67. *Id.* at 244.
68. *See* Dickinson, *supra* note 38, at 201.
69. *See* Dodson, *supra* note 5, at 730.
70. *Id.* at 748.
71. *Id.* at 732.
72. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988); *see also* Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALBANY L. REV. 1365, 1375–76 (2014); Benjamin J. Beaton, Note, *Walking the Federalist Tightrope: A National Policy of State Experimentation for Health*

C. Takings Divergence

Some state interpretations of the takings provisions strengthen protections for property owners in regulatory takings claims above and beyond the federal baseline.[73] A minority of states have formulated new regulatory takings and public use analytical tests.[74] A few other state courts have outright rejected the Supreme Court's takings doctrine.[75] However, there is one jarring episode of divergence that warrants a brief mention. The most extreme episode of a resistance movement against the Supreme Court's takings doctrine rose from the aftermath of the Court's holding in *Kelo v. City of New London*: one of the most dramatic moments of "disequilibrium in takings" history.[76]

In *Kelo*, the Supreme Court employed a traditional deferential approach to the question of economic development takings. Justice Stevens' majority opinion tasked state agencies and legislatures with effectuating state takings statutes and constitutional provisions to determine what constituted public use.[77] As a result, local decision-makers were given wide latitude to permit eminent domain takings for virtually any rationally related and conceivable purpose. The "great respect" afforded to state legislatures and state courts was a reoccurring theme in the opinion.[78] But massive backlash ensued.

Before the *Kelo* ruling, most states sat at the "constitutional bottom" and rarely granted greater protections to private property beyond the federal minima created by the Supreme Court.[79] After *Kelo*, state legislatures denounced and resisted the Supreme Court's expansive reading, emphasizing that economic development was far too broad a conception of public use, especially when the result was effectively a property transfer from one private landowner (typically a homeowner) to another private landowner (typically a business or corporation).[80] The Court's opinion, steeped in federalist dimensions, effectively enabled, and arguably encouraged, the ensuing backlash. Justice Stevens explained that state courts could diverge

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Information Technology, 108 COLUM. L. REV. 1670, 1688–93 (2008). Some states, for instance, provide greater protections to employees claiming discrimination. *See* Sally F. Goldfarb, *The Supreme Court, The Violence Against Woman Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 91 (2002).

73. *See, e.g.*, R & Y, Inc. v. Mun. of Anchorage, 34 P.3d 289, 293 (Alaska 2001) (explaining that the Alaska Constitution provides property owners expanded protections compared to that of the United States Constitution).

74. *See, e.g.*, Town of Gurley v. M & N Materials, Inc., 143 So.3d 1, 12 (Alaska 2012) (refusing to recognize regulatory takings under the state constitution and rejecting federal precedents).

75. *See, e.g.*, Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 847–48 (Iowa 2019).

76. *See, e.g.*, *id.*

77. *See* Kelo v. City of New London, 545 U.S. 469, 488–89 (2005).

78. *See id*. at 483–84.

79. *See* 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 creates "a constitutional bottom" allowing states to go above and beyond rights-protective action).

80. *Puntenney*, 928 N.W.2d at 846–48.

if they chose to and that legislatures were free to offer greater protections beyond the Supreme Court's baseline.[81]

What followed was an "unprecedented wave of eminent domain reform [that swept the nation] that either barred or restricted economic development takings."[82] Regulatory takings sustain a balanced level of state convergence with the Court's doctrine, while public use takings simultaneously endured a complete wipeout at the state level. A vast majority of states resisted the ruling by enacting new legislation or amending existing legislation to provide greater protections to private property in eminent domain challenges or outright ban takings for economic development.[83] State constitutions were amended, and state courts handed down rulings that limited the scope of the public use within state constitutions.[84]

In states that did not amend their constitutions or pass restrictive legislation, state supreme courts stepped in to thwart the impact of *Kelo*. The South Dakota Supreme Court explicitly opposed the *Kelo* ruling, interpreting the state constitution to restrict economic development takings.[85] The court determined that, under the state takings clause, "public use" demands the use of seized property by the general public or the government.[86] The court was not shy in contrasting the state document with the federal Constitution, explaining that "our state constitution provides its 'landowners more protection against the taking of their property than the United States Constitution."[87]

The Supreme Court of Ohio, in *Norwood v. Horney*,[88] expressly counteracted the federal *Kelo* ruling and interpreted the state constitution's takings clause restrictively, explaining:

> [W]e are not bound to follow the United States Supreme Court's determinations of the scope of the Public Use Clause in the federal Constitution and we decline to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause.[89]

In fact, the Ohio Supreme Court's majority opinion relied upon the *Kelo* dissenting opinions in interpreting the state constitutional provisions. The court explained that "we find the analysis by . . . the dissenting justices

81. *Kelo*, 545 U.S. at 482–84.
82. *See* Dickinson, *supra* note 38, at 183.
83. *Id*. at 183–84.
84. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L. J. F. 82, 84–85 (2015).
85. Schafer v. Deuel Cnty. Bd. Comm'rs, 725 N.W.2d 241, 247 (S.D. 2006).
86. Benson v. State, 710 N.W.2d 131, 162–63 (S.D. 2006).
87. *See id.* at 146.
88. 853 N.E.2d 1115 (Ohio 2006).
89. *Id.* at 1136 (internal citations omitted).

of the United States Supreme Court in *Kelo* are better models for interpreting" Ohio's Constitution.[90]

The Oklahoma Supreme Court likewise thwarted the *Kelo* ruling, interpreting the state constitution to prohibit economic development takings. The court explained that "[t]o permit the inclusion of economic development alone in the category of 'public use' or 'public purpose' would blur the line . . . [and] render our constitutional limitations . . . a nullity."[91] The court further acknowledged that its decision could be interpreted as inconsistent with the *Kelo* ruling: "To the extent that our determination may be interpreted as inconsistent with the U.S. Supreme Court's holding in [*Kelo*], today's pronouncement is reached on the basis of Oklahoma's own special constitutional eminent domain provisions" that offer greater protections to property than the federal Takings Clause.[92] Justice Lavender of the Oklahoma Supreme Court expounded upon state court independence from federal commands, explaining that "[o]ur holding . . . concerns state constitutional questions based on [state] law, which constitutes 'separate, adequate, and independent grounds' for our decision."[93]

Indeed, the "post-*Kelo* rupture in federalism was a significant transformation in constitutional property" because it created a massive schism in takings law not seen since the Civil War.[94] Within months, one vein of takings law—public use—was completely upended by state actors while the other vein—regulatory takings—remained intact.[95] The ruling undoubtedly "gave rise to an imbalance in federalism and takings doctrine."[96]

This centrifugal episode has raised fascinating constitutional and federalism questions about why states resist certain federal commands. Indeed, "despite the fracturing of public use doctrine following *Kelo*, states continue to converge around" the Court's regulatory takings jurisprudence.[97] There is little evidence, if any, to prove that the *Kelo* ruling caused state courts and legislatures to reexamine or cast aside their regulatory takings jurisprudence, including an absence of efforts to grant greater protections.[98]

From *Mahon* to *Berman*, and *Penn Central* to *Lucas*,[99] state courts have followed lockstep with the federal takings doctrine and have rarely ventured off course to blaze a new analytical path. The *Kelo* saga is

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90. *Id.* at 1140 (noting "[a]s Justice O'Connor correctly discerned in her analysis of the taking in *Kelo* . . . .").
91. Bd. Cnty. Comm'rs Muskogee Cnty. v. Lowery, 136 P.3d 639, 652 (Okla. 2006).
92. *Id.* at 651.
93. *Id.* at 651 n.19.
94. Dickinson, *supra* note 38, at 185.
95. *See id.* at 184.
96. *Id*. at 185.
97. *See id.* at 146.
98. *Id*.
99. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); Berman v. Parker, 348 U.S. 26 (1954); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125, 128 (1978); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

regarded as the modern-day exemplar of the "risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our [individual rights and] liberties."[100] The ruling and the states' subsequent resistance receive significant scholarly attention precisely because it is a story of states bucking the federal trend and blazing their own paths. The *Kelo* ruling "unleashed a wave of state responses that filled many, if not all, of the gaps left by the U.S. Supreme Court's decision."[101] Some prominent state constitutional scholars argue that *Kelo* provides a "contemporary illustration of the capacity and willingness of state courts . . . to protect . . . other individuals rights when the Supreme Court declines to do so."[102] This is a well-worn story in federalism literature.

But it is noteworthy that the post-*Kelo* state courts' backpedaling was in reaction to, not in anticipation of, the Court reaffirming its expansive reading of public use. While a few state supreme courts had narrowed the scope of state public use clauses prior to the *Kelo* ruling, the vast majority of the resistance arrived after *Kelo*. This is a key feature of state constitutionalism that is part of the popular account and discourse of judicial federalism. There are, indeed, episodes along the long arc of American history where states refuse to follow or actively avoid the Supreme Court's pronouncements by relying on state constitutional law as an independent source of interpretation to repudiate federal rulings. In fact, this is the traditional narrative of the value of judicial federalism; that states can and do fill the gaps where the Supreme Court refuses to protect certain rights, or states proactively push back against Supreme Court decisions they disagree with. As Jeffrey Sutton explains, "All of this does not . . . prove that the States have compensated for [the Supreme Court's] failings."[103] But it does raise questions as to what state courts can and should do "when the U.S. Supreme Court stays its hand."[104]

There is, indeed, another underappreciated story of federalism that is neither predicated on the top-down domination of federal constitutional law over state constitutional interpretation nor is it a "states-fill-the-gaps" of federal constitutional law conception of state constitutionalism. Rather, the federalization dimension of takings concerns state courts leading the Supreme Court to follow state doctrines to resolve federal takings questions, consult state court reasonings to decide takings disputes, or borrow state court tests to establish newly minted federal takings doctrines.

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100. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 204 (2018).
101. *See id.* at 205.
102. *Id.*
103. *Id.*
104. *Id.*

II. TAKINGS FEDERALIZATION

A. State Courts as Federal Leaders

The modern-day structure of constitutional control in America is "top-down": federal constitutional law reigns supreme, pulling the states into its orbit and influencing vast areas of state law.[105] The Supreme Court and state courts, taking cues and commands from this hierarchical constitutional structure, follow a familiar path where the "Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions."[106] If the states disagree (they rarely do), then states may diverge from the Court's pronouncements. But state constitutionalism does not, and should not, presume that the role of states is to fill the gaps of individual rights where the Court fails to, or to push back against the Court's pronouncements by intentionally interpreting state constitutional provisions differently to thwart the Court's commands. States can (and do) accomplish more. Indeed, the "modern Court" has taken cues, in limited instances, from "state developments."[107]

As Scott Dodson explains, while "[f]ederal law [has become] the new leader" in our federalist system,[108] there are rare moments in American constitutional law when "state innovations are followed by federal rulemakers and courts."[109] Though "federal following is rarer than state following"[110] it "is not to say that federal law *always* leads."[111] It is a feature, not a bug, of judicial federalism for state courts to lead on doctrine and for the Supreme Court to follow suit with or without federal precedent, doctrine, or history available. Sometimes "federal . . . interpretation may reflect a common policy shared by states . . . ."[112] Indeed, "[a] common thread . . . [for why] States have been leaders rather than followers . . . is the complexity of the problem at hand."[113] As Jeffrey Sutton explains, the more complex the legal issue, the "more likely state-by-state variation is an appropriate way to handle the issue and the more likely a state will pay attention . . . ."[114] Occasionally, the Court literally and figuratively reaches down to the states, grabs and pulls up state doctrines, and inserts those doctrines into new federal constitutional pronouncements. Consequently, there is an ongoing academic and judicial debate as to whether

105. SUTTON, *supra* note 100, at 20.
106. *Id*.
107. *See* Dodson, *supra* note 5, at 753.
108. *Id.* at 744 (emphasis added).
109. *Id.* at 710 n.24.
110. *Id.*
111. *Id.* at 744 (emphasis added).
112. *Id.* at 705.
113. SUTTON, *supra* note 100, at 208.
114. *Id*. There are, understandably, concerns with the "national judicialization" of state court jurisprudence because states historically may not have honored, respected, and followed "their independent roles in enforcing the structural protections and individual rights guarantees found in their own constitutions." *Id*. at 214.

"state[s] . . . [should] assume the dominant role traditionally occupied by the Supreme Court" in being the first democratic institution to articulate and protect individual rights and liberties. [115]

Justice Brandeis' call for states to serve as laboratories of democracy created an intellectual following[116] and plenty of critics.[117] It was "one of the happy incidents," Justice Brandeis proclaimed, "that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments . . . ."[118] Those supporting Brandeis's vision argue that there is great value in states continuing "to develop their independent rulemaking capabilities" in a manner that may later persuade the Supreme Court to adopt the states' approach.[119] Under this approach, the traditional state court follower becomes the unexpected federal leader who educates—rather than learns from—the Supreme Court. States may "blaze their own paths"[120] of tests, standards, analytical frameworks, tiers of scrutiny, and substantive rights under their state constitutions without the slightest idea that those very same standards could someday be

115. *Failed Discourse*, *supra* note 25, at 763.

116. *See, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 181 (1959) (arguing that state courts may protect against abuses of national judicial power by generously interpreting individual liberties within state constitutions); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144 (1985) (examining the development of state constitutional law through the lens of criminal law); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PA. ST. L. REV. 837, 837–38 (2011) (endorsing the position that constitutional analysis should begin with state constitutions); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984) (discussing the shift in state courts towards giving "independent attention to state constitutional issues . . . ."); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985) (arguing that state constitutionalism is beneficial to both liberals and conservatives); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1530–31 (2005) (opining that when state courts adopt federal constitutional law they must be careful not to cast doubt on the validity of independent state constitutional arguments); Joseph R. Grodin, *State Constitutionalism in Practice*, 30 VAL. U. L. REV. 601, 605, 609 (1996) (reviewing ROBERT F. NAGEL, INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (1995) (examining Justice Linde's theory of state constitutionalism through the lens of a specific area of state jurisprudence)); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 135–232 (2009) (discussing methodology problems arising in cases where similar federal and state constitutional rights claims are raised, and examining the concept of judicial lockstepping); Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 764, 771 (1998) (arguing that Justice Brennan's state constitutional advocacy was not reactive, but rather a product of his early career).

117. *See* Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429, 434 (1988); H.C. Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 8–9 (1982); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981); Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L. Q. 1, 2 (1981).

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

119. 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). *See also* Dodson, *supra* note 5, at 753.

120. Dodson, *supra* note 5, at 705.

appropriated by the Supreme Court. In fact, this phenomenon of states leading and federal actors following dates to the founding era.[121]

The doctrinal experiments in state judicial laboratories pit state courts against other state courts in a competition to embrace or reject "innovative legal claims."[122] The innovation of one state court may gain followers (and admirers) from sister states, thus creating horizontal uniformity. But the state-level experiments also allow the Supreme Court to "profit from the contest of ideas."[123] The Court, for example, may "choose whether to federalize the issue after learning the strengths and weaknesses of the competing ways of addressing the problem."[124] Some scholars advocate for a process where state courts "work their way through the constitutional issues [first] . . . developing their own tests and doctrines along the way . . . after which the [Supreme Court] can assess the States' experiences and develop its own federal constitutional rules."[125] This "ground-up approach to developing constitutional doctrine allows the Court to learn from the States."[126] The significance of this reverse polarity is "who, not what—should be the leading change agents in society going forward . . . ."[127]

Two prominent arguments emerged from this conception of state courts as change agents. The first is that state courts should not rival the federal courts as institutions of rights innovation.[128] The second was state courts, rather than federal courts, were the most effective avenues and venues to vindicate those rights.[129] The legal community, especially advocates, were encouraged to "abandon [the] rebuttable presumption in favor of federal courts and to consider the possibility of a rebuttable presumption in favor of state courts."[130] Building on this second argument, some scholars argue that state courts and their state constitutions should be "on the front lines . . . when it comes to right innovation[]."[131] In other words, states can and should serve as the "lead change agents in society going forward" instead of the Supreme Court.[132] The idea is to "[l]et the state courts be the initial innovators of constitutional doctrines if and when they wish, and allow the U.S. Supreme Court to pick and choose from the

121. The Bill of Rights, for example, looked to state constitutional versions for guidance. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501–02 (1977).

122. SUTTON, *supra* note 100, at 20.

123. *Id*.

124. *Id*. (emphasis omitted).

125. *Id*.

126. *Id*. at 216.

127. *Id*. at 214.

128. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977).

129. William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 625 (1999).

130. *Id.* This competing idea may be "useful to pragmatic justices interested in how ideas work on the ground, useful to originalist justices interested in what words first found in state constitutions mean[]," and perhaps useful to textualists who would be interested to understand how certain words, clauses, or provisions have been interpreted by state supreme courts. SUTTON, *supra* note 100, at 216.

131. SUTTON, *supra* note 100, at 214.

132. *Id*.

emerging options."[133] Indeed, the Court could, if it chose to, "wait for, and nationalize, a dominant majority position [across the states], lowering the stakes of its decision in the process" instead of, say, creating its own "imperfect" jurisprudence that might not be the right fit for the vast majority of states.[134] The value of this approach, according to some jurists and scholars, is that the accumulation of state rulings and doctrines construct a state window through which federal actors, like the Supreme Court, can peer to observe the "changing norms objectively."[135] This may place less emphasis and pressure on the Court "to be the key rights innovator in modern America."[136]

Indeed, this conception of federalism and state constitutionalism is distinct from that envisioned by Justice Brandeis and Justice Brennan. Their conception of judicial federalism was one where state courts fill the gaps where the Court should have, could have, or outright failed to recognize certain rights.[137] On the contrary, state courts can lead and "state constitutionalism [becomes] . . . a key mechanism for prospectively shaping federal constitutional law" as opposed to reacting to, diverging from, or simply following federal constitutional law.[138] State courts, not the Supreme Court, are the first to decide many difficult and novel constitutional law questions. State courts become "a vital component of the process by which constitutional law properly evolves."[139] As Justice Kennedy noted in *Obergefell v. Hodges*,[140] finding a constitutional right to same-sex marriage under equal protection and due process principles, "the highest courts of many States [] contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."[141] There are a handful of other examples of judicial federalization.

B. Judicial Federalization Doctrine

The phenomenon of state courts becoming federal leaders has morphed into an academic concept coined "judicial federalization doctrine."[142] The origins of the doctrine emanate from "well-documented areas of federal constitutional law," including racially motivated peremptory challenges, the exclusionary rule, same-sex sodomy, same-sex marriage, and

133. *Id*. at 20.
134. *Id*. at 216.
135. *Id*. at 69.
136. *Id*. at 214.
137. Justice Brandeis's focused on state legislatures, but his concept of laboratories of democracy are equally relevant to state courts. *See* Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 261 (2023).
138. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1323 (2019) (book review).
139. *Id*.
140. 576 U.S. 644 (2015).
141. *Id.* at 663.
142. Gerald S. Dickinson, *Judicial Federalization Doctrine*, 75 BAYLOR L. REV. (forthcoming 2023) (on file with author) [hereinafter *Judicial Federalization Doctrine*]; Gerald S. Dickinson, A Theory of Federalization, at 203 (unpublished manuscript) (on file with author) [hereinafter A Theory of Federalization].

freedom of speech and press.[143] The source of these federal doctrines, however, is anything but federal.[144] The doctrine of judicial federalization is comprised of rare instances when the Supreme Court heavily consults, adopts, or borrows state court doctrine to guide and inform federal constitutional law.[145] The practice does not always "nationalize" a right or protection, but may simply entail consultation and guidance from state court decisions to inform how the Court ought to decide a particular federal dispute. There are few instances of the Court expressly appropriating the interpretive methods, substantive reasoning, or constitutional conclusions of the state courts. However, the rare occasions when the Court engages in this practice illustrates an important aspect of judicial federalism and state–federal dialogue worthy of academic treatment and exploration, especially in takings, which I will address in a moment.

In 1961, the Supreme Court, in *Mapp v. Ohio*,[146] incorporated the Fourth Amendment's exclusionary rule through the Fourteenth Amendment. Prior to this decision, "'[t]he contrariety of views of the [exclusionary rules across] States'" made the issue one lacking unanimity.[147] While some Justices were persuaded to "brush aside the experience of States," others were drawn to the fact that state courts were increasingly interpreting both the federal and state constitutional provisions to include an exclusionary rule.[148] The "changing norms" in state courts towards the exclusionary rule had garnered significant attention by legal observers, including the Supreme Court.[149] When the Court decided to incorporate the Fourth Amendment's exclusionary rule with the states, much water had flowed under the federalism bridge, making the leap less jolting to the legal system.[150] By 1949, a twenty-seven state majority had refused to interpret their state constitutions to include an exclusionary rule, but that number was dwindling.[151] An increasing number of state courts had long "recognized the validity of and necessity for the exclusionary rule long before the United States Supreme Court required states to apply it in state court proceedings."[152] The Court's decision in *Mapp* was "deeply influenced" by the California Supreme Court's reasoning and the "emerging consensus" across the state courts.[153] Racially peremptory challenges were

143. *Judicial Federalization Doctrine*, *supra* note 142, at 138.
144. *Id*.
145. A Theory of Federalization, *supra* note 142, at 203–04.
146. 367 U.S. 643 (1961).
147. *Id.* at 651.
148. *Id.*
149. SUTTON, *supra* note 100, at 69.
150. *Id.* at 216.
151. Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 377 (2007).
152. State v. Johnson, 716 P.2d 1288, 1297 (1986).
153. *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1039–40 (2003) [hereinafter *State Constitutional Rights*].

another area of state constitutional law that influenced the Court's decision to federalize the protections.[154]

In *Batson v. Kentucky*,[155] the Supreme Court found that the Fourteenth Amendment's Equal Protection Clause made it unconstitutional for prosecutors to use race as a motivation to strike Black jurors.[156] The Court was influenced by and urged "to follow decisions of other states."[157] California's "*Wheeler* and its progeny . . . amply demonstrate[d] that such judicial passivity in the face of racial discrimination is both unnecessary and unwise."[158] To prevent other state courts from circumventing racially motivated peremptory strikes under state constitutional law, the Court was asked to "act on this problem"[159] through the establishment of a federal prohibition to create "one legal and moral authority" under the United States Constitution "to ensure the rights of the people."[160] While the Fourteenth Amendment has been central to the Court's judicial federalization doctrine, especially in *Mapp* and *Batson*, the First Amendment has also been subject to the practice.

In *New York Times Co. v. Sullivan*,[161] the Court, "for the first time," had the opportunity to establish an actual malice test on "a like rule, which [had] been adopted by a number of state courts . . . ."[162] The Court consulted "[the] turn-of-the-century"[163] and the "oft-cited statement of a like rule . . . found in the Kansas case of *Coleman*."[164] Commentators noted that "state courts played an important role in laying the foundations for a modern-day understanding of freedom of speech and of the press."[165]

In *Lawrence v. Texas*,[166] finding a federal constitutional right to same-sex sodomy, the Supreme Court recognized that state courts had increasingly diverged from the Court's decision in *Bowers v. Hardwick*[167] by relying on "provisions in . . . state constitutions parallel to the Due

154. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1636 (2010).

155. 476 U.S. 79 (1986), *modified by* Powers v. Ohio, 499 U.S. 400 (1991).

156. *Id.* at 97–99.

157. Brief for Petitioner at 4, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84–6263), 1985 WL 667872 ("Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in [*Wheeler*]".).

158. Brief of Michael McCray, the New York Civil Liberties Union, and the American Civil Liberties Union as Amici Curiae at 4, Batson v. Kentucky, 476 U.S. 791 (1986) (No. 84–6263), 1985 WL 669916 (citing People v. Wheeler, 583 P.2d 748 (Cal. 1978)).

159. Brief for Petitioner, *supra* note 157, at 33–34.

160. *Id*. at 34

161. 376 U.S. 254 (1964).

162. *Id.* at 256, 280.

163. Dairy Stores, Inc. v. Sentinel Pub. Co., 516 A.2d 220, 226 (1986).

164. *Sullivan*, 376 U.S. at 280 (citing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)).

165. THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF SPEECH AND PRESS 43 (Bill F. Chamberlin & Charles J. Brown, eds. 1982); *see also* Deckle McLean, *Origins of the Actual Malice Test*, 62 JOURNALISM Q. 750, 750–51 (1985) (tracing the test used by the Supreme Court in Sullivan back to Kansas Supreme Court decisions).

166. 539 U.S. 558 (2003).

167. 478 U.S. 186 (1986).

Process Clause of the Fourteenth Amendment."[168] The "trend in the states toward decriminalization . . . driven by judicial federalism [was] worthy of consideration in [the Court's] federal due process analysis."[169] The Court's decision to overrule *Bowers* and federalize protections for same-sex sodomy was heavily influenced by the states' widespread, growing, and "substantial . . . disapprov[al] of its reasoning in all respects."[170]

Likewise, the Court's landmark decision in *Obergefell*, finding a federal constitutional right to same-sex marriage, acknowledged that "[t]he new and widespread discussion of [same-sex marriage] led other States to a different conclusion."[171] Justice Kennedy acknowledged that "the highest courts of many States . . . contributed to [the] ongoing dialogue in decisions interpreting their own State Constitutions" and that those decisions, along with state legislatures increasingly passing liberal marriage laws, played a significant role in the Court's decision to federalize same-sex marriage protections.[172]

C. Takings Federalization

The lack of academic and judicial attention to judicial federalization doctrine is curious. But perhaps more surprising is the lack of attention to the doctrine in the context of takings by scholars of state and federal constitutional law.[173] The Court's seminal exactions cases, *Nollan* and *Dolan*, along with a few obscure takings decisions in the late-1800s involving just compensation and damages, have been overlooked in the scholarly literature for their value as exemplary examples of takings federalization.

1. Eminent Domain

While the debates over the meaning of the Takings Clause were at the center of state–federal dialogue, questions pertaining to the just compensation and damages aspects of eminent domain proceedings received

168. *Lawrence*, 539 U.S. at 576.

169. Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1855 (2004).

170. *Lawrence*, 539 U.S. at 576.

171. Obergefell v. Hodges, 576 U.S. 644, 662 (2015).

172. *Id.* at 662–63.

173. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1026 (1985) ("State courts have made a valuable contribution to the analysis and development of federal constitutional law."). Judge Utter is one of the few scholars who recognized the influence of state courts in the development of early Republic federal takings jurisprudence. Most other commentators have focused their attention on instances of federalization in the context of the First, Second, Fourth, and Fourteenth Amendments. The takings dimension, however, is absent. *See* Devins, *supra* note 154, at 1636–37; *State Constitutional Rights*, *supra* note 153, at 1037–38; Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1219–20 (1994); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 203–05 (1998); Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 28 n.12 (1993); Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More—Or Less?*, 127 HARV. L. REV. 1419, 1442 (2014) (book review); Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 119 n.143 (1997); Blocher, *supra* note 19, at 346; Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1036 (2011).

far less attention.[174] It is here that we find historical examples of takings federalization. The Court's eminent domain doctrine, historically, "relied heavily on state court decisions . . . ."[175] In the late 1800s, the Court was increasingly faced with challenges involving the scope and extent of the government's eminent domain power.[176] While the Court's interpretation of public use followed the familiar top-down approach, other aspects of the Supreme Court's federal takings interpretations, such as just compensation and damages clauses,[177] were born from the bottom-up by relying on state court doctrines interpreting state constitutional provisions. Leading up to the Supreme Court's intervention in determining the constitutionality of certain just compensation requirements under particular state constitutions in the mid to late 1800s, state courts had already taken the lead to carve out their own doctrines without the helping hand of prior federal precedent.

For example, the Massachusetts Supreme Court, in *Commonwealth v. Coombs*,[178] led the charge by ruling that land value is not the sole measurement in estimating damages when private property is taken by the government.[179] The New York high court expanded this rule to consider benefits when determining the diminution of compensation or damages when private land is taken for purposes of constructing a highway.[180] The Pennsylvania Supreme Court crafted a similar takings doctrine under its state constitution, concluding that the correct measure for just compensation in damages from takings is the difference between what the whole, unaffected, property would have sold for and what the property would have sold for if it was affected by the railroad construction.[181] The Ohio Supreme Court, in *Symonds v. City of Cincinnati*,[182] reiterated a similar interpretation of its state takings clause to require that when property is taken, benefits that resulted in improvements may be off-set when assessing just compensation.[183]

In the late 1800s, state courts also began addressing vexing questions regarding the definition of a nuisance and the effects of nuisances on takings with greater frequency. New Jersey courts found that stenches, noise, smoke, steam, and dirt caused by railroad companies were serious impairments to persons and their home, and thus nuisances were subject to takings claims.[184] The New York Court of Appeals, in *Cogswell v. New York,*

174. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344 (2018).
175. Utter, *supra* note 173, at 1037.
176. Brady, *supra* note 174, at 367–68.
177. *Id.* at 377–78.
178. 2 Mass. 489 (Mass. 1807).
179. *Id.* at 492.
180. J.R. Livingston v. Mayor of New York, 8 Wend. 85, 101–02 (1831). *See also* State v. Hudson Cnty. Bd. Chosen Freeholders, 25 A. 322, 323 (N.J. 1892).
181. Watson v. Pittsburgh & Connellsville R.R., 37 Pa. 469, 481 (Pa. 1861).
182. 14 Ohio 147 (Ohio 1846).
183. *Id.* at 174–75.
184. Pa. R. Co. v. Angel, 7 A. 432, 432–34 (N.J. 1886).

N.H. & H.R. Co.,[185] ruled that locomotive operations that cause private property to become unhealthy or unfit, and thus depreciate in value, create a nuisance.[186] Similarly, state courts in New York reasoned that legislative authority permitting the construction of railroads does not immunize the railway companies from nuisance liability when the operation of the railroads directly affects private property.[187] These state court rulings laid a foundation for determining when conduct can or should be deemed a nuisance in light of limited federal precedent.

By 1897, the Supreme Court was asked to chime in on the question of assessing just compensation and damages. In *Bauman v. Ross*,[188] the Court reviewed issues related to the proper measurement for just compensation over condemned private land. The Court ruled that valuation, in and of itself, was not the sole tool for measuring damages when a portion of a larger parcel of land is seized.[189] In its decision, the Court relied heavily on the rationales of state supreme courts, explaining that "for the reasons and upon the authorities" of the state courts, the Constitution did not explicitly or implicitly prohibit courts from considering benefits when estimating just compensation in takings.[190] In fact, the Court "borrowed its rule directly from the" Massachusetts Supreme Court's decision in *Coombs*.[191] Indeed, the Court had consulted "the overwhelming number of decisions in the courts of the several states" to support its decision[192] and referenced the "careful collection and classification of the [those] cases" to conclude that "in the greater number of states . . . special benefits are allowed to be [offset], both against the value of the part taken, and against damages to the remainder."[193]

Almost a decade later, the Court federalized aspects of the state courts' eminent domain doctrines. In *Richards v. Washington Terminal Co.*,[194] the Court borrowed directly from state court interpretations of analogous takings provisions under state constitutions to hold that railroads were immune from nuisance suits where damages arise from ordinary operations, e.g., claimants could not recover under the Takings Clause for harms caused by railroads.[195] The *Richards* ruling was "just a few decades removed from the passage of most of the [damages] clauses" in state constitutions.[196] The Court's takings jurisprudence, at the time, was devoid of any precedent that provided guidance on what was deemed a private

185. 8 N.E. 537 (N.Y. 1886).
186. *Id.* at 543.
187. Garvey v. Long Island R.R. Co., 54 N.E. 57, 58 (N.Y. 1899).
188. 167 U.S. 548 (1897).
189. *Id.* at 574.
190. *Id.* at 584.
191. Utter, *supra* note 173, at 1037 n.75.
192. *Bauman*, 167 U.S. at 575.
193. *Id.* at 583.
194. Richards v. Wash. Terminal Co., 233 U.S. 546 (1914).
195. *Id.* at 553–54.
196. Brady, *supra* note 174, at 377.

nuisance and when a nuisance amounts to a taking of property.[197] Instead of looking inward at its own precedent, or to the precedent of lower federal courts, and attempting to reason its way to a decision based merely on federal decisions, the Court focused its reasoning on state court rulings interpreting their analogous takings provisions. Justice Mahlon Pitney explained that the answer to the vexing nuisance question was found in the "great and preponderant weight of judicial authority in those states whose constitutions" have the same or substantially similar takings clause as the federal.[198] The Court determined that railroad companies could not be liable for damages on the theory that the company is a tortfeasor because the practical implications would be devastating to the railroad industry.[199] To draw this conclusion, the Court heavily rested its reasoning on the New Jersey Supreme Court's ruling in *Beseman v. Pennsylvania R.R. Co*.[200] noting that the state high court's "doctrine has become so well established that it amounts to a rule of property . . . ."[201] Indeed, the Court noted, "[A]s pointed out by [the Chief Justice] in the *Beseman* Case, if railroad companies were liable for suit for such damage . . . the practical result would be to bring the operation of railroads to a standstill."[202]

2. Exactions

The Court's exactions doctrine is a relatively recent development in takings compared to its counterparts: regulatory and eminent domain takings. The doctrine, which originated in the *Lochner*-era unconstitutional conditions doctrine, was crafted in the 1980s, and tacked on a new line of attack to government overreach under the Takings Clause. The doctrine was first introduced into federal discourse in *Nollan*[203] and *Dolan*,[204] and subsequently extended in *Koontz v. St. Johns River Water Management*.[205]

The unconstitutional conditions doctrine, as articulated by Kathleen Sullivan, explains that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[206] This doctrine attempts to hold the government accountable for means to an end it could otherwise achieve through a different, more direct approach; that is, the state cannot do "indirectly what it may not do directly," and the power to deny a "benefit includes the lesser power to impose a condition on its receipt."[207] The

197. *See Richards*, 233 U.S. at 553.
198. *Id*. ("We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.").
199. *Id.* at 555.
200. 13 A. 164, 165 (N.J. 1888).
201. *Richards*, 233 U.S. at 555.
202. *Id.*
203. 483 U.S. 825, 831–32 (1987).
204. 512 U.S. 374, 385 (1994).
205. 570 U.S. 595, 604–05 (2013).
206. Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).
207. *Id.*

concept addressed the problem of the state conditioning corporate privileges on the surrender of preexisting constitutional rights.[208] During the Warren Court era, the doctrine grew to cover other areas of constitutional law (including speech, association, religion, and privacy) but its application was inconsistent and unbalanced.[209]

The doctrine raises important questions about the extent of government intrusion into individual liberties, including property rights. States will frequently offer a benefit to a person but condition the benefit on the person agreeing to engage in certain activity or surrender an activity in order to receive the benefit. Because the benefit is conditioned, a constitutional right is subsequently affected. The problem is that the "imposition of a burden on the constitutional right would normally be strictly scrutinized," while the benefit enjoys deferential treatment by courts.[210] It has become commonplace, at least under the unconstitutional conditions doctrine, that strict scrutiny is applied to instances of conditioned government benefits.[211] Some may say the benefits are really just political gratuities to be measured, weighed, and evaluated deferentially by courts.[212] While the doctrine has focused on various areas of constitutional law, the focus of this Article is on the doctrine's effect on individual rights, especially property rights. Enter *Nollan*, *Dolan*, and *Koontz*.

In the context of property rights, analysis under the unconstitutional conditions doctrine does not differ much from the analysis of government welfare benefits or corporate privileges. In the case of the Court's exactions doctrine, a regulation becomes suspect when it mandates a private landowner to give up a property interest (an easement, for example) for public use and access as a condition to the receipt of a permit.[213] The Court has required that there be an "essential nexus" and "rough proportionality" between the condition and the objective of the government.[214] If the objective of the government is not connected to the condition in any meaningful way, courts will view the regulation skeptically.[215] The overarching concern the doctrine aims to snuff out is extortion; that is, government demands for private landowners to do something that the government could otherwise do itself or have the public pay for.[216] Or, worse, the government abuses its discretion to impose conditions that force developers to subsidize other unrelated government projects and shoulder the burden of costs that should be borne by taxpayers. Here, the government may find an easier, more affordable, and efficient means to its objective by simply

208. *Id.* at 1416.
209. *Id.*
210. *Id.* at 1422.
211. *Id.*
212. Sullivan, *supra* note 206, at 1424.
213. *Id.* at 1505.
214. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605–06 (2013).
215. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (describing the Court's high bar for proving a connection between the condition and the government's objective).
216. *See Koontz*, 570 U.S. at 607.

conditioning a landowner's land use permit on the surrender of a property interest, or in the context of the Court's *Koontz* decision, the payment or surrender of monies.

In *Nollan*, the Court, in a five–four decision, invalidated such a condition.[217] There, the Court faced a regulation in which a beachfront landowner desired a land use permit for building.[218] The government offered the permit, but only on the condition that the landowner surrendered an easement for the general public to have walkable access through the property and onto the nearby public beach.[219] Clearly, the government could have simply denied the permit outright without the condition. Likewise, the government could simply have found a less intrusive alternative to allowing public access to the public beach, perhaps paying a monetary amount to the landowner for a license or purchasing a piece of the landowner's property. Instead, the government sought to ensure public access to the beach and avoid compensation by imposing a condition on the receipt of the land use permit, effectively cornering the landowner into a difficult decision—one that some legal observers believe was extortion. But the imposition of the condition without payment of just compensation is where governments run afoul of the Takings Clause and where the Court has drawn a line. Indeed, there must be some connection between the condition exacted by the government and the achievement of a legitimate state interest. According to the Court, this essential nexus is an imperative analytical evaluation of the facts of a dispute.[220] The Court went further in *Dolan* by requiring a rough proportionality test.[221]

In *Dolan*, the exaction had to be roughly proportional to the impact of the proposed land use development. If the government needs an easement, the government must show that the easement is an essential and necessary element to achieving a legitimate state interest, and that the condition is clearly connected to the legitimate interest. Again, outright denial of a building or land use permit by the government in the absence of a condition would yield no problems under the Takings Clause. As a result, the *Nollan* and *Dolan* rulings set the stage for the Court to apply a heightened standard of review for land use exactions and effectively carved out a special application of the doctrine of unconstitutional conditions under the Takings Clause. Indeed, the burden of proof was placed on the government to show the essential nexus and rough proportionality, which was a clear departure from the deferential standard of rational basis for state action. As the Court noted in *Nollan*:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in

217. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 841–42 (1987).
218. *Id.* at 827.
219. *Id.* at 828.
220. *Id.* at 837.
221. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

> order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.[222]

Unlike the plaintiff in *Kelo*, who had an existing single-family home physically taken from her, Mr. and Mrs. Nollan were denied a building permit to build a larger structure on their land.[223] The existing structure, which was a small bungalow used during the summers and rented to vacationers, was slated to become a larger structure akin to a home.[224] The permit requests were rejected because they refused to allow a public easement across their property in exchange for the permit.[225] The Court's decision in favor of the Nollans did not trigger the same resistance as the decision in *Kelo* largely because the ruling strengthened private property rights by striking down an unconstitutional condition. Thus, unlike *Kelo*, there was very little reason for state legislatures and state courts to embark on a campaign to rewrite the exactions doctrine. The same could be said for *Dolan*.[226]

Then arrived *Koontz*, which expanded the reach of the Court's exactions doctrine by affixing monies to the question of what constituted a condition.[227] There, the property owner sought to apply for permits to construct wetlands for commercial development.[228] The state agency, however, mandated that the property owner redress the environmental damage to the wetlands in exchange for the permit.[229] The property owner, alternatively, offered a conservation easement on the portion of the land not planned for development.[230] The state agency, unsatisfied, proposed several alternatives.[231] The property owner subsequently refused the option to redress the environmental impact and was consequentially denied the permit.[232] The denial was justified by the agency because, without satisfactory mitigation, the property owner failed to meet the standards necessary for the permit approval.[233] A lawsuit ensued, where the state agency asserted that the rejected permit application fell short of the essential nexus and rough proportionality tests.[234] The Court reiterated its stance that permits must comply with *Nollan* requirements and must also adhere to *Dolan* even when there is a failure to comply with the conditions.[235] The

222. *Nollan*, 483 U.S. at 831.
223. *Id.* at 828.
224. *Id.* at 827–28.
225. *Id.* at 828.
226. In *Dolan*, the Court noted, "Without question, had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. 512 U.S. at 384.
227. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013).
228. *Id.* at 601.
229. *Id.*
230. *Id.*
231. *Id.* at 601–02.
232. *Id.*
233. *See Koontz*, 570 U.S. at 600–02.
234. *Id.* at 602–03.
235. *Id.* at 596.

distinction between the requirements of *Nollan* and *Dolan*, and the Court's holding in *Koontz*, however, is that the condition amounted to the landowner being required to pay money, arguably a property interest, as opposed to relinquishing another property interest, such as the easement.[236]

Prior to *Nollan* and *Dolan*, there were a variety of tests and standards to address exactions "developed *by* the state courts."[237] Under the reasonable relationship test, governments had wide latitude to exercise broad discretion to require, mandate, or impose "impact fees."[238] Local governments are required to merely demonstrate a reasonable relationship between the fee and the cost of the proposed development.[239] Some state courts crafted the "reasonable relationship" standard while others rejected it outright as "too lax" to adequately protect property owners' rights to just compensation.[240] Some state courts dismissed the "excessively restrictive" "uniquely attributable test" and settled on a variation of the "rational nexus test."[241]

California, specifically, was the trailblazer for the looser reasonable relationship test.[242] The California Supreme Court's reasonable relationships test left significant discretion to local governments to impose fees and exact concessions from developers for the benefit of the community and the public.[243] The Supreme Court of Missouri followed suit, requiring some reasonable relationship or "reasonably attributable" connection between the proposed activity of the landowner and the exactions of the government, noting that the Illinois approach, discussed below, is too restrictive.[244] Maryland, likewise, follows the relaxed version.[245]

The most stringent standard, the "[s]pecifically and uniquely attributable test," defined the impact fee as permissible if a local government shows evidence that the impact fee "is directly proportional to the specifically created need . . . ."[246] The impact fee is valid if it requires a developer

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236. *Id.* at 612.

237. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999 (1997) (emphasis added). *See also* John J. Delaney, Larry A. Gordon, & Kathryn J. Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 L. & CONTEMP. PROBS. 139, 146–56 (1987) (explaining various state-created tests to assess the constitutionality of an exaction).

238. *Id.* at 146–48.

239. *Id.* at 147–49.

240. Dolan v. City of Tigard, 512 U.S. 374, 389–90 (1994). *See also* Delaney et al., *supra* note 237, at 148–150.

241. *See* Delaney et al., *supra* note 237, at 152–54.

242. *See, e.g.*, Associated Home Builders of the Greater E. Bay v. City of Walnut Creek, 484 P.2d 606, 615–17 (Cal. 1971); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673, 675–76 (N.Y. 1966); Billings Props., Inc. v. Yellowstone Cnty., 394 P.2d 182, 187–89 (Mont. 1964); Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist., 100 Cal. Rptr. 3d 204, 215–216 (Cal. Ct. App. 2009).

243. Ayres v. City Council of L.A., 207 P.2d 1, 7–8 (Cal. 1949).

244. *See, e.g.*, State *ex rel.* Noland v. St. Louis Cnty., 478 S.W.2d 363, 367 (Mo. 1972); Home Builders Ass'n of Greater Kan. City v. City of Kan., 555 S.W.2d 832, 835 (Mo. 1977).

245. *See, e.g.*, Krieger v. Planning Comm'n, 167 A.2d 885, 886 (Md. 1961).

246. N. Ill. Home Builders Ass'n v. Cnty. of Du Page, 649 N.E.2d 384, 389 (Ill. 1995) (quoting Dolan v. City of Tigard, 512 U.S. 374, 389–90 (1994)).

to only assume the costs of improvements required as a result of the developer's activity; such a fee for improvements made necessary due to the activity caused by and addressed for the community would be impermissible.[247] In other words, this standard grants greater protections to developers and landowners while reducing the discretion of governments to impose impact fees.[248] The Illinois Supreme Court is the main state architect of this test, which it established in *Pioneer Trust & Savings Bank v. Mount Prospect*.[249] The state appellate court has maintained that its state-level exactions test would remain "controlling with respect to our own constitution until the [Illinois Supreme Court] speaks again on the issue."[250] Thus, even today Illinois imposes a stricter requirement under its test, making it an outlier, along with Montana, New Hampshire, Oregon, and Rhode Island.[251] The Wisconsin Supreme Court adopted a slightly different test from Illinois's specifically and uniquely attributable test to avoid placing such a great burden on the government that no conditions would be found valid. [252]

The " rational nexus test" is a moderated version of the reasonable relationship test and the specifically and uniquely attributable test, establishing a middle level of scrutiny. The test has been identified as the most widely held standard and the test most often adopted by state courts.[253]

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247. *Id.* at 390 (citing Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 801–02 (Ill. 1961)).

248. Home Builders Ass'n of Dayton & The Mia. Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000).

249. *Pioneer Tr.*, 176 N.E.2d at 802.

250. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 387 (Ill. App. Ct. 1995).

251. *See, e.g.*, J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981); Haugen v. Gleason, 359 P.2d 108, 110–11 (Or. 1961); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913–14 (R.I. 1970); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860, 863 (Fla. Dist. Ct. App. 1972); Schwing v. City of Baton Rouge, 249 So. 2d 304, 309–10 (La. Ct. App. 1971); Baltimore Planning Comm'n v. Victor Dev. Co., 275 A.2d 478, 482 (Md. 1971); State *ex rel.* Noland v. St. Louis Cnty., 478 S.W.2d 363, 367–68 (Mo. 1972); Billings Props., Inc. v. Yellowstone Cnty., 394 P.2d 182, 187 (Mont. 1964); Simpson v. City of North Platte, 292 N.W.2d 297, 300–01 (Neb. 1980); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971); Bd. of Supervisors of James City Cnty. v. Rowe, 216 S.E.2d 199, 208–09 (Va. 1975).

252. Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965). Other states follow this slightly modified strict exactions test. Aunt Hack Ridge Ests., Inc. v. Planning Comm'n, 273 A.2d 880, 886–87 (Conn. 1970); Call v. City of W. Jordan, 614 P.2d 1257, 1258–59 (Utah 1980).

253. *See* Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 287 (1983) (stating that the "rational nexus test . . . has become the most widely held standard for examining subdivision exactions."). However, it is worth noting that the study was conducted prior to the *Nollan* and *Dolan* rulings. Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 992–93 (1989) [hereinafter *Municipal Development Exactions*] (describing the "rational nexus test" created and adopted by state courts before *Nollan*, noting that "[m]any state courts have resolved these conflicts by adopting some variation of the 'rational nexus' rule."); Fred P. Bosselman & Nancy E. Stroud, *Legal Aspects of Development Exactions*, *in* DEVELOPMENT EXACTIONS 70, 75 (James E. Frank & Robert M. Rhodes eds., 1987) (finding many states adopting the rational nexus test); Dabbs v. Anne Arundel Cnty., 182 A.3d 798, 813 n.20 (Md. 2018) (questioning the assertion that "the majority of courts in this country apply *Nollan* and *Dolan* to impact fees or monetary exactions."). The plaintiffs in *Dabbs v. Anne Arundel County* relied upon *Home Builders Ass'n of Dayton & the Mia. Valley*, 729 N.E.2d at 356 (Ohio 2000) (finding that the "third test, the dual rational nexus test, is based on the *Nollan* and *Dolan* cases . . . ."), to argue that not following the rational nexus test would be tantamount

Under the rational nexus test, governments must show and prove a "reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated" by the new development.[254] The government must also show there is "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the" new development.[255] If the impact fee meets both requirements of the test, the fee is authorized.[256] This moderated test seeks to balance the interests of the developer/landowner with the interests of the community. The Wisconsin Supreme Court laid out this moderated test in *Jordan v. Village of Menomonee Falls*.[257] The Minnesota Supreme Court followed suit in *Collis v. City of Bloomington*,[258] choosing to follow Wisconsin, California, and New York.[259] The Ohio Supreme Court noted that it is essential to "balance the interests of the city and developers of real estate without unduly restricting local government" and that the rational nexus test was the most efficient approach to evaluating the constitutionality of impact fees in light of exaction takings challenges.[260]

The court then proceeded to dismiss the reasonable relationship test as wrong because it gives "almost unfettered discretion" and "governments should be subject to a higher degree of scrutiny."[261] As to the specifically and uniquely attributable test, the court noted that it "affords property owners the greatest level of protection, but it leaves the local governments with little discretion to enact legislation."[262] In adopting the rational nexus test, states like Kentucky intentionally avoided adopting a

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to "walking against the wind of the majority of our sister states that have held to the contrary." *Dabbs*, 182 A.3d at 812. The Maryland Court of Appeals disputed the plaintiffs' assertions, stating that the litigant "offer[ed]-up in this regard a single case," that the evidence was "wa[f]er-thin support," and that "reality suggests the opposite conclusion." *Id.* at 812. However, the disagreement between the appellate court and the plaintiffs missed the point because the plaintiffs were focusing on the applicability of the rational nexus test broadly and generally, whereas the appellate court was referencing case law dealing mostly with exactions imposed legislatively, not ad hoc adjudications. Taking this nuance into consideration, both would be correct. The Supreme Court has not, even since the *Koontz* decision, decided whether its exaction jurisprudence extends to scenarios where the imposition of a fee was due to a legislatively enacted law generally applicable to many landowners, as opposed to one landowner subject to a fee condition as a requirement for permit approval.

254. 8 MCQUILLIN MUN. CORP., MCQUILLIN THE LAW OF MUNICIPAL CORPORATIONS § 25:140 (3d ed. 2022). *See* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668, 674 (Colo. 1981); Town of Longboat Key v. Lands End, Ltd., 433 So.2d 574, 576 (Fla. Dist. Ct. App. 1983); Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980); Howard Cnty. v. JJM, Inc., 482 A.2d 908, 920 (Md. 1984); Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976); Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730, 734 (Neb. 1980); Longridge Builders, Inc. v. Planning Bd., 245 A.2d 336, 337 (N.J. 1968); Kamhi v. Planning Bd., 452 N.E.2d 1193, 1194–95 (N.Y. 1983); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984); Call v. City of West Jordan, 614 P.2d 1257, 1258 (Utah 1980).

255. 8 MCQUILLIN MUN. CORP., MCQUILLIN THE LAW OF MUNICIPAL CORPORATIONS § 25:140 (3d ed. 2022).

256. *Id.*

257. 137 N.W.2d 442, 447–48 (Wis. 1965).

258. 246 N.W.2d at 26.

259. *Id.*

260. Home Builders Ass'n of Dayton & Mia. Valley v. City of Beavercreek, 729 N.E.2d 349, 350, 355 (Ohio 2000).

261. *Id.* at 355.

262. *Id.* at 355–56.

more rigid test like the uniquely attributable test.[263] Likewise, Tennessee, which recently interpreted its state constitution to include regulatory takings, adopted the rational nexus test because it is the "only one that balances both the interests of real estate developers and the interests of local governments."[264]

When the Court adopted a federal exactions jurisprudence in *Nollan* and *Dolan*, the Court had at its disposal several regulatory takings precedents to consult to craft the new doctrine, including *Pennsylvania Coal Co. v. Mahon*,[265] *Penn Central Transp. Co. v. New York City*,[266] and *Loretto v. Teleprompter Manhattan CATV Corp*.[267] Justice Stevens, in a dissenting opinion, argued that the Court should have crafted its new tests from the "more open-ended inquiry that resembled its ad hoc balancing test in *Penn Central*."[268] However, the majority had a different approach in mind; one that looked to the state courts—rather than the Court's precedent or that of lower federal courts—to settle the exactions questions.[269]

Justice Scalia's opinion in *Nollan* implicitly endorsed judicial federalization by relying upon and consulting the various exactions doctrines that had been developed by the state courts. Justice Scalia explained that the Court's decision was "consistent with the approach taken by every other [state] court that has considered the [exactions standard] question . . . ."[270] Likewise, the Court's *Dolan* ruling set forth a "newly minted second phase" of exactions by adopting a "rough proportionality" test.[271] Justice Rehnquist looked to state supreme court decisions to guide his reasoning in developing the second part of the exactions tests. Justice Rehnquist recognized that "[s]ince state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."[272] In weighing the competing standards followed by the states, Justice Rehnquist concluded that the "reasonable relationship" followed by some states was "too lax to adequately" protect rights under the federal constitution.[273] He also considered the Illinois's specific and uniquely attributable test,[274] but eventually landed on the rational nexus test adopted by the majority of the state courts, because that standard was "closer to the federal constitutional norm than either of those previously

263. Lexington-Fayette Urb. Cnty. Gov't v. Schneider, 849 S.W.2d 557, 559 (Ky. 1992).
264. Home Builders Ass'n of Middle Tenn. v. Williamson Cnty., No. M2019-00698-COA-R3-CV, 2020 WL 1231386, at *4 (Tenn. Ct. App. Mar. 13, 2020).
265. 260 U.S. 393, 415 (1922).
266. 438 U.S. 104, 125, 128 (1978).
267. 458 U.S. 419, 433–39 (1982).
268. Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 629 n.91 (2004).
269. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 839–40 (1987).
270. *Id.* at 839.
271. Dolan v. City of Tigard, 512 U.S. 374, 391, 399 (1994).
272. *Id.* at 389.
273. *Id.*
274. *Id.* at 389–90 (citing Pioneer Tr. Savs. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

discussed."[275] While some commentators feared that the Court's decisions in *Nollan* and *Dolan* nationalized exactions, it appears that "[r]ather than monitoring compliance with the [exactions] standard, the Court [is] content to leave implementation to the state courts—many of which had already embraced the Court's position."[276]

III. OBSERVATIONS AND IMPLICATIONS OF TAKINGS FEDERALIZATION

A. The Market of Judicial Reasoning

These historic bottom-up approaches to eminent domain and exactions doctrine are examples of the "market of judicial reasoning" that judicial federalism creates. This state-level judicial market allows the Supreme Court to "profit from the contest of ideas" by choosing to consult state decisions for guidance or to completely "federalize the issue" after learning the strengths and weaknesses of the state-led standard before adopting the standard as its federal test.[277] State courts compete against each other to craft the most effective and "innovative legal claims,"[278] because the "market of judicial reasoning identifies winners and losers."[279] An especially innovative test created by one state court may gain admirers among its sister states. In fact, this phenomenon created three different exactions tests at the state level, but the rational nexus test invariably became the predominant uniform standard followed by most states, creating some horizontal uniformity. Some state courts crafted slight variations to the test, while others departed completely, instead choosing to go their "separate ways."[280]

The Missouri Supreme Court, for example, reviewed other out of state exactions cases for guidance . . . ."[281] The Supreme Court of California weighed the competing exactions standards and concluded that the "clear weight of [state] authority upholds the constitutionality of statutes" that require a property owner to dedicate land or pay a fee as a condition to development approval.[282] The Wisconsin Supreme Court, in *Jordan*, closely examined the specifically and uniquely attributable test from Illinois. The court found the general statement of the test to be "acceptable" but ultimately endorsed a "refinement" of the test that was less strict to suit the needs of local governments and to ensure that the words of the Illinois test "are not so restrictively applied as to cast an unreasonable burden of proof upon the" government.[283] The Minnesota Supreme Court, after weighing competing states' approaches and "[i]n articulating [its]

275. *Id.* at 391.
276. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 247 (2004).
277. *See* SUTTON, *supra* note 100, at 20.
278. *Id.*
279. *Id.*
280. *Id.*
281. State *ex rel.* Noland v. St. Louis Cnty., 478 S.W.2d 363, 367 (Mo. 1972).
282. Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 608 (Cal. 1971).
283. Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965).

test . . . decline[d] to follow the extreme approaches of the Illinois and Montana cases . . . ."[284] The court chose "instead to follow the lead of Wisconsin, California, and New York" in applying the loose reasonable relationship standard.[285]

The analytical jostling over the appropriate exactions standard showed how state courts "work their way through the constitutional issues . . . developing their own tests and doctrines along the way . . . ."[286] State courts and their state constitutions, in other words, were "on the front lines of . . . rights innovations."[287] Indeed, state constitutionalism "[l]et the state courts be the initial innovators of constitutional doctrines if and when they wish[ed]" to.[288] State courts had developed and tested a "diverse, experimental patchwork of state law," setting forth tests and standards for exactions.[289] Those same "[s]tate courts had [established] a fairly large body of law regarding the validity of development or impact fees by the time" the *Nollan* and *Dolan* rulings were handed down.[290] Indeed, states "blaze[d] their own paths"[291] of standards for land use exactions without the slightest idea that those very same standards would one day become the centripetal force that pulls most states into and moors them to the Supreme Court's federal takings jurisprudence. This bottom-up approach, where the market of judicial ideas at the state level flourishes, is central to the judicial federalization of state jurisprudence. The history of eminent domain also neatly exemplifies takings federalization.

The immunity from liability rule in eminent domain created by some state courts and subsequently endorsed by the Supreme Court, had "not been adopted without some judicial protest" from other state courts.[292] Justice Pitney, aware of the conflicting viewpoints in the states, after careful deliberation and study of the decisions, chose to endorse the approach of New Jersey's Chief Justice Beasley.[293] The market of judicial ideas in takings liability cases also bore out a practical solution that the Court felt obliged to follow. If the Court did not follow the state courts' lead on the just compensation question, then the operation of the railroads, as Justice Pitney cautioned, would come to a standstill.[294] When the Court ascertained the appropriate interpretation of damages and benefits when

284. Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976).
285. *Id.*
286. *See* SUTTON, *supra* note 100, at 20.
287. *Id.* at 213.
288. *Id.* at 20.
289. Fenster, *supra* note 268, at 626; *see also generally* James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-End Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENV'T L. & POL'Y 143, 146–47 (1999).
290. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 997 (Ariz. 1997). *See generally* Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation"*, 38 WASH. U. J. URB. & CONTEMP. L. 55 (1990); Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981).
291. *See* Dodson, *supra* note 5, at 705.
292. *See* Webster Richards v. Wash. Terminal Co., 233 U.S. 546, 555 (1914).
293. *Id.*
294. *Id.*

estimating just compensation under the Takings Clause in *Bauman*, the Court benefitted greatly from the "careful collection and classification of the [state] cases" in the past.[295] While a "great" and "overwhelming" number of state decisions supported the Court's ultimate decision, the Court did have to grapple with a number of state decisions that opposed such a ruling.[296] The market of ideas, nonetheless, played out in a manner that crystallized the issue for the Court to one day settle a dispute.

B. Federal Appropriation of State Innovation

The journey to creating a national exactions jurisprudence is not one of states following federal courts, but instead, the ultimate federal court following the states. The judicial market of reasoning built a menu of options over decades for the Supreme Court to "assess the States' experiences [to] develop its own federal constitutional rule[]."[297] The Court's establishment of its exactions doctrine—instructing lower courts to evaluate the impact of an exaction against essential nexus and rough proportionality tests—was the result of the Court assessing, observing, critiquing, and finally "[a]dopting the predominant test developed *by* the state courts . . . ."[298] Indeed, the Court's "discussion of the state [exactions] cases permeate[d] the Court's analysis of the appropriate test[s]" it chose in the *Nollan* and *Dolan* decisions.[299]

When the Supreme Court handed down both *Nollan* and *Dolan*, it effectively created a new presumptively uniform federal standard of review for constitutional property at a time when there was already a framework put in place by the states.[300] In *Nollan*, for example, Justice Scalia endorsed the judicial federalization of state exactions by assenting to the appropriation of the state standards. He noted that the ruling was "consistent with the approach taken by every other court that has considered the [exactions standard] question . . . ."[301] While there has been some debate on exactly which state test the Court chose, there is agreement that it was somewhere between the stricter specifically and uniquely attributable test, and the looser reasonable relationship standards.[302] As a result, the

295. Bauman v. Ross, 167 U.S. 548, 583 (1897).
296. *Id.* at 573–75.
297. SUTTON, *supra* note 100, at 20.
298. *Home Builders Ass'n*, 930 P.2d at 999 (emphasis added).
299. Dolan v. City of Tigard, 512 U.S. 374, 397 (1994) (Stevens, J., dissenting).
300. Fenster, *supra* note 268, at 624–625 ("[S]tate courts had [already] applied various state statutory and constitutional doctrines to develop differing standards of review for land use exactions.").
301. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) (noting that California was the exception).
302. ROBERT A. FULLER & DWIGHT MERRIAM, CONN. PRAC., LAND USE LAW & PRAC. § 54:12 (4th ed. 2022).

Court was able to play winners and losers by rejecting some state standards that were too "lax" while dismissing other tests as too "exacting."[303]

Similarly, the *Dolan* ruling established an iteration of the rough proportionality test adopted by state courts. The Court conceded that there was a lack of federal precedent on exactions.[304] Justice Rehnquist chose to reflect on and observe the diversity of state supreme court decisions crafting exactions jurisprudence under state constitutional provisions.[305] The Court weighed the competing state tests, explaining that "[s]ince state courts have been dealing with these questions a good deal longer than we have, we turn to representative decisions made by them."[306] Justice Rehnquist went on to say that the reasonable relationship standard endorsed by some states was "too lax to adequately" protect rights under the federal Constitution.[307] The Court similarly weighed the specific and uniquely attributable test born in Illinois and adopted by a minority of states, dismissing it as too strict.[308] The test had already been hotly contested, debated, and invariably discarded by the majority of states, who instead chose the rational nexus test.

Notably, the *Dolan* opinion referenced Illinois's specific and uniquely attributable test[309] established in *Pioneer Trust & Savings Bank*, but rejected its application, noting that "[w]e do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved."[310] The Illinois Supreme Court, in response, acknowledged that the Court rejected the Illinois test for the rough proportionality in *Dolan*. But, the state supreme court vowed to continue to follow the uniquely and attributable test under the state constitution, because it remains "controlling with respect to our own constitution until" the Supreme Court spoke again on the issue.[311] The Court winded its way through the market of judicial reasoning to conclude that the rational nexus test adopted by the majority of the state courts "is closer to the federal constitutional norm than either of those previously discussed."[312] Scholars have noted that in federalizing exactions, the Court "hijacked" the "federal 'rational nexus'

303. *Dolan*, 512 U.S. at 389. The Court, in fact, determined that some of the state standards were "very generalized statements as to the necessary connection between the required dedication and the proposed development" which under protected property owners' rights to just compensation. *Id.*

304. *Id.* at 397 (Stevens, J., dissenting) (summarizing the argument of the majority).

305. *Id.* at 389–91; *but see* Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENV'T. L.J. 215, 231–32, n.86 (1995).

306. *Dolan*, 512 U.S. at 389.

307. *Id.*

308. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 387 n.5 (Ill. App. Ct. 1995); Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 801–02 (Ill. 1961).

309. *Pioneer*, 176 N.E.2d at 802.

310. *Dolan*, 512 U.S. at 390. The Court, however, rejected part of the Illinois Supreme Court's exactions test, because the Court said it did not require "such exacting scrutiny, given the nature of the interests involved." *Id.* It is also worth noting that both *Nollan* and *Dolan* offer slightly different variations of the test, including the "essential nexus" and "rough proportionality" requirements that differed slightly from the state courts' dual rational nexus test. *Id.* at 397–98 (Stevens, J., dissenting).

311. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 387 n.5 (Ill. App. Ct. 1995).

312. *Dolan*, 512 U.S. at 391.

limitation" created by the state courts.[313] But the Court thoroughly referenced and expressly relied upon state exactions doctrines "with approval"[314] throughout its opinions in *Nollan* and *Dolan*. Some scholars have noted that the Court's goal was to "reinforce the trend in the state courts toward use of the rational nexus test."[315] This led many commentators to anticipate "greater federal supervision of all exactions" following the *Nollan* decision.[316]

The Court has rarely signaled such reverence for state jurisprudence in crafting a new federal pronouncement. But it is not unprecedented. In other cases involving constitutional property, some Justices have, indeed, looked to the states for guidance. Take for example, *Moore v. City of East Cleveland*,[317] where the Court found a right to raise a family in the home.[318] There, Justice Stevens, concurring, noted that the "case-by-case development of the constitutional limits on the zoning power has not . . . taken place in this Court" but instead has been "applied in countless situations by the state courts . . . for the past half century" and therefore "shed a revelatory light" on how the Court should decide its case, establish the right in question, and craft its analytical framework.[319] However, Justice Stevens's attitude towards federalizing state doctrine in *Nollan* and *Dolan* was very different than his sentiment in *Moore* because he felt Justice Rehnquist misapplied and misread the state court cases in developing the federal doctrine.

His somewhat contradictory statements concerning the role of state court doctrine in the Court's decision illuminates the debate on the role of state constitutionalism in federal courts. His dissenting opinion in *Dolan* was skeptical of the majority's focus on state exactions doctrine, noting that "neither the [state] courts nor the litigants imagined they might be participating in the development of a new rule of federal law."[320] Justice Stevens questioned the Court's decision to craft its federal exactions doctrine by selecting a test created and adopted by state courts, based mostly in state constitutional jurisprudence, instead of articulating and developing its own test based on prior federal constitutional pronouncements.[321]

He argued that the "role the Court accords [to state courts] in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive."[322] Justice Stevens acknowledged, however, that it is sometimes "certainly appropriate" for the Court to look to state courts

313. *Municipal Development Exactions*, *supra* note 253, at 993.
314. *Id.* (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).
315. Fred P. Bosselman & Nancy Stroud, *Development Exactions Addendum*, *in* DEVELOPMENT EXACTIONS 202 (James E. Frank & Robert M. Rhodes eds., 1987).
316. *Municipal Development Exactions*, *supra* note 253, at 993.
317. 431 U.S. 494 (1977).
318. *Id.* at 494–95.
319. *Id.* at 514–15 (Stevens, J., concurring).
320. Dolan v. City of Tigard, 512 U.S. 374, 399 (1994) (Stevens, J., dissenting).
321. *Id.* at 398–99.
322. *Id.* at 399.

where there is an absence of federal precedent or doctrine to guide the Court.[323] He also agreed that the state court decisions can be "enlightening," may "provide useful guidance in a case of this kind,"[324] and "lend support to the Court's reaffirmance of *Nollan*'s reasonable nexus requirement . . . ."[325] Notwithstanding his contradictions, Justice Stevens is not alone in his discomfort with the Court's appropriation of state standards. Some scholars[326] and jurists have argued that the Court inappropriately selected and relied upon a variety of state court tests[327] in creating its jurisprudence instead of crafting a test from the "more open-ended inquiry that resembled its ad hoc balancing test in *Penn Central*."[328] Indeed, Justice Stevens's dissenting opinion elucidates a broader debate on state constitutionalism and federalizing state doctrines: Why is the judicial federalization of state doctrine something to scoff at, as Justice Stevens seemed to do?

The constitutional structure of federalism invites a feedback loop where "state innovations [can be] followed by federal rulemakers and courts."[329] Sometimes "federal . . . interpretation may reflect a common policy shared by states . . . ."[330] That is precisely what happened in *Nollan* and *Dolan*. At the time of those rulings, a patchwork of sustained and robust exactions doctrines existed across the states, evidencing a shared interest in courts reviewing land use disputes involving government-imposed conditions on private landowners.[331] The purpose of those standards was to create a judicial platform to temper local exercises of police power in land use regulations and ad hoc determinations in new and existing developments that unfairly impacted property owners.[332] Those shared interests varied slightly in degree from state to state, resulting in three separate standards—the rational nexus test, the reasonable relationship test, and the specifically and uniquely attributable test.[333] State courts experimented and developed these tests long before the Supreme Court decided to intervene and federalize exactions.

Notably, the specifically and uniquely attributable test was increasingly adopted by states in the Midwest and Northeast experiencing "relatively slow patterns of growth . . . ."[334] Perhaps Justice Stevens's vision of judicial federalism fell squarely with that of Justices Brandeis and

323. *Id.* at 397.
324. *Id.* at 397, 400.
325. *Id.* at 399. Justice Stevens, however, disagreed that the Court was adopting the test that was employed by the vast majority of state courts.
326. *See* Fenster, *supra* note 268, at 629 n.91.
327. *Dolan*, 512 U.S. at 390–91.
328. *See* Fenster, *supra* note 268, at 629 n.91.
329. Dodson, *supra* note 5, at 710 n.24.
330. *Id.* at 705.
331. *See Dolan*, 512 U.S. at 383–84 (1994) (explaining Oregon's exaction doctrine); *see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (explaining California's exaction doctrine).
332. *See* Fenster, *supra* note 268, at 614–15 (explaining how different local governments, through the use of exactions doctrine, have negatively and unfairly impacted private property owners).
333. Delaney et al., *supra* note 237, at 148.
334. Fenster, *supra* note 268, at 624 n.63.

Brennan: state courts and state legislatures are to serve as laboratories of democracy to fill the gaps where the Court fails to protect certain rights, not to serve as change agents who educate and teach the Court how to craft new doctrines. Justice Stevens's dissent foreshadowed his opinion in *Kelo* decades later, where he would reaffirm an expansive reading of public use but remind state courts of their discretion to depart under state constitutional law if they disagreed with the ruling.[335] However, Justice Stevens's *Kelo* opinion, like his dissenting opinions in *Nollan* and *Dolan*, make clear that the Supreme Court should lead and place an emphasis on independently crafting "its newly minted" doctrines instead of relying too heavily on the states.[336]

C. State Court Laboratories

Justice Brandeis exalted states as laboratories of experimentation; experiments which may someday be repeated and adopted by the Supreme Court. It was "one of the happy incidents[,]" he said, "that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments . . . ."[337] This presumes, of course, that states want to experiment, desire to innovate, and understand that their roles as courts may serve as an inventive vehicle for change beyond the courts' jurisdictional borders. However, that is not always the case. Instances of reverse polarity ought to be praised.

As Scott Dodson explains, while "[f]ederal law [has become] the new leader" in our federalist system, "[t]hat is not to say that federal law *always* leads"[338] even though "federal following is rarer than state following."[339] It is a feature, not a bug, of federalism, as some scholars argue, for state courts to take the lead on doctrine, only for the Supreme Court to adopt the states' approach when no federal precedent, doctrine, or history of the constitutional question is available.[340] In fact, federal following of state jurisprudence is simply part of a feedback loop created by the gravitational force of federal constitutional law. It is a part of the natural progression of the pull and lure of federal constitutional law. Sometimes the lure of federal law first begins with the Court literally reaching down, grabbing, and then pulling up state court doctrines, tests, and standards into the federal stratosphere. There are some scholars who go as far to argue that "state[s] [should] assume the dominant role traditionally occupied by the Supreme Court in articulating and protecting individual rights[.]"[341] Others are more skeptical of this approach.[342]

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335. Kelo v. City of New London, 545 U.S. 469, 472, 480, 483 (2005).
336. *See id.* at 479–80, 482–83.
337. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
338. Dodson, *supra* note 5, at 744 n.237.
339. *Id.* at 710 n.24.
340. *See Failed Discourse*, *supra* note 25, at 773.
341. *Id.* at 763.
342. *See id.*

The judicial federalization of state exactions followed a rare but familiar path. New state innovations were "followed by federal rulemakers and courts,"[343] and the Court's federal interpretation reflected "a common policy shared by states . . . ."[344] This state-level judicial market allowed the Supreme Court to "profit from the contest of ideas"[345] and have the discretion to "choose whether to federalize [exactions] after learning the strengths and weaknesses of the competing ways of addressing the problem."[346] State courts, in other words, worked "their way through" exactions to develop "their own tests and doctrines along the way . . . ."[347] Thereafter, the Supreme Court assessed the "States' experiences and develop[ed] its own federal constitutional rules."[348]

This exactions phenomenon was a "ground-up approach to developing constitutional doctrine [that] allow[ed] the Court to learn from the States"[349] as the states—knowingly or unknowingly—were the lead change agents.[350] This "front line" approach to exactions "innovation"[351] made state courts the "lead change agents" instead of the Supreme Court.[352] As a result, it was state courts, not the Supreme Court, who were the "initial innovators of constitutional doctrines . . . ."[353] Even though Justices Stevens, Scalia, and Rehnquist were divided on this point, the Supreme Court was able to "pick and choose from the emerging options" of doctrinal patchworks.[354] It is arguably the case that the Court, and especially Justices Scalia and Rehnquist, chose to "wait for, and nationalize, a dominant majority position [across the states], [thus] lowering the stakes of its decision in the process" instead of crafting its own "imperfect" jurisprudence, as Justice Stevens advocated, that might not fit with the vast majority of states.[355]

The accumulation of state rulings and doctrines constructed a state window through which the Supreme Court later peered through to observe the "changing norms objectively" on the ground in the states.[356] The result, one might argue, is that unlike the Court's top-down approach to developing its public use and regulatory takings jurisprudence, the Court's exactions doctrine allowed the Court to experience less emphasis and pressure "to be the key rights innovator in" exactions.[357] Perhaps this is why states go with the flow of federal exactions jurisprudence. The adoption of the

343. Dodson, *supra* note 5, at 710 n.24.
344. *Id.* at 705.
345. *See* SUTTON, *supra* note 100, at 20.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 216.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* at 20.
354. *Id.*
355. *Id.* at 216.
356. *Id.* at 69.
357. *Id.* at 216.

state standards lent a level of legitimacy to the state–federal collaboration, which made it more difficult for a state to try to upset the proverbial apple cart because doing so would effectively upend the very apple cart constructed by the states themselves. This conception of exactions federalism, which is slightly different than the one envisioned by Justice Brandeis and Justice Brennan, is one where "state constitutionalism is . . . a key mechanism for prospectively shaping federal constitutional law" and where state courts, not the Supreme Court, decided first how best to properly evolve exactions into a constitutional doctrine.[358]

There is, indeed, "[a] common thread . . . in which the States have been leaders [in exactions] rather than followers" because the "complexity of the problem at hand" warranted state supervision and treatment given the local and complex nature of exactions.[359] As Jeffrey Sutton explains, the more complex the legal issue, the "more likely state-by-state variation is an appropriate way to handle the issue and the more likely a state will pay attention . . . ."[360] If anything, there is some value in states continuing "to develop their independent rulemaking capabilities" and perhaps collectively and cooperatively doing so in an effort to persuade the Supreme Court of the value and virtue of a particular doctrine or jurisprudence.[361] Clearly, even without knowledge or intent to influence the Court on exactions, that is exactly what happened in the development of a federal exactions jurisprudence. States unexpectedly became the "state informants" to a new federal exactions jurisprudence. Today, some states embrace the history of this role reversal or reverse polarity. Other state supreme courts have noted that "[t]his test, only slightly modified, was adopted by the Supreme Court as the standard required by the Takings Clause of the Fifth Amendment."[362] Indeed, there are moments when the traditional follower becomes the unexpected leader that teaches—rather than learns from—the Supreme Court.

D. Background State Law

Perhaps one of the overlooked benefits of takings federalization is that background state principles often govern takings rulings at the state and federal levels. Recall Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*.[363] There, Justice Scalia reiterated the Court's approach to nuisance and property disputes in the constitutional law context, explaining that the Court traditionally resorts to existing rules or understanding that derive from independent sources of state law when defining property interests that deserve legal protection.[364] The Fifth Amendment's Takings Clause, then, "protects primarily against change in

358. Liu, *supra* note 137, at 1323.
359. *See* SUTTON, *supra* note 100, at 208.
360. *Id.*
361. Koppel, *supra* note 119, at 1176.
362. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 997–98 (1997).
363. 505 U.S. 1003 (1992).
364. *Id.* at 1030.

background state law" and the protection afforded to a private property owner is dependent on the background principles of state law at force prior to the enactment of a challenged regulation.[365] Indeed, it is the state courts, not federal courts, that interpret the very state laws that embody some of the background principles of property, including state constitutional provisions. This arguably supports the proposition that the state courts ought to be the first in line to innovate and develop state takings doctrine that the federal courts can later consult, adopt, or borrow.

Indeed, background state principles are "fruitful source[s] of state court modern interpretations of vintage [takings] doctrines . . . ."[366] And while there may be some tension between state and federal court interpretations of state law, it is the state courts who have always had the first say in developing novel takings questions that emanate from state judicial proceedings. The state courts, in other words, decide the "nature of the private property rights protected by the compensation promise of the Constitution . . . ." [367] Although the Court's *Richards* decision in the late 1880s long preceded the Court's *Lucas* decision setting forth the background state principles doctrine, one can see how the Supreme Court, practicing federalization, relied upon the state courts' interpretation of background principles regarding nuisance. The Court noted, "[b]ut the question remains . . . [w]hat is to be deemed a private nuisance such as amounts to a taking property?" [368] The Court answered this question by borrowing from the state courts who were most familiar with nuisance principles under state constitutional, common, or statutory law. The answer was in the "great and preponderant weight of judicial authority in those states whose constitutions contain a prohibition of the taking of private property for public use without compensation, substantially in the form employed in the 5th Amendment . . . ."[369] However, some caution is in order.

There are clear drawbacks to promoting a bottom-up approach to takings federalization. It is difficult for the Supreme Court to "develop a comprehensive national takings standard" because the constitutional standards applied to regulations are subject to background state law and principles.[370] As a result, the application of a new standard or doctrine developed by a state court in one state may not protect against certain regulations, but those same standards and doctrines may not apply neatly in another state due to changes in background state laws across the states. Even so, Stewart Sterk argues that a "comprehensive national takings standard is unnecessary" because state courts and state laws already offer the means to protection against land use regulations.[371] Thus, it is arguably inappropriate

365. Sterk, *supra* note 276, at 206.
366. Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1166 (2019).
367. *Id.* at 1207.
368. Webster Richards v. Wash. Terminal Co., 233 U.S. 546, 553 (1914).
369. *Id.*
370. Sterk, *supra* note 276, at 206.
371. *Id.*

for the Court to borrow or adopt directly from state court doctrines in developing new federal takings jurisprudence because any attempt at uniform federalization will be subject to such wide and varying degrees of background state principles that such a federalized result may only further muddle takings jurisprudence beyond recognition.[372] Indeed, the "primacy of state law" contributes to state courts' evaluation of takings challenges, and thus limits the Court's capacity to develop a comprehensive jurisprudence. The Court actively seeking to replicate state court doctrine would arguably further frustrate the limitation, instead of uniformly nationalizing new federal takings doctrine.

E. Involuntary Participation

The practice of takings federalization raises concerns about whether state courts agreed to participate in a national project to federalize state takings doctrine. Justice Stevens raised this objection in his dissenting opinion in *Dolan*. He noted that "neither the [state] courts nor the litigants imagined they might be participating in the development of a new rule of federal law."[373] He was, instead, supportive of the Court relying upon its own precedent to create a new jurisprudence rather than borrow from the states, because at the time of the development of the state exactions doctrines, states would have not known that those doctrines would someday become subject to federalization.[374] This same concern of involuntary participation has also been raised in the legislative federalization context, where the Court consults state legislative enactments as sources of meaning for federal constitutional law. Some argue that the Supreme Court inappropriately attributes federal constitutional significance to state legislators' votes when those state legislators are "unaware" their votes are being interpreted and used in that manner.[375] Those same legislators may actually "vociferously reject" the idea that the Supreme Court borrows the meaning of state legislative enactments as primary sources to interpreting the federal Constitution.[376]

On the other hand, there are no limitations on interjurisdictional borrowing of doctrines between state and federal courts. While states may not know or intend for their prior rulings to be adopted by the Supreme Court, the expectation under our dual sovereign federalist system is that everything that happens at the state level (for the most part) is fair game for examination, experimentation, and carbon copying by the Supreme Court. There is nothing inherent in our constitutional design that requires the

372. *See* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T L. J. 525, 528–30 (2009); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 827–31 (2006) (explaining the current muddled takings jurisprudence); *see* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562, 598 (1984).

373. Dolan v. City of Tigard, 512 U.S. 374, 399 (1994) (Stevens, J., dissenting).

374. *See id.* at 397, 399 (Stevens, J., dissenting).

375. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L. & PUB. POL'Y 17, 20 (2009).

376. *Id.* at 20–21.

Supreme Court to lead and states to follow, there is likewise nothing inherent that prohibits the Supreme Court from mimicking state court doctrine.

CONCLUSION

Takings federalization is an underappreciated feature of judicial federalism. Takings jurisprudence has traditionally followed a top-down model where the Court's takings doctrines have been followed lockstep by state courts. However, the gravitational pull of federal takings doctrine is not absolute. There are times, as discovered in this Article, when the state courts take the lead and the Supreme Court follows. These rare episodes of takings federalization offer a fresh perspective on how judicial federalism functions beyond the historic top-down model. And as takings doctrine has proven to be one of the most muddled areas of constitutional law,[377] the Court's takings federalization jurisprudence may serve as an interpretive method and practice for future Supreme Courts to follow to answer vexing takings questions if there is little, if any, federal constitutional guidance available. Even in the absence of federal precedent or doctrine, takings federalization should be recognized and embraced, alongside other interpretive practices, as a readily available model for informing federal constitutional law.

377. Rose, *supra* note 372.