THE DOMINO EFFECT IN STATE TAKINGS LAW: A RESPONSE TO *51 IMPERFECT SOLUTIONS*

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In 51 Imperfect Solutions*, Judge Jeffrey Sutton depicts some of the virtues and flaws of our dual system of American constitutionalism across four chapters illustrating different models of interaction among the state and federal constitutions and their interpreters. In this symposium contribution, I submit a fifth chapter about property law that varies in some important respects from Judge Sutton's chapters involving education rights, the Fourth Amendment's exclusionary rule, forced sterilization, and the First Amendment.*

Several of Judge Sutton's chapters are told through parallel federal and state stories. Borrowing this approach, this contribution tells a federal story—from an odd period during the nineteenth century when the federal courts routinely expounded and disseminated state takings law—and a state story—from a fifty-year period in the twentieth century when the states were left to decide whether to follow the federal courts in recognizing regulatory takings but without a specific test to follow. Across these stories, takings law has often been marked by uniformity, rather than state-level variation and innovation—uniformity driven, in part, by the force of other states' rules. This domino effect is the consequence of both specific features of takings doctrine and organic borrowing. In closing, I offer some tentative thoughts on why property and takings law have tended to yield homogeneity and eliminate ingenuity in this way, even in the absence of definitive federal pronouncements about some of the thorniest puzzles within takings doctrine.

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I. INTRODUCTION

Although each chapter of *51 Imperfect Solutions* carries multiple lessons about constitutional history, structure, and substance, Judge Sutton's primary aim is to describe the duality of American constitutionalism through four stories illustrating four different models of interaction among the state and federal constitutions and their interpreters.[1] The four stories involve subjects as disparate as education rights, the Fourth Amendment's exclusionary rule, forced sterilization, and the First Amendment's freedom of speech and free exercise guarantees. They also involve different models of interaction among the state and federal courts in interpreting constitutional provisions: state responses to federal failures, state and federal judges engaged in interactive and iterative construction, state conformity to bad federal precedent, and state and federal courts independently struggling toward solutions to complex and novel problems.

There is already much to ponder in comparing these stories to one another. In this contribution, however, I submit a fifth story that varies in some important respects from the ones that Judge Sutton tells. The takings clauses of the state and federal constitutions each provide that property shall not be taken for public use without just compensation, language that governs the contours of physical takings (appropriations of land by government) and now regulatory takings (regulations that devalue or interfere with property to such an extent that they trigger the compensation requirement).[2] Though property and takings law are not absent from Judge Sutton's book—indeed, he describes the overwhelming state-level rejection of the Supreme Court's widely panned finding in *Kelo v. City of New London* that economic development satisfies the Constitution's "public use" requirement[3]—adding a longer property story to the other four offers a different perspective on the interactions among state and federal courts and the likelihood of innovation, variation, and independence.

Judge Sutton structures some of his chapters as federal and state stories.[4] Borrowing that approach, this Essay examines the parallel histories of federal and state takings law in turn. In telling these stories, it focuses in particular on two aspects of takings history: first, an odd period during the nineteenth century

1. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 3 (2018).

2. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 347–50 (2018) (describing these two categories and cataloging state takings provisions).

3. SUTTON, *supra* note 1, at 204–05.

4. *Id.* at 22–30, 135–72.

when the federal courts routinely expounded and disseminated state constitutional takings law; and second, a fifty-year period in the twentieth century when the states were left to decide whether to follow the federal courts in recognizing regulatory takings but without a coherent test or set of factors to apply in doing so. Strikingly, across these stories, takings law is marked by uniformity, rather than variation and innovation—uniformity driven, in part, by the force of other states' rules. This domino effect is the consequence of both specific features of takings doctrine and organic borrowing. In closing, I offer some tentative thoughts on why property and takings law tend to yield homogeneity and eliminate ingenuity in this way, even in the absence of definitive federal pronouncements.

II. THE FEDERAL STORY

The federal Takings Clause bears a somewhat attenuated relationship with the colonial and state eminent domain provisions that came before it. As Judge Sutton notes in several of his chapters, other parts of the Bill of Rights had direct state precedents:[5] for example, most early state constitutions had search-and-seizure provisions that closely anticipated the federal Fourth Amendment.[6] When James Madison proposed what became the Takings Clause on June 8, 1789, no state constitution contained the phrasing of either his proposal (which instead used the operative verb "relinquish," bringing us perilously close to a "relinquishings clause") or the version ultimately ratified: "nor shall private property be taken for public use without just compensation."[7] Of course, this formulation may in fact have been in more common use elsewhere in the historical record. For example, in 1644, nearly 150 years before Madison's proposal for the Takings Clause, the General Court in New Haven, Connecticut, granted a small parcel to William Peck with the proviso that "if the towne see cause to take itt frō him for any publique vse, he shall relinquish itt, they paying him such charges as shall be judged just."[8] With its juxtaposition of "take" or "relinquish," "public use," and "just" compensation, this town record is the closest ancestor to the Takings Clause that I have located, and others may be in deed and local ordinance books waiting to be uncovered.

There were other sources of law with similar aims, of course. Beyond scattered local precedents like the New Haven example, there were colonial highway acts that authorized officials to lay out roads and compensate those damaged

5. *Id.* at 12.

6. *Id.* at 42; *see also* Maureen E. Brady, *The Lost Effects of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 982–83 (2016) (tracing how the Fourth Amendment's protection for "effects" derived from state constitutions).

7. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 573–74 (Neil H. Cogan et al. eds., 2d ed. 2015). The 1790 Pennsylvania Constitution came much closer, providing "nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made." *Id.* at 585.

8. CHARLES J. HOADLY, RECORDS OF THE COLONY AND PLANTATION OF NEW-HAVEN, FROM 1638 TO 1649, at 144 (Hartford, Case, Tiffany & Co. 1857).

thereby.[9] The Continental Congress used the phrase "just compensation" to describe the sums owed to individuals whose property was destroyed or used during the Revolutionary War.[10] And many early commentators and state judges believed the "law of the land" or due process always required the payment of compensation for expropriation.[11] Further, four states' constitutions predating Madison's proposal—those in Massachusetts, Pennsylvania, Vermont, and Virginia—and the Northwest Ordinance of 1787 each had provisions putting conditions on expropriations of property.[12] Nevertheless, these antecedents were different from both Madison's proposal and the ratified clause in various respects,[13] and not a single state or group requested the inclusion of a Takings Clause in the Bill of Rights.[14]

For most of the nineteenth century, the federal courts—both lower and Supreme—decided few cases involving the Takings Clause. Ostensibly, this is because in the 1833 case of *Barron v. Baltimore*, the Supreme Court held that the Clause applied only to "restrain[] the power of the general [(*i.e.*, federal)] government," rather than the power of states.[15] This left the Takings Clause with minimal work to perform, particularly because the state and local governments

9. Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507, 509–10 (2014). *See generally* John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 AM. J. LEGAL HIST. 253 (1996) (comparing colonial highway acts).

10. *See*, *e.g.*, JOURNALS OF THE CONTINENTAL CONGRESS–FRIDAY, AUGUST 8, 1777, 622–23 (1907); JOURNALS OF THE CONTINENTAL CONGRESS–THURSDAY, OCTOBER 26, 1780, 980 (1910).

11. This historical relationship between takings and due process is partially reflected in the modern Supreme Court's struggle to disentangle them. *See* Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 738 (2010) (Kennedy, J., concurring in part and dissenting in part); Lingle v. Chevron U.S.A., 544 U.S. 528, 540 (2005); *see also* Maureen E. Brady, *Defining Navigability: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1467–68 (2015) (describing similarities in tests under both clauses as applied to property). Some states, like Virginia, may not have paid compensation for takings until relatively late in time. William Michael Treanor, Note*, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695–96 n.6 (1985); *see also* Stokes & Smith v. Upper Appomatox Co., 30 Va. (3 Leigh) 318, 337 (1831) ("[I]t will be found, on an examination of our legislation on that subject, that the right of way on the land, has uniformly been asserted, notwithstanding the grant of the land, in the broadest terms, and that without compensation to the proprietor, until a very late period . . . .").

12. THE COMPLETE BILL OF RIGHTS, *supra* note 7, at 584–86.

13. Massachusetts's Bodie of Liberties of 1641 required "reasonable allowance" if a person was pressed into "publique service" and "reasonable prices and hire" or "sufficient[] recompence[]" if "Cattel or goods" were "taken for any publique use," but did not mention real property. F.C. GRAY, REMARKS ON THE EARLY LAWS OF MASSACHUSETTS BAY 30 (Boston, Charles C. Little & James Brown 1843); THE COMPLETE BILL OF RIGHTS, *supra* note 7, at 584–85. In 1780, the Massachusetts constitution stated that if property "be taken . . . or applied to publick uses," it required both the "consent" of a representative body and "reasonable compensation" (though making mention of "publick exigencies" necessitating the appropriation in the first instance). *Id.* at 585. Vermont's 1777 constitution also imposed the "consent" requirement and stated that "when Necessity requires" property to be "taken for the Use of the Public, the Owner ought to receive an Equivalent in Money." *Id.* at 586. And before 1789, the constitutions of Pennsylvania and Virginia adopted the consent requirement, but made no mention of compensation. *Id.* at 585–86. Though most distant from it in time, the Northwest Ordinance of 1787 mirrored the 1641 Bodie of Liberties in linking takings of property to being pressed into service. Furthermore, like the 1780 Massachusetts constitution, it provided that "should the public exigencies make it Necessary for the common preservation to take any persons property . . . full compensation shall be made." *Id.* at 584–85; BERNARD H. SIEGAN, PROPERTY RIGHTS FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 109 (2001).

14. SIEGAN, *supra* note 13, at 109; William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1794 (2013).

15. Barron v. Balt, 32 U.S. (2 Pet.) 243, 247 (1833).

in this period were doing much of the regulation of property and much of the work of building infrastructure.[16] Further, the federal government often enlisted the states to condemn property when needed for its own internal improvements.[17] There were small numbers of cases in the lower federal courts about physical takings,[18] and those were joined by a few more important Supreme Court cases, such as *Kohl v. United States*, which officially recognized the federal government's authority to condemn land inside the states.[19] In 1897, the prohibition on uncompensated takings was at last held to apply through the Fourteenth Amendment to state and local government acts, beginning an era of much greater importance for this language in the Fifth Amendment.[20]

Despite the relative irrelevance of the federal Takings Clause for most of the nineteenth century, federal courts were playing a role in expounding state constitutional law. Then, as now, parties could end up in lower federal forums with state constitutional claims by virtue of diverse citizenship.[21] But in this period, the Supreme Court routinely engaged in state constitutional interpretation. Before 1891, the Supreme Court lacked discretionary review and had to hear all appeals from the federal circuit courts.[22] In other words, the Supreme Court could end up with appeals in diversity cases from lower federal courts where the only claim for resolution arose under a state constitution.

Several important nineteenth-century state takings cases ended up in the Supreme Court this way.[23] One is *Pumpelly v. Green Bay & Mississippi Canal Co.*[24] in which the state-authorized canal company built a dam that overflowed 640 acres of the plaintiff's land.[25] The landowner, a citizen of New York,[26] claimed that this was a taking of property for which compensation was required; the Wisconsin canal company argued that, strictly speaking, it had not taken anything, because it had merely consequentially damaged the property,[27] and consequential damages were not compensable under takings law of the period.[28] The Supreme Court was called on to interpret whether Wisconsin's takings clause required compensation, a question it answered in the affirmative: "It would be a

16. *See* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1175–87 (2016).

17. *See* Baude, *supra* note 14, at 1761–77; Christian R. Burset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CAL. L. REV. CIRCUIT 187, 202 (2013). These two articles also represent different sides of the dispute over whether the federal government even had the power of eminent domain outside of the District of Columbia and its territories. *See* sources *supra*.

18. *E.g.*, United States v. Inlots, 26 F. Cas. 490, 494 (C.C.S.D. Ohio 1873).

19. Kohl v. United States, 91 U.S. 367, 370 (1875).

20. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 236–37 (1897).

21. *See* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9–10 (1963).

22. Edward A. Purcell, Jr., Ex Parte Young *and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOL. L. REV. 931, 937 (2009).

23. *E.g.*, Yates v. Milwaukee, 77 U.S. (10 Wall.) 479, 506 (1870); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89 (1823); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815).

24. Pumpelly v. Green Bay & Mississippi Canal Co, 80 U.S. 166 (1871).

25. *Id.* at 167.

26. Transcript of Record at 2, *Pumpelly*, 80 U.S. 166.

27. *Pumpelly*, 80 U.S. at 177.

28. *See* Brady, *supra* note 16, at 1181.

very curious and unsatisfactory result . . . [to hold] that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely."[29]

On the way to this result, however, the *Pumpelly* Court was schizophrenic about the role of Wisconsin decisional law in the Supreme Court's analysis of the state constitution. This reflects the fact that in this period—the era of *Swift v. Tyson* and federal common law, before *Erie Railroad v. Tompkins*—federal courts hearing cases on the basis of diversity jurisdiction freely ignored state court interpretations of the state constitution if they seemed to rest on "general" principles as opposed to specific, local state law.[30] To be sure, some of the Court's opinion defers expressly to Wisconsin: the opinion states that in considering the Wisconsin Constitution, the "decisions of her Supreme Court . . . are of special weight if not conclusive on us."[31] And the opinion does cite and analyze Wisconsin cases, asserting that "no State court has given more frequent utterance" to the idea that flooding could constitute a taking than Wisconsin's.[32]

However, the Court also relied heavily on universal, nonfederal law in reaching its interpretation that compensation was required—especially because Wisconsin law might not truthfully have supported compensation.[33] Before it discussed a single Wisconsin case, the Court noted that before Wisconsin existed, court decisions in New York and New Jersey had held governments liable for flooding, even when those states lacked constitutional takings clauses.[34] And the Court had to find a way to distinguish *Alexander v. Milwaukee*, the Wisconsin high court's most recent decision, which had denied compensation for flooding. According to the Court, it could disturb *Alexander* because it was reliant on the "general weight of authority" rather than an interpretation of the state Bill of Rights.[35] While it is true that the *Alexander* opinion cited court decisions from many other states in reaching its result—Connecticut, Indiana, New Jersey, New York, and an explanation of why the court regretted it could not follow Ohio's contrary rule—it is hard to classify the decision as anything but an interpretation that the flooding resulting from an authorized public improvement was not a taking under the Wisconsin Constitution.[36]

As it turns out, there was quite a state-by-state split in this period about devaluation or consequential damages like those caused by flooding, with different states finding such damages constitutionally compensable and others not.[37] Some states, like Wisconsin in *Alexander*, held that devaluative acts like flooding

29. *Pumpelly*, 80 U.S. at 177.

30. *See* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1264–65 (2000); Michael G. Collins, *October Term, 1896-Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 72 (2001); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 59–64 (2007).

31. *Pumpelly*, 80 U.S. at 180.

32. *Id.* at 179.

33. *See id.* at 180.

34. *Id.* at 178–79.

35. *Id.* at 180.

36. Alexander v. Milwaukee, 16 Wis. 247, 256–57 (1862).

37. Brady, *supra* note 16, at 1185–87.

were "*damnum absque injuria*," or consequential and remote damages for which compensation should not be due.[38] Some states' courts had found devaluative acts compensable using the state's common law of property and different interpretations of their state constitutions;[39] others had, at the same instant that *Pumpelly* was decided, begun changing their takings clauses to expressly address consequential damages by requiring compensation for property "damaged" by public works or for public use.[40] Reflective of this split and the emerging panoply of responses, the Supreme Court *itself* had declined to award compensation for consequential damages as a matter of *federal* law just fourteen years before *Pumpelly*, in a case about a District of Columbia woman whose property was devalued when the city cut down K Street and left her property atop a hill.[41] Indeed, in denying that landowner compensation, the Supreme Court cited multiple state cases to assert that "[t]he law on this subject is well settled, both in England and this country."[42] The *Pumpelly* Court, however, now criticized state reluctance to award compensation for consequential damages:

> We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury . . . there is no redress; . . . . And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it.[43]

The Supreme Court continued to waver on where to draw the line in consequential damages cases as a matter of general constitutional law for several more years, at one point suggesting *Pumpelly* was an extreme outlier in terms of what law generally required.[44]

The history of *Pumpelly* illustrates the complex interaction between state, neighbor-state, and federal constitutional law that the era of general constitutional law enabled. One legacy of this era is a matter of vertical transmission,

38. *Alexander*, 16 Wis. at 253.

39. Brady, *supra* note 16, at 1185–87 (describing creation of property "right of access" and changing state constitutional interpretations).

40. Brady, *supra* note 2, at 356–57 (describing Illinois's adoption of a damagings clause in 1870 and West Virginia on its way to adoption in 1872).

41. Smith v. Corp. of Washington, 61 U.S. (20 How.) 135, 149 (1857). The opinion does not cite or discuss the federal Constitution, but the arguments—whether it was within Congress's power to authorize the regrade and whether compensation was due—strongly parallel takings claims of the period. *See generally* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004). Furthermore, the *Smith* court cited state constitutional opinions interpreting takings clauses in support of its ruling. 61 U.S. (20 How.) at 149.

42. *Smith*, 61 U.S. at 148.

43. Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 180–81 (1871). Though *Pumpelly* did not discuss *Smith*, it might have distinguished it on the basis that *Pumpelly* involved an "actual[] inva[sion] by superinduced additions of water, earth, sand, or other material," *Id.* at 181, which *Smith* had not. *See* Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878) (stating the justification for *Pumpelly* was a "physical invasion" in declining to award compensation in a case without a like invasion).

44. *See Transp. Co.*, 90 U.S. at 645 (calling *Pumpelly* "the extremest qualification" of the settled doctrine "supported by an immense weight of authority" that consequential damages are not compensable).

from state to federal law: federal court decisions on general takings law came to be repeated as binding federal precedents, leading to a direct line of influence for state constitutional law in federal constitutional interpretation.[45] *Pumpelly* is frequently cited as a federal Takings Clause decision,[46] even though the reasoning emerged in large part from Wisconsin and other state cases.[47] General law gave state constitutional decisions a horizontal role though, too: state decisions also contributed to creating a "weight of authority" that the Supreme Court frequently referred to in pronouncing what the general law actually was.[48] Since general law might be used by federal courts sitting in diversity to limit a state's own unique interpretations, this gave states indirect influence over neighbor-state rulings. Because of this horizontal role, outliers risked not being welcomed as innovators, but rather being squelched by universal, jurisdiction-free reasoning itself constructed in part by the rules of neighbor states.

The *Pumpelly* Court noted that standard takings clauses like Wisconsin's were ubiquitous—identical to the one in the United States Constitution and provisions in the constitutions of nearly every other state.[49] It also suggested that even in the absence of a takings clause, the same result would be compelled,[50] consistent with much older understandings that indemnification is required as a matter of ancient common law when property is taken for public use.[51]

But the Supreme Court's general law pronouncements were not limited to identical provisions. A particularly interesting case in this vein is *City of Chicago v. Taylor*,[52] a case about the Illinois Constitution, which by that time had one of those meaningfully different takings clauses from its federal counterpart: it required compensation for property "damaged," as well as taken, for public use.[53] Moses Taylor, a citizen of New York, sued the city of Chicago after an aqueduct cut him off from a road, rendered access otherwise inconvenient, and sent some quantum of dirt and other debris onto the property.[54] The Supreme Court noted that it had said in other general law cases that consequential damages were not required in circumstances like these.[55] Here, however, it said that the "different words" required a different approach.[56] Citing Illinois decisions, the Court concurred in their interpretations, holding that the new provision was intended to

45. *See, e.g.*, Brady, *supra* note 16, at 1197.

46. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982); Montana Co. v. St. Louis Min. & Mill. Co., 152 U.S. 160, 169 (1894).

47. *See Pumpelly*, 80 U.S. at 180.

48. *Transp. Co.*, 99 U.S. at 642; *Pumpelly*, 80 U.S. at 181; *see* Smith v. Corp. of Wash., 61 U.S. (20. How.) 135, 148–49 (1857).

49. *Pumpelly*, 80 U.S. at 176–77.

50. *Id.* at 178–80.

51. SIEGAN, *supra* note 13, at 109.

52. Chicago v. Taylor, 125 U.S. 161 (1888).

53. ILL. CONST. of 1870, art. II, § 13.

54. Tr. of Record at 3–5, *Taylor*, 125 U.S. 161 (No. 151). Moses died during the proceedings, and his executors continued the case on his behalf. *Id.* at 6.

55. *Taylor*, 125 U.S. at 165–66.

56. *Id.* at 165.

compensate for exactly the sort of injury that Taylor had suffered.[57] As for the city's apparent efforts to invoke general law principles that compensation was not due based on the Supreme Court's earlier cases,[58] the Court advised that those concerns might "be addressed more properly to the people of the state in support of a proposition to change their constitution."[59]

Here, then, are more lessons from the general law era. Textual differences and state constitutional change meaningfully affected federal courts' deference to state actors and willingness to ignore state precedents even in an era in which these courts felt little compunction to follow state court rulings.[60] More depressingly, though, *Taylor*'s later history would illustrate a major flaw associated with general law and federal court involvement with state constitutions. Later state courts tasked with interpreting their own "damagings" provisions followed *Taylor*'s endorsement of the Illinois approach in lockstep, often explicitly because it had the imprimatur of Supreme Court approval.[61] Over time, this homogenization led the damagings clauses to be interpreted into near-total irrelevance, with a combination of federal and neighbor-state law stifling what had been perceived by constitutional drafters as a significant movement in furtherance of the protection of property rights.[62]

The most significant change in the federal story of takings, however, is probably not the gradual erosion of general constitutional law, but rather the recognition of a separate category of takings altogether. In 1888, the same year as *Taylor*, the Supreme Court decided *Mugler v. Kansas*, considering a due process challenge brought by a brewery owner to a state law banning the manufacturing and sale of liquor.[63] Though the Takings Clause is not thought of as having been "incorporated" against the states until 1897,[64] the owner's claim sounded in takings-related principles:[65] the statute authorized the uncompensated destruction of bottles, signs, glasses, and the liquor itself, and required the abatement of

57. *Id.* at 165–670.

58. Brief for Pl. in Error, at 15–20, 27–28, Taylor, 125 U.S. (No. 151).

59. *Taylor*, 125 U.S. at 170.

60. *See, e.g.*, Brady, *supra* note 16, at 1197.

61. Brady, *supra* note 2, at 388.

62. *Id.* at 394–95. To be sure, lawyering that contends "damagings" and "takings" to be the same has not helped. For a recent example from a state with a damagings clause, see Order and Judgment, Lech v. Jackson, No. 18-1051 (10th Cir. Oct. 29, 2019) (slip. op. at 6 n.6) (noting that the plaintiffs "acknowledged that their rights under the state and federal Takings Clauses are 'essentially the same'" and failed to challenge district court's treatment as such on appeal). Intriguingly, the situation in *Lech*—where the plaintiff sought compensation for police damage to property—is one of the very few circumstances where two states have indeed recognized the broader coverage of the damagings clause. Brady, *supra* note 2, at 394–95.

63. Mugler v. Kansas, 123 U.S. 623 (1887).

64. Though the relevant case, Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897), is often discussed as the case that "incorporated" the Takings Clause against the states, *see*, *e.g.*, Philip Morris, Inc. v. Harshbarger, 159 F.3d 670, 674 (1st Cir. 1998), the case in fact relies on general law precedents and random state decisions to construct the bounds of due process rather than the Takings Clause. *See* Collins, *Before* Lochner, *supra* note 30, at 1311–13; *see also* Collins, *October Term, 1896*, *supra* note 30, at 88–91 (discussing the effect and novelty of *Chicago, B.*).

65. One of the Kansas judges, dissenting in part, expressly invoked takings language in one of the underlying cases. State v. Mugler, 29 Kan. 252, 274 (1883) (Brewer, J., concurring in part and dissenting in part).

the owner's desired brewery use, a use to which the building had been adapted.[66] The Supreme Court upheld the restriction as a valid use of the police power to prevent a nuisance in service of the public welfare, distinguishing such regulations from eminent domain, where "unoffending property is taken away from an innocent owner."[67]

The border between the police power and unconstitutional expropriation proved challenging to pinpoint and, ultimately, porous.[68] At the moment *Mugler* was decided, future Supreme Court Justice Oliver Wendell Holmes, Jr., was on the Massachusetts Supreme Judicial Court. A year after *Mugler*, Justice Holmes wrote an opinion in a case about an alleged "spite fence"[69] built in violation of a state ordinance, suggesting that the limit of the police power was not one of substance but one of degree: "some small limitations" of property may be imposed without compensation, but "large ones could not be."[70] Holmes had been critical of expansive notions of the police power before, alleging in a book review before his time as a jurist that the police power was "invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary."[71] In 1922, now on the federal bench, Justice Holmes got his chance to discuss the police power and takings as a matter of federal constitutional law.[72]

The history of what are now called "regulatory takings" is often thought to begin with Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*.[73] *Mahon* involved the Kohler Act, a Pennsylvania state law that prohibited mining coal in urban areas in a way that would cause the surface to cave in.[74] These cave-ins had become a major problem in cities like Scranton, where one need only look at contemporary newspapers to find dramatic pictures and tales of individuals and property trapped.[75] Writing for the majority, Justice Holmes held that the regulation required compensation to coal companies who claimed their property interests in subsurface coal pillars were destroyed; a contrary result would give a windfall to surface owners who had bargained the right to prevent subsidence away.[76]

66. *Mugler*, 123 U.S. at 670.

67. *Id.* at 669.

68. For discussions of the relationship between the police power and constitutional takings protection, see generally Barros, *supra* note 41; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 793–94 (1995).

69. *See* Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1194 (2020).

70. Rideout v. Knox, 19 N.E. 390, 392 (Mass. 1889).

71. Treanor, *supra* note 68, at 798–99 (quoting *Book Review*, 6 AM. L. REV. 132, 141–42 (1871)).

72. *Id.* at 782; *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

73. 260 U.S. at 415–16; *see* Brady, *supra* note 2, at 348 n.20. There are, as previously mentioned, definitional problems with separating takings and due process cases in this period. *See* Robert Brauneis, *The Foundation of Our Regulatory Takings Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 615 n.3 (1996).

74. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 13 (1995).

75. *See Pillar-Robbing Caused Big Cave-In: $100,000 Damage*, SCRANTON TIMES, Aug. 30, 1909; *Imprisoned Coal Miners*, LEBANON DAILY NEWS, Nov. 19, 1892; *Cave-In at Plains*, SUNDAY NEWS-DEALER (Wilkes-Barre), July 28, 1889.

76. 260 U.S. at 414, 416.

In an opinion often called "cryptic"[77] and "mysterious,"[78] Justice Holmes cited several Massachusetts nonconstitutional cases in pronouncing that a regulation, as opposed to some public work or action, could trigger the compensation requirement.[79] The decision came to establish that even valid uses of the police power could require payment to affected property owners;[80] in other words, a legitimate purpose would not save regulations from alternative constitutional problems. According to the opinion, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions."[81]

Despite the professed lack of "general propositions"—and over a strident dissent by Justice Brandeis—the opinion discussed a few particulars. First, it mentioned the "valuable estate" at issue in *Mahon*, a peculiar Pennsylvania property interest in coal pillars supporting the surface;[82] the dissent would have treated the relevant property interest as all the subsurface coal, rather than the pillars alone that were affected by the Kohler Act.[83] Second, the majority opinion mentioned "average reciprocity of advantage": the idea that prior regulations had been upheld without compensation because in abating a nuisance or other activity they conferred some benefit on affected individuals even as they were burdened, and the Kohler Act failed to offer similar benefits to affected coal companies.[84] Perhaps the most important legacy of *Mahon*, though, was its most clear directive.[85] "One fact for consideration," Justice Holmes wrote, should be "the extent of the diminution" in value.[86]

This left questions: armed with the holding that regulations could not "go[] too far," but without many "general propositions," the task of filling in the contours of federal regulatory takings law would fall to some extent to lower federal and state forums.[87] In this period and before, though, state courts were turning

77. Barros, *supra* note 41, at 499.

78. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 156 (1977).

79. *Mahon*, 260 U.S. at 415–16.

80. Justice Brandeis would have preserved the old view that valid uses of the police power do not require compensation. *Id.* at 417 (Brandeis, J., dissenting).

81. *Id.* at 415–16.

82. *Id.* at 414.

83. *Id.* at 419 (Brandeis, J., dissenting).

84. *Id.* at 415.

85. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 565–66 (1984).

86. *Mahon*, 260 U.S. at 413.

87. The Supreme Court weighed in a few more times in takings cases before 1978, such as when it decided *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the most influential case on regulatory takings. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1645 (2003); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 52 (2016). None, however, articulated a new test for regulatory takings. The most famous decisions from this period are probably *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which pronounced that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935), in which the Court struck down New Deal provisions enabling farmers to reacquire foreclosed property from banks. Another famous decision from this period is *Miller v. Schoene*, 276

to their own constitutions and other sources to develop state takings protections. It is to those developments before and after *Mahon*—and their effects and interactions with federal takings law—that the next Part turns.

III. THE STATE STORY

As previously noted, there were few state constitutional predecessors for the federal Takings Clause.[88] Over the antebellum period, however, additional states adopted takings provisions.[89] Furthermore, multiple states' courts held that even in the absence of a specific takings provision, compensation was required for acts of eminent domain by virtue of natural or common law principles and due process guarantees.[90] In shaping principles for deciding cases involving claims to compensation, the states routinely borrowed from one another,[91] guided in part (and particularly in the late nineteenth century) by influential treatises covering eminent domain.[92] In other words, even in this very early period, neighbor-state law exerted significant persuasive force—most often creating dominant, rigid lines of authority, not a multitude of solutions.

The last Part examined how state constitutional takings law played a critical role in constructing general constitutional law and informing federal and neighbor-state decisions directly in that way. Furthermore, some scholars have detected in state takings decisions from the nineteenth century relatives of the regulatory takings principles that *Mahon* would begin to bring into focus.[93] State cases on consequential damages, including *Pumpelly*, sometimes required compensation for devaluation or interference from flooding or road-grading unaccompanied by any invasion, laying the foundation for the idea that takings clauses protected value or rights independent of any loss or transfer of title.[94] In addition to compensating for devaluations in these circumstances, state courts did occasionally strike down confiscatory regulations under state takings and due process clauses in this period.[95] In doing so, they articulated some strong state-

U.S. 272 (1928), which upheld under the Due Process Clause a state regulation requiring the destruction of cedar trees without compensation to the owners because the cedars were capable of transmitting disease to apple trees. *Miller* nowhere cites or discusses *Mahon*.

88. *See supra* notes 11–14 and accompanying text.

89. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1233–34 (1996).

90. *Id.* at 1229–33.

91. *Id.* at 1233–34.

92. *See* Brady, *supra* note 2, at 368 (discussing important treatises on takings, constitutional law, and municipal corporate power written by John Lewis, John Dillon, and Thomas Cooley).

93. *See* Kobach, *supra* note 89, at 1218.

94. *See id.* at 1234–65. This devaluation, though, is distinguishable because it occurred not because of regulation but rather because of the physical acts of entities vested with the power of eminent domain, like railroads and municipal governments. *See* Brady, supra note 2, at 355.

95. *See* Claeys, *supra* note 87, at 1574–1604; Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 753–57 (2008).

level parallels for the "average reciprocity of advantage" principle discussed in *Mahon*.[96]

An interesting question is how much variation the states exhibited in their approach to takings law prior to *Mahon*.[97] Several indicia suggest there was not much: general constitutional law had a pervasive hold, there were frequent interstate citations and citations to popular treatises, and most scholarly assessments now treat nineteenth-century state takings law as relatively uniform,[98] perhaps belying the natural-law pedigree of the just compensation principle.[99] Other evidence, however, suggests that there were at least some divergences.[100] On the issue of consequential damages, to reiterate, states had begun to split from one another on whether a physical displacement of debris or water onto land was required, as in *Pumpelly*, or whether indirect impairments, like cutting off access to a street, would suffice.[101] States in the mid-nineteenth and early twentieth centuries invented or recognized some new constitutional property interests, bringing some small variations to the types of property recognized as supporting compensation claims.[102]

After 1870, different states began amending their takings clauses to address consequential damages, expressly relying on state cultural and topographical differences in their arguments about the propriety of the change.[103] A delegate from South Dakota suggested they should not amend their takings clause to be like California's because that state had been influenced by radical communists.[104] A delegate in Virginia argued against changing the constitution to address consequential damages, worried about its effects on public improvements; while other states might be more economically developed, "[i]s not Virginia very largely a great dessert-waste [sic], grown up with pines and broom-sage?"[105] A delegate in Kentucky likewise worried about the specific economic condition of his state, and delegates in Pennsylvania maligned the influence of "western states" on their own constitution.[106] Over a long duration of time, the extent of variation even between states with amended and unamended clauses proved minimal, but for a

96. Claeys, *supra* note 87, at 1619–21, 1626.

97. Rappaport, *supra* note 95, at 756 (noting "it is not clear how widespread this expanded view of takings was" and suggesting some states might have been more protective of property rights than others).

98. Claeys, *supra* note 87, at 1576 (characterizing state takings doctrine in the nineteenth century as a "uniform body of law, for a uniform problem"); Kobach, *supra* note 82, at 1233–34 (stating that despite "a chaotic collage of takings doctrines" the approach of "different states were not entirely dissimilar").

99. Claeys, *supra* note 87, at 1576.

100. *See* Brady, *supra* note 2, at 392.

101. *See supra* notes 37–39.

102. Brady, *supra* note 16, at 1199 n.150; Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 60–62 (2017).

103. In this case, proponents often relied on the bare fact of its favorable reception elsewhere, rather than affinities among adopting states. Dissenters more commonly invoked state differences. *See* Brady, *supra* note 2, at 367–68.

104. *Id.* at 373–74.

105. *Id.* at 370 (citing 1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA, HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902, at 694 (1906)).

106. *Id.* at 373 n.167.

brief window, the possibility of divergence based on different traditions and conditions was real.[107]

The period before *Mahon* thus exhibited some small flashes of variances in state constitutional takings law.[108] The period after *Mahon* likewise presents another unique opportunity for examining the possibility for variation in state takings law. In 1922, Justice Holmes both confirmed that regulations could trigger takings protections and resisted any "general propositions" for deciding when that had occurred.[109] Lower federal courts were tasked with interpreting some of this directive,[110] and state courts, too, heard federal constitutional cases involving regulations.[111] But they were without significant guidance from the Supreme Court for fifty years, until 1978, when the Supreme Court decided *Penn Central Transportation Co. v. City of New York*, which articulated a three-part framework for regulatory takings: courts should look to "the character of the governmental action," "the economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations," examining how a regulation operates with respect to all three factors on the "parcel as a whole."[112] Though in slightly permutated form—the final prong became "reasonable" rather than "distinct" investment-backed expectations within a year[113]—and now joined by a few other tests, this is the dominant framework for evaluating nearly all federal takings challenges to confiscatory regulations.[114] Long before *Penn Central* announced a concrete framework, though, state courts may have had to apply federal takings law, but they certainly had to decide whether and how to interpret their own state constitutions to apply to regulations and to develop regulatory takings principles as a matter of state constitutional law.[115]

To be sure, the few principles mentioned in *Mahon* exerted a strong influence on state constitutional takings law in this period. As mentioned before, there is some evidence that "average reciprocity of advantage" had been a part of a proto-regulatory takings doctrine in the state courts even before *Mahon*.[116] And Justice Holmes's emphasis on degree—the idea that a taking occurs where there is a substantial diminution in value—was soon repeated in state constitutional

107. *See generally id.* at 378–88.

108. *See id.* at 401 n.294.

109. *See supra* notes 79–87 and accompanying text.

110. Westlaw suggests that approximately seventy-seven lower federal court cases cited *Mahon* before *Penn Central* was decided in 1978, though exceedingly few discussed the case. Some skipped past *Mahon* and returned to *Mugler*. *See*, *e.g.*, Oro Fina Consol. Mines v. United States, 92 F. Supp. 1016, 1021 (Ct. Cl. 1950). In contrast, approximately 291 state courts cited or discussed *Mahon*.

111. Many federal takings or due process challenges to zoning appeared in the state courts. *See e.g.*, Appeal of White, 134 A. 409, 411 (Pa. 1926); Gorieb v. Fox, 134 S.E. 914, 915 (Va. 1926).

112. 438 U.S. 104, 124 (1978).

113. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

114. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (noting that "[o]utside . . . two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by" *Penn Central*).

115. *See id.*

116. *See supra* note 95 and accompanying text.

interpretations,[117] even though it had not been a significant part of the preexisting state constitutional doctrine.[118] No state court appears to have taken Justice Brandeis's side in rejecting regulatory takings as a matter of state constitutional law—though in the 1970s, New York did decide that all its takings jurisprudence should be recharacterized in due process, meaning the ordinary remedy should be invalidation and not compensation.[119] The next closest thing to rejection is in an opinion from Justice Holmes's own home state, in which a Massachusetts court pronounced *Mahon* "decided upon peculiar facts by a divided court" and thus "not decisive" in a later case about the constitutionality of a zoning ordinance,[120] though Massachusetts eventually fell into line.[121]

While courts largely followed the few directives in *Mahon* as a matter of state constitutional law, the reader of state constitutional law in this period before the announcement of a federal test realizes something else: much of *Penn Central* was anticipated by state cases. Recall that in 1978, *Penn Central* set out three factors for courts to consider in deciding takings cases: the character of the government action, the economic impact on the claimant, and the extent of the regulation's interference with the claimant's reasonable investment-backed expectations.[122] All three of these factors appeared eleven years earlier, in Frank Michelman's 1967 article *Property, Utility, and Fairness*.[123] While the phrasing was new—"investment-backed expectations" is jargon only an economist could love—Michelman constructed these factors out of a mix of federal and state constitutional doctrine.[124] Though he described a "bewildering array" of lower court

117. Bureau of Mines of Md. v. George's Creek Coal & Land Co., 321 A.2d 748, 757–60 (Md. 1974); Stevens v. City of Salisbury, 214 A.2d 775, 781 (Md. 1965) (interpreting both Maryland and federal constitutions); Lipsitz v. Parr, 164 A. 743, 748 (Md. 1933) (same).

118. *See supra* notes 103–11 and accompanying text.

119. *See* Charles v. Diamond, 360 N.E.2d 1295, 1303 (N.Y. 1977). Though Frank Michelman's test proved very influential, *see infra* notes 123–25; *e.g.*, William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 872 n.345 (1998), this departure may have owed to the scholarship of Joseph Sax, who had argued that government should compensate when engaging in its own "enterprise" but not when regulating the activities of private owners. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964).

120. Town of Burlington v. Dunn, 61 N.E.2d 243, 246 (Mass. 1945).

121. *See* Comm'r of Nat. Res. v. S. Volpe & Co., 206 N.E.2d 666, 669–70 (Mass. 1965) (examining whether a regulation deprived owner of "practical uses" and caused diminution in value); Aronson v. Town of Sharon, 195 N.E.2d 341, 345 (Mass. 1964) (requiring compensation where 100,000 square foot lot size requirement was part of town's plan to leave open space and acquire land).

122. 438 U.S. 104, 124 (1978).

123. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1226–29, 1128–29 & nn.110, 1233 (1967).

124. State constitutional opinions relied upon by Michelman to reconstruct takings law include Ark. State Highway Comm'n v. McNeill, 381 S.W.2d 425, 427–28 (Ark. 1964) (McFaddin, J., dissenting); Colby v. Bd. of Adjustment, 255 P. 443, 446 (Colo. 1927); Hard v. Hous. Auth. of Atlanta, 132 S.E.2d 25, 27 (Ga. 1963); County of Winnebago v. Kennedy, 208 N.E.2d 612, 615 (Ill. App. Ct. 1965). Michelman also cited many cases that rely heavily on state precedents, even if those precedents and cases are at times unclear about whether they are interpreting the federal or state constitutions. *See e.g.*, Jones v. City of Los Angeles, 295 P. 14, 18 (Cal. 1930) (collecting other state cases requiring or not requiring compensation where "the owner of the land had incurred expenses in the preparation of plans for the structure"); Wofford v. North Carolina State Highway Comm'n, 140 S.E.2d 376, 380–81 (N.C. 1965); Commonwealth. v. Spear, 38 Pa. D. & C.2d 210, 214 (Pa. Com. Pl. 1965).

decisions, he also distilled the reasoning into four categories that shaped his normative recommendations and that closely approximate the current three-factor test.[125]

The considerations in state regulatory takings opinions in this period do bear similarities to the *Penn Central* test, particularly in anticipating the relevance of "reasonable expectations." From the 1940s onward, state courts had begun compensating for deprivations of nearly all "practical" or "beneficial" uses of property under their constitutions, particularly when accompanied by prior reliance.[126] State constitutional opinions on the legitimacy of government regulations of railroads and utilities asked whether these entities could still make a "reasonable return,"[127] an idea that both the *Penn Central* majority and dissenting opinions discuss at length with respect to real-property takings.[128] To be sure, some states engaged in other takings inquiries, though ones that would likely result in *less* protection to owners; for example, engaging in nuisance-like assessments of "unreasonableness," balancing the harm to the owner against the utility or benefit of the regulation.[129] Four years before *Penn Central*, a dissenting judge in a Pennsylvania case announced a hybrid four-part test both dissimilar and similar to what was to come: it asked about the "character" of the government action and the "extent of interference with the property interest," but also the "extent of the public interest" and the "nature of the harm caused by the owner's use."[130]

After *Penn Central* was announced, though, most shreds of difference evaporated. Now, nearly all states follow *Penn Central* in lockstep as a matter of state constitutional interpretation where regulatory takings are concerned.[131] As I have put it elsewhere, "[i]n lieu of fifty (or even just two or three) different approaches to state [regulatory] takings law, federal precedents are very likely to be controlling as a matter of state constitutional interpretation."[132] This is not because *Penn Central* has proven to be a particularly good rule—scholars across the political and subject-matter spectrum generally view it as incoherent and

125. Michelman, *supra* note 123, at 1165, 1184.

126. *See* Munns v. Stenman, 314 P.2d 67, 73 (Cal. Ct. App. 1957); Brecciaroli v. Connecticut Comm'r of Envtl. Prot., 362 A.2d 948, 951 (Conn. 1975); Comm'r of Nat. Res., 206 N.E.2d at 669–70; Morris Cty. Land Improvement. Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232, 240 (N.J. 1963); Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 386 (Special Term 1945); Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 106 (Tex. 1961).

127. Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 NYU J.L. & LIBERTY 151, 169 (2017); Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433, 447 (1995).

128. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978); *id.* at 149 (Rehnquist, J., dissenting).

129. *See* Bacich v. Bd. of Control of California, 144 P.2d 818, 828 (Cal. 1943) (Edmunds, J., concurring); Ray v. State Highway Comm'n, 410 P.2d 278, 288–89 (Kan. 1966) (Fatzer J., concurring).

130. Gaebel v. Thornbury Twp, 303 A.2d 57, 63 (Pa. Commonw. Ct. 1973) (Kramer, J., dissenting).

131. *See* Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 719 n. 138 (2019) (collecting cases); Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139, 205 (2018).

132. Brady, *supra* note 131, at 720.

vague,[133] and recent empirical studies show that *Penn Central* claims have an abysmal success rate approximating zero.[134] One wonders, though, whether anything different might have evolved in its absence, given that the factors had already begun to coalesce.

There is an interesting caveat outside of regulatory takings law: the rules governing compensation for airplane overflights in fact exhibit a rich diversity of state constitutional approaches. The Supreme Court announced in *United States v. Causby* and a few subsequent cases that low overflights could constitute compensable takings of property, a directive that lower federal courts interpreted only to apply to direct physical invasions by the aircraft into the owner's airspace.[135] State courts rejected this view as a matter of state takings law, holding that individuals disturbed by proximity to the flight path, even if not directly underneath it, could maintain compensation actions despite the activity falling neither into the physical nor the regulatory takings categories.[136] On the regulatory side of things, though, state innovations and differences like these are far harder to find.[137]

IV. ASSESSING THE TAKINGS TRAJECTORY

As noted at the outset, property rights and takings clauses make several appearances in Judge Sutton's book. In pointing out how "local conditions and traditions [might] affect" state constitutional interpretation, he asks: "Does anyone doubt that the Wyoming Supreme Court might look at property rights—and takings claims—differently from the New York Court of Appeals?"[138] Likewise, the post-*Kelo* movement, where state courts, legislators, and constitutional drafters gave "public use" a narrower interpretation than the Supreme Court, figures prominently in several spots.[139] The reaction to *Kelo* does indeed look like the type of state-level reaction and innovation in takings law that *51 Imperfect Solutions* chronicles with respect to other constitutional provisions, although some property scholars are skeptical about whether the post-*Kelo* changes will be effective in both the short and long term.[140] Finally, though it does not feature in

133. *See* Gary Lawson et al., *'Oh Lord, Please Don't Let Me Be Understood*!*': Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 3 (2005).

134. Krier & Sterk, *supra* note 87, at 64.

135. United States v. Causby, 328 U.S. 256, 260 (1946); *e.g.*, Batten v. United States, 306 F.2d 580, 585–86 (10th Cir. 1962).

136. *See* Wash. Mkt. Enters. v. City of Trenton, 343 A.2d 408, 414 (N.J. 1975) (collecting cases); WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 158–61 (1977).

137. *See* Brady, *supra* note 2, at 347 n.17.

138. SUTTON, *supra* note 1, at 17. In another portion, an Alaska state court decision on takings serves as an example of state courts "taking the lead" in property rights protection, because the decision relied only on the Alaska constitution (though the court followed the *Penn Central* test). *Id.* at 21, 222 n.56; *see* Hageland Aviation Servs., Inc. v. Harms, 210 P.3d 444, 449–50 (Alaska 2009).

139. SUTTON, *supra* note 1, at 204–05; *see* City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006); Bd. of Cty. Comm'rs. v. Lowery, 136 P.3d 639, 650–51 (Okla. 2006).

140. ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN 136, 141–64, 173–78 (2015). As a historian of other state constitutional property movements, I also

Judge Sutton's book, there is another property example from his home state that should make fans of state constitutionalism proud.[141] *Penn Central* dictates that in deciding whether a regulation is a taking, courts should apply its three-factor test to the "parcel as a whole."[142] But the Ohio Supreme Court has held that "coal rights are severable and may be considered as a separate property interest" for takings analyses, in part because "states are free to interpret their constitutions independently of the United States Constitution."[143]

These examples aside, the dominant theme of decades of state and federal takings law has been uniformity.[144] "Public use" is only one variable in the takings equation; states might recognize as a matter of state constitutional law different types of property (as the Ohio court did), different tests for when a taking has occurred, or different measures of just compensation.[145] Though there are some historical variations in court decisions, more recently, where there have been variations in coverage, the impetus has come from state legislation. Even so, some of these protections have been minimally effective. For example, six states have passed statutes that would require compensation for a greater range of regulatory interferences than the state courts would recognize as takings, yet in all but one state—Oregon—these measures have had little effect or application.[146] In contrast, the definition of "just compensation" has probably had the most successful and sustained variation: different states award owners some premium greater than fair market value in some instances,[147] states may make attorneys' fees available in eminent domain cases,[148] and states may provide relocation assistance beyond what the federal constitution (and applicable federal laws) might require.[149] Maybe the takings trajectory, like other stories in Judge Sutton's book, reminds us again that state courts and judges are neither the only nor the best hope for innovation and change in shaping rights and remedies.[150]

The question remains, though: why have state courts been so hesitant to chart new or different territory in takings law? Perhaps the answer lies in some-

remain circumspect about prematurely celebrating state-level variations in the scope of "public use." *See* Brady, *supra* note 2, at 343–44.

141. State *ex rel*. R.T.G., Inc. v. State, 780 N.E.2d 998, 1008 (Ohio 2002).

142. Krier & Sterk, *supra* note 87, at 44–45.

143. State *ex rel.* R.T.G., Inc., 780 N.E.2d at 1008.

144. *See supra* notes 98–99 and accompanying text.

145. *See* State *ex rel* R.T.G., Inc, 780 N.E.2d at 1008.

146. Krier & Sterk, *supra* note 87, at 78–80.

147. *See* City of Moorhead v. Red River Valley Coop. Power Ass'n, 830 N.W.2d 32, 38 (Minn. 2013) (upholding similar statute and noting that federal definition of "just compensation" is "minimum constitutional requirement"); St. Louis County v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116, 135–36 (Mo. 2013) (upholding statute authorizing "heritage value" premium when property is taken).

148. *See*, *e.g.*, OHIO REV. CODE ANN. § 163.21 (West 2007) (permitting award of attorneys' fees if government offer is below a certain threshold).

149. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121–26 (2006).

150. SUTTON, *supra* note 1, at 169–70.

thing unique about property as opposed to other constitutionally protected interests.[151] Some scholars have made the case that property is particularly ill-suited for local experimentation and innovation: while people are somewhat mobile and can reflect their preferences by choosing the state culture, constitutional or otherwise, that suits them, real property is emphatically not moveable.[152] Other recent work suggests the answer lies in political economy and the motivators of political change: where divergence in constitutional property law has occurred, as in *Kelo*, sympathetic homeowners have been affected and have mobilized political outrage, as opposed to the businesses and developers that have been most financially affected by use restrictions and other regulations over time.[153] Perhaps the explanation for uniformity or universality relates to the specific remedy in takings law: when a taking has occurred, even if temporarily, compensation is due to the owner.[154] Any state constitutional rule more favorable to the property owner than federal ones will directly affect state coffers (rather than resulting in mere invalidation), a consequence that state judges may be especially wary to cause.[155] Lastly, and most banally, decades of court decisions and scholarly articles make clear that the takings problem has seemed intractable for scholars and judges.[156] A Tennessee court deciding a takings case as recently as 2014 stated as much, observing that choosing a different state constitutional course "would needlessly complicate an already complex area of law, increase uncertainty for litigants attempting to bring claims under both the federal and state constitutions, and place Tennessee at odds with the vast majority of states, nearly all of which have already adopted federal takings jurisprudence."[157]

That said, other forces suggest takings innovation is at least possible, if not desirable. Property may be immobile, but there is nothing more local—physically connected to and an embodiment of the state—than land.[158] Judges deciding state constitutional takings cases may have deep local knowledge and expertise, especially as the same judges determine and apply nonconstitutional

151. Earlier empirical work has claimed that variation in state constitutional law (when there is a corresponding federal provision) primarily occurred in freedom of religion, rights to jury trials, and search-and-seizure law. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

152. Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 54 (2011). Of course, there is also reason to doubt the premise that people choose where to live because of constitutional culture (or that people "vote with their feet" more generally). *See* RICHARD C. SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 46–56 (2016); Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1860 (2010); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1831–34 (2003).

153. *See generally* Dickinson, *supra* note 131.

154. First English Evan. Luth. Church of Glendale v. Los Angeles County, 482 U.S. 304, 318 (1987).

155. *Cf.* Brady, *supra* note 11, at 1460–61 (discussing problems associated with compensation remedy and judicial institutional capacity).

156. Carol Rose has suggested regulatory takings law will always be a "muddle" because of the competing interests and underlying property concepts at stake. Rose, *supra* note 85, at 561.

157. Phillips v. Montgomery County, 442 S.W.3d 233, 244 (Tenn. 2014); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 338–39 (2011) (noting that state supreme courts sometimes fall into line "either from force of habit, mistaken belief that they were bound by the federal rules, lack of expertise, or simply because they agreed with [Supreme Court] reasoning").

158. *See* Krier & Sterk, *supra* note 87, at 326–35.

property law.[159] Indeed, some scholars see that within adherence to *Penn Central*, state courts in fact use a plethora of different questions to get at pieces of the *Penn Central* test, factors they might make explicit as a matter of state constitutional rules.[160] And variation does occur in constitutional property law outside the takings context. In the closely related area of substantive due process, for example, different states appear to have materially different levels of protection for property interests. Courts in Illinois have used a searching eight-part test to evaluate the constitutionality of zoning decisions,[161] while California judges simply ask if they are supported by "any reasonable basis."[162] If courts are capable of variation in a thicket as robust as due process, it is not clear why takings protection for property should be any different.

Oddly, the universality problem in takings is not endemic to the relationship between state and federal constitutional law. The federal constitution is theoretically dependent on nonconstitutional state law at two points even in the *federal* takings analysis, and thus subject to variation across state borders: the Constitution uses state law to define the relevant property interest and to define the parameters of the regulatory and common-law regime that forms the owner's expectations and the baseline against which an alleged taking will be measured.[163] As I have chronicled elsewhere, courts tasked with defining both "property" and "expectations" have developed tests that universalize these variables by examining "reasonableness" across jurisdictional boundaries, relying on multistate rather than state-specific rules to define both the interest and the forces that shape an owner's claim.[164] To put it more concretely, an owner in New York bringing a federal regulatory takings claim might find the court rejecting the claim by citing California law to define the scope of the property interest or regulations from Ohio that make their expectations for the property seem unreasonable and thus noncompensable.[165]

In that case, perhaps the explanation goes back to where the federal story began: to the lessons from general constitutional law. Even in the absence of state

159. *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 (2005); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 954 (2000); *see also* Kelo v. City of New London, 545 U.S. 469, 482 (2005) ("[E]mphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."); San Remo Hotel v. City & County of San Francisco, 545 U.S. 323, 347 (2005) ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.").

160. *Cf.* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 765–67 (1988); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 264–70 (2004) (discussing institutional capability of state courts and different practical outcomes reached despite same tests).

161. Twigg v. County. of Will, 627 N.E.2d 742, 745 (Ill Ct. App. 1994).

162. Cormier v. County of San Luis Obispo, 207 Cal. Rptr. 880, 884 (Cal. Ct. App. 1984).

163. Brady, *supra* note 131, at 698.

164. *Id.* at 706.

165. Two judges in the Ninth Circuit are aware of this curious jurisdiction-less reasoning, as a recent opinion reveals. *See* Fowler v. Guerin, 918 F.3d 644, 645 (9th Cir. 2019) (Bennett, J., dissenting from the denial of rehearing en banc) (noting that court had constructed Washington property interest from "centuries past" "common law").

constitutional text, state courts were recognizing takings claims in the early republic. Across the nineteenth century, general constitutional law was defined by natural-law principles, as those principles were defined and elaborated by state judges who together constructed the "weight of authority" that the Supreme Court, federal courts, and state courts relied upon.[166] Federal courts weighed in to fix incorrect discernments of these principles.[167] With a pedigree as deep as the one the just compensation provision has, perhaps the legacy of universality has too much sway to support as many solutions as the existence of dual takings protections would seem to allow. Though glimmers of variation appeared in the era of great constitution-making—in and after Reconstruction and westward expansion[168]—those variations, too, mostly succumbed to homogenization.[169] That is not to say there is no dialogue: in the general law era, in *Mahon*, and even leading up to *Penn Central*, state and federal courts were examining and relying upon each other's rules and arriving at consensus about the proper takings considerations and outcomes.[170] In takings, there are just fewer examples of the local victories and innovations that other rights stories have.[171]

Then again, perhaps property and takings are not outliers at all, which calls for deeper thinking about when and why any state should vary, especially from emerging currents and consensuses emanating from other states. The phenomenon of lockstep state interpretations of federal law is well known,[172] and perhaps in instances where the state constitution predates the federal or exhibits textual differences, the case for independent interpretation is strongest. But the stories of takings law are tantalizing in part because states often ended up following some kind of multistate law in interpreting their own constitutions, whether that multistate law came in the guise of the "general law" or merely congealed into a set of uniform rules or factors. State takings law might be characterized as susceptible to a sort of domino or herd effect: where most states start to go, the others tend to follow, whether because of doctrinal features (like modern "reasonableness" requirements) or the spread and persuasive force of neighbor-state decisions.

Is this homogeneity so surprising? At least one state judge has argued that this sort of interstate communication and borrowing is especially important—perhaps for legitimacy reasons—as states consider departing from federal interpretations.[173] Looking historically, in the nineteenth century, we know that the drafters of state constitutions invoked the laws and constitutions of other states

166. Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878); Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 181 (1871); *see* Smith v. Corp. of Wash., 61 U.S. (20 How.) 135, 148–49 (1857).

167. *Transp. Co.,* 99 U.S. at 642; *Pumpelly*, 80 U.S. at 181; *see Smith*, 61 U.S. at 148–49.

168. Brady, *supra* note 2, at 355–56.

169. *Id.*

170. *Id.* a 349–51.

171. *Id.* at 410.

172. *E.g.*, Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707–28 (2016); SUTTON, *supra* note 1, at 20.

173. *See* Stewart G. Pollock, *Adequate and Independent State Grounds As A Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).

while drafting their own,[174] suggesting deep connections between and among the documents, despite formal jurisdictional boundaries. That influence often extended to wholesale adoption: "of the 137 sections of the original California Constitution 66 were adapted from the Constitution of Iowa and 19 from the Constitution of New York."[175] In 1955, the drafters of the Alaska Constitution mentioned forty-five other state's laws (and even Hawaii's), failing to mention only the Carolinas and Rhode Island.[176] Moving from enactment to interpretation, empirical studies have shown that state judges routinely adopt and cite other states' constitutional interpretations in arriving at their own.[177] And both state constitutional law and property are the subjects of treatises and other projects seeking to synthesize, unify, and spread approaches at the state level.[178] Of course, a pluralist faced with this evidence of homogenization might argue that state constitutional law should exhibit neither one universal nor fifty-one solutions, but broad and shifting "regional" ones, based on legal families and affinities (or learning from one another's successes and failures).[179] In the end, though, the stories of state constitutional law may simply return us to some of the perennial debates within law more generally. What sources can judges rely on in the interpretive process? Should judges be influenced by natural-law principles of morality that would indeed tend to yield single answers, or should judges follow

174. *See* Brady, *supra* note 2, at 367–68.

175. Diamond v. Bland, 521 P.2d 460, 465 (Cal. 1974) (Mosk, J., dissenting).

176. *See* ALASKA CONSTITUTIONAL CONVENTION (1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf. Delegates mentioned (at least once) the laws or constitutions of Alabama, *id.* at 1787, Arizona, *id.* at 1975, Arkansas, *id.* at 949, California, *id.* at 1234, Colorado, *id.* at 2368, Connecticut, *id.* at 705, Delaware, *id.* at 2020, Florida, *id.* at 724, Georgia, *id.* at 747, Hawaii, *id.* at 1370, Idaho, *id.* at 1228, Illinois, *id.* at 1371, Indiana, *id.* at 1309, Iowa, *id.* at 3908, Kansas, *id.* at 1725, Kentucky, *id.* at 2020, Louisiana, *id.* at 3048, 3302, Maine, *id.* at 704, Maryland, *id.* at 1787, Massachusetts, *id.* at 2020, Michigan, *id.* at 2314, Minnesota, *id.* at 3507, Mississippi, *id.* at 1787, Missouri, *id.* at 2324, Montana, *id.* at 3507, Nebraska, *id.* at 432, Nevada, *id.* at 1530, New Hampshire, *id.* at 2218, New Jersey, *id.* at 2264, New Mexico, *id.* at 3390, New York, *id.* at 1438, North Dakota, *id.* at 931, Ohio, *id.* at 1622, Oklahoma, *id.* at 1358, Oregon, *id.* at 1705, Pennsylvania, *id.* at 2733, South Dakota, *id.* at 3507, Tennessee, *id.* at 3508, Texas, *id.* at 2613, Utah, *id.* at 2311, Vermont, *id.* at 433, Virginia, *id.* at 429, Washington, *id.* at 724, 946, West Virginia, *id.* at 3389, Wisconsin, *id.* at 1151, Wyoming, *id.* at 1730.

177. Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 846–47 (1997); James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALA. L. REV. 783, 790 (2003); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1263–68 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 132–35 (2006).

178. Thomas Cooley's state constitutional law treatise—covering all existing states—was wildly popular through the late nineteenth century. Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1487 (1990). Property, too, has been the subject of many treatises seeking to bring coherence and synthesis. *See* Richard W. Effland, *In the Tradition Powell on Real Property*, 60 COLUM. L. REV. 161, 177 (1960). Treatises coexist with Restatements in property. The Restatement (Fourth) of Property will aim to restate the architecture of property, highlighting its systemic features to reveal complex interactions among doctrines and rights without flattening them. *See* Henry E. Smith, *Restating the Architecture of Property*, *in* 10 MODERN STUDIES IN PROPERTY LAW (Ben McFarlane & Sinéad Agnew eds. 2019).

179. *See* Baude, *supra* note 177, at 836–37.

law recognized by positive social practices that may vary by community and jurisdiction?[180] A full defense of either variation or homogenization in state constitutional law eventually has to engage these questions.

V. CONCLUSION

In providing this limited picture of the takings clauses, I have emphasized failures to innovate, brief flashes of divergence followed by homogenization, and state consensus presaging federal adoption. But in this story, there are causes for optimism if one is interested in state constitutional development—at least in the ivory tower, if not the courts. For a long time, takings scholarship has suffered from the same problem that constitutional scholarship suffers from more broadly: "'preoccupation with Supreme Court doctrine' has obscured important trends in . . . state forums."[181] Over the last few years, the tide has begun to turn. Several property scholars are excavating state-court and state-constitutional opinions for empirical, historical, and qualitative data on state takings law,[182] indirectly responding to Judge Sutton's call to law schools, deans, and students to engage more seriously with state constitutional doctrine.[183] Still, one of the questions raised by both this Essay and the stories in Judge Sutton's book is when and why variation occurs or flounders, questions that may return us to intractable problems about the nature of rights, law, and the state. Happily, answering even the hardest questions raised by Judge Sutton's book will require more attention to state constitutions and court decisions, a prescription for the future that many will agree is a good one.

180. *See* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 677–78 (1998) (containing an overview of the debate about natural law and positivism).

181. Brady, *supra* note 2, at 346 (quoting Krier & Sterk, *supra* note 87, at 38).

182. I would put much of my own scholarship in this category, and other examples include Dickinson, *supra* note 131; Krier & Sterk, *supra* note 87; Sterk, *supra* note 160.

183. SUTTON, *supra* note 1, at 194–97.