Taking Homes

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The home enjoys special constitutional protections across multiple amendments in the Bill of Rights, yet the Takings Clause remains an anomaly, offering no unique safeguards for residential property. Justice Clarence Thomas's dissent in Kelo v. City of New London *underscored this inconsistency, questioning why the Court grants heightened protection to the home in contexts like the Fourth Amendment but not under the Takings Clause, where homes can be seized with minimal constitutional scrutiny. Twenty years after* Kelo*, the doctrinal and statutory landscape may be poised to resolve this paradox.*

The backlash against Kelo *among state legislatures and courts represented a sharp rebuke of federal doctrine, overwhelmingly rejecting the Supreme Court's broad conception of public use and creating an unprecedented divergence between federal and state public-use doctrine. While* Kelo *maintained federal deference to legislative determinations of public use, states responded by enacting reforms that imposed stricter limitations on economic-development takings and narrowed their definitions of public use to better protect residential property. Two decades later, this state-level resistance provides a blueprint for strengthening home protections in takings jurisprudence.*

*Against this backdrop, this Article argues that the Supreme Court's history of takings federalization—borrowing and adopting state exactions doctrines to shape its federal exactions jurisprudence—offers a compelling interpretive model for reconsidering its public-use doctrine. Indeed, the post-*Kelo *consensus among states in narrowing public use could inform a more restrictive federal approach. By examining the overwhelming trend in state laws limiting public use, the Court could incorporate these developments into federal doctrine. Given that the protection of homes, like Ms. Kelo's pink house, was the driving force behind the backlash, the Court could embrace Justice Thomas's* Kelo *dissent by establishing heightened scrutiny or enhanced just compensation for home takings.*

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Finally, federalizing state public-use doctrine and creating special protections for homes would resolve the long-standing doctrinal inconsistency that places the Takings Clause at odds with other home-protective provisions in the Bill of Rights, such as the First, Second, Third, and Fourth Amendments. By aligning takings law with these other constitutional safeguards, the Court could restore coherence to its federal constitutional framework, ensuring that homes receive the same level of protection under the Takings Clause as they do in other constitutional contexts.

Introduction

The home enjoys special constitutional protections across multiple amendments in the Bill of Rights, yet the Takings Clause of the Fifth Amendment remains an anomaly, offering no unique safeguards for homes. In his dissent in *Kelo v. City of New London*, Justice Clarence Thomas underscored this inconsistency, questioning why the Supreme Court grants heightened protection to the home in contexts like the Fourth Amendment but not under the Takings Clause, where homes can be seized with minimal constitutional scrutiny.[1] Twenty years after *Kelo*, the doctrinal and statutory landscape may be ripe to resolve this doctrinal gap.

The post-*Kelo* backlash among state legislatures and courts provides a pathway for developing stronger home protections in takings jurisprudence. In response to *Kelo*, states overwhelmingly rejected broad eminent-domain powers, creating an unprecedented divergence between federal and state public-use doctrine. While *Kelo* maintained federal deference to legislative determinations of public use, states enacted reforms that imposed stricter limitations on economic-development takings and narrowed their definitions of public use to better protect residential property.

Against this backdrop, this Article argues that the Supreme Court should exercise takings federalization by borrowing from post-*Kelo* state-law trends and an emerging consensus of barring economic-development takings to shape and inform the Court's public-use doctrine. By incorporating the content of post-*Kelo* state-level protections, the Court could realign federal takings jurisprudence with evolving state norms that advocate for special protections for homeowners, whether through heightened scrutiny or enhanced just compensation.

1. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (Thomas, J., dissenting).

Finally, by adopting stronger home-centric protections drawn from state public-use reforms, courts could reconcile the Takings Clause with other provisions in the Bill of Rights that robustly safeguard the home. By doing so, the Court could restore coherence to its federal constitutional framework.

Part I lays the foundation for the central doctrinal inconsistency at the heart of takings law; that is, the home enjoys special constitutional status under multiple provisions of the Bill of Rights, but not under the Takings Clause. While the First, Second, Third, and Fourth Amendments recognize the home as a space that warrants heightened protection, the Court has failed to extend similar deference in the context of eminent domain. This Part interrogates why, despite a long history of jurisprudence emphasizing the sanctity of the home, takings doctrine remains indifferent to the home's unique constitutional significance. The analysis explores how the Court's takings jurisprudence treats homes as fungible assets, stripping them of the protections they receive in privacy and property contexts elsewhere in constitutional law. This asymmetry—where the home protects enjoying lewd material and bearing arms for self-defense or defense of the home, is protected from searches, forced quartering, and government intrusion but remains vulnerable to seizure for private economic development—constitutes a foundational puzzle that the Court has yet to resolve.

Part II examines the state-level backlash to *Kelo*, which catalyzed a doctrinal fracture between state and federal takings law. Following *Kelo*, in which the Court upheld the use of eminent domain for economic development, state legislatures overwhelmingly rejected the ruling, amending their constitutions and statutory frameworks to impose stricter limitations on economic-development takings. This Part details how more than forty states acted to narrow the definition of "public use," creating a sharp departure from the Supreme Court's deference to legislative determinations of public use. This divergence, unprecedented in modern takings jurisprudence, underscored the extent to which state governments have sought to reassert protections for homeowners that the federal doctrine has failed to recognize. By examining this shift, the Part highlights the broader implications of state-driven reform and the emerging national consensus that homes warrant greater safeguards under takings law.

Part III situates this state-led transformation within the broader practice of judicial federalization—that is, the Supreme Court's historical tendency to borrow from state constitutional doctrines to shape federal law. This Part explores the Court's exactions jurisprudence, where state takings doctrines played a critical role in shaping federal exactions standards in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.[2] Drawing from this precedent, the Part argues that the Court has a clear interpretive pathway to incorporate post-*Kelo* state protections into federal public-use doctrine. By tracing how the Court has previously relied on state legislative enactments and

2. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839-840 (1987); Dolan v. City of Tigard, 512 U.S. 374, 389-392 (1994).

state-court rulings to inform constitutional meaning, this Part makes the case that the overwhelming state-level rejection of *Kelo* provides a compelling basis for recalibrating the federal approach to home takings.

Finally, Part IV directly addresses the unresolved doctrinal gap that *Kelo* exposed, arguing that the Takings Clause could be aligned with the Court's broader jurisprudence on home protections. Given that state legislative reforms have largely been driven by a recognition of the home's unique constitutional status, the Court has an opportunity to remedy the inconsistency between takings law and the rest of the Bill of Rights. This Part builds on Justice Thomas's *Kelo* dissent, which criticized the Court for failing to extend home-centric protections to the Takings Clause and argues that the home should be treated as a distinct constitutional category in eminent-domain law. By borrowing from the state-led movement to safeguard homes from economic-development takings, the Court can restore doctrinal coherence and ensure that the home receives the same heightened protections under the Takings Clause that it already enjoys in other areas of constitutional law.

I. Takings Puzzle

A. Special Thread of Home Rights

The home holds a pervasive and enduring place in American constitutional law.[3] The Bill of Rights, in a peculiar fashion, has become the primary stronghold for safeguarding the "sanctity of the home."[4] This constitutional sanctuary presents a compelling textual and doctrinal enigma.[5] A discernible pattern emerges across the first five amendments, framing the home as a protected sphere for constitutional rights related to speech, obscenity, religion, firearms, quartering soldiers, searches, sex, and self-incrimination. Yet, this cohesive thread inexplicably unravels when it reaches takings, where neither the constitutional text nor judicial doctrine extends special protections to the home. This stark contrast gives rise to a deep and unresolved constitutional puzzle.[6] The Supreme Court, in its textual interpretation, finds justification for granting the home unique constitutional deference, and its doctrinal framework often adjusts to align with the "distinctive nature of the home."[7] However, this solicitude

3. Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1100 (2019) [hereinafter Dickinson, *The Puzzle of the Constitutional Home*]; *see also* Gerald S. Dickinson, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, 15 DUKE J. CONST. L. & PUB. POL'Y 292, 293 (2020).

4. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

5. *See* Dickinson, *The Puzzle of the Constitutional Home*, *supra* note 3, at 1100 (noting that "[t]his engagement has produced a stark dichotomy and a deep puzzle. In most contexts, the Court finds reason to grant special solicitude to a zone of constitutional protection emanating from the distinctive nature of the home. The Court has, in other words, extended itself to textually adhere or doctrinally shape its jurisprudence to protect the home, as opposed to other places and spaces. That solicitude is entirely absent when it comes to the Takings Clause.").

6. *Id*.

7. *Id*.

abruptly vanishes when the Court confronts the Takings Clause, declining—without clear justification—to extend its home-centered jurisprudence to takings law.

The Court's First Amendment free-speech jurisprudence reflects a strong commitment to protecting an individual's right to privacy within the home.[8] The doctrine affirms that the home's privacy protections are of the highest order."[9] The Court safeguards the possession and enjoyment of expressive materials, emphasizing that a central tenet of the First Amendment is that the State has no authority to dictate what a person, in the solitude of their home, may read or watch.[10] Expanding on these home protections, the Court has recognized that privacy, freedom of association, and broader free-speech principles emerge from its First Amendment jurisprudence.[11] Similarly, religion holds an exalted status in society, and the Court has affirmed the home as a uniquely protected space for religious practice, recognizing a constitutional right to private worship within one's home.[12]

Like the First Amendment, the neighboring Second Amendment embraces the fundamental principle of the home's sanctity.[13] Although the Amendment does not *explicitly* define a protected zone for gun possession and use within the home, the Court has elevated the protection of firearms in the "hearth and home" above other interests under the Second Amendment.[14]

The Third Amendment provides clear textual safeguards, prohibiting the quartering of soldiers in a home during peacetime without the owner's consent.[15] These textual protections against forced quartering are immediately followed by the Fourth Amendment's explicit protection against warrantless and unreasonable searches and seizures in "houses."[16] The Court has recognized the heightened significance of this protection, emphasizing that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[17]

The constitutional protection of the home extends to matters of sex and privacy as well. The Fourth Amendment's concept of privacy, embedded within the Court's search-and-seizure jurisprudence, serves as a textual foundation for sex protections within the home that fall outside the Bill of Rights. Privacy

8. Carey v. Brown, 447 U.S. 455, 471 (1980).

9. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting *Carey*, 447 U.S. at 471).

10. Stanley v. Georgia, 394 U.S. 557, 565 (1969) (emphasis added).

11. United States v. Orito, 413 U.S. 139, 142 (1973); Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973).

12. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021); Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 638 (2021) (explaining that the Court "recognized the right of people to worship privately in their home").

13. District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008).

14. *Id*. at 615-16, 635 (explaining "every man bearing his arms about him and keeping them in his house, his castle, for his own defense").

15. U.S. CONST. amend. III.

16. U.S. CONST. amend. IV.

17. Payton v. New York, 445 U.S. 573, 573 (1980).

principles within the Fourth Amendment shape the Fourteenth Amendment's due-process protections, safeguarding sex, family rights, and personal integrity.[18] This constitutional thread further connects the Fourth Amendment to the Fifth Amendment, as the two have been described as running "almost into each other," both shielding individuals from government intrusions on "the sanctity of a man's home and the privacies of life."[19] However, the thread abruptly stops there. Home protections vanish as soon as the analysis shifts from self-incrimination to takings.[20]

B. The Home-less Takings Clause

Despite the outlier status of takings, the Court's homebound protections within the Bill of Rights share significant commonalities. The Framers and subsequent Supreme Courts successfully harmonized a substantial portion of constitutional text and judicial doctrine—at least within the first five amendments—a feat deserving of scholarly recognition. The Court's takings jurisprudence, however, does not share the same distinction.

The Takings Clause allows the government to take "private property" as long as it provides compensation and the taking serves a public use.[21] Unlike its homebound counterparts, the Court's takings doctrine lacks any special interest in or unique protection for the home.[22] Why is this the case? Constitutional and property scholars often point to the inherent tension between privacy and property rights when examining this issue.[23] In the realm of property rights, the home is treated as a fungible asset that can be bought and sold on the market, whereas home protections in other areas of the Bill of Rights are not subject to market exchange. The home's alienability in the property context stands in contrast to the inalienability of privacy rights, which remain beyond the reach of commercial transactions.

For example, a person cannot sell or transfer their constitutional right to view and enjoy expressive materials in their home to a neighbor for market value. Similarly, an individual cannot sell their right to bear arms in the home to the government or a private buyer. This distinction highlights the longstanding explanation for the takings puzzle. Indeed, most home protections in the Bill of Rights stem from a zone of privacy rather than from property ownership.

This dichotomy alone does not fully explain why the Takings Clause fails to extend special protections to the home, however, because the threat of seizing a home not only threatens economic investment and financial stability but also

18. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

19. Boyd v. United States, 116 U.S. 616, 630 (1886).

20. *See* Dickinson, *The Puzzle of the Constitutional Home*, *supra* note 3, at 1101.

21. U.S. CONST. amend. V.

22. *See* Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) (stating the government may seize an individual's home under the Fifth Amendment, provided it offers just compensation).

23. *See* John Fee, *Eminent Domain and the Sanctity of Home,* 81 NOTRE DAME L. REV. 783, 788 (2006) ("Unlike other areas of law, eminent domain treats the home as indistinguishable from any other form of property.").

risks encroaching on privacy. A person has a greater expectation of privacy in their home than they do in commercial property. The home is a space for intimacy, family growth, and marriage. This is one of the strongest arguments for why taking homes deserves greater scrutiny than taking other forms of property. The absence of home-specific protections in the Takings Clause creates an asymmetry within the Bill of Rights, suggesting that the prevailing privacy-versus-property explanation does not tell the whole story. While takings law is inherently redistributive, this characteristic does not preclude the possibility of a distinct, home-specific right within the Bill of Rights.

The text and history of the Takings Clause also provide little guidance for scholars or jurists in determining whether a special protection for the home exists or should exist. James Madison inserted the clause into the draft Constitution, but his precise intent remains unclear to this day.[24] The historical record is sparse, offering little insight into what other Framers intended with the clause.[25] At the time of ratification, the clause received virtually no debate.[26] Some scholars argue that the Takings Clause was primarily designed to limit military seizures of personal and real property during wartime.[27]

Even though the Fifth Amendment does not explicitly include the words "home" or "house," as the Third and Fourth Amendments do, protections for the home could still be incorporated into the Court's takings doctrine. This approach would not be unprecedented. Similar interpretive methods have been used in the Court's First and Second Amendment jurisprudence, as well as in its interpretation of the Fifth Amendment's Self-Incrimination Clause. Justice Scalia, for example, applied conservative doctrinalism to establish the "hearth and home" protection in gun rights.[28] Similarly, in the Fourth Amendment case *Kyllo v. United States*, Justice Scalia emphasized the heightened constitutional concerns surrounding searches and seizures that target the home, distinguishing it from other spaces typically associated with privacy.[29] Yet, the Court's failure to extend similar protections in its takings jurisprudence suggests that something more is at play beyond mere textual inconsistency, doctrinal oversight, or the standard privacy-versus-property distinction.

The *Kelo* Court, however, appeared indifferent to affording homes the same level of constitutional protection against government expropriation as it does against warrantless searches or the forced quartering of soldiers in peacetime.

24. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1794 (2013) ("Madison's draft of the Fifth Amendment included the Takings Clause without discussion. A committee made minor revisions without explanation, and it passed both chambers with little recorded debate on its purpose).

25. *See* Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV., 112, 115-17, 131 (2012) (positing that the Framers intended for the Takings Clause, though lesser known, to afford the home greater protection than other forms of property).

26. *Id*. at 132.

27. *Id*. at 115-16.

28. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

29. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001).

For example, Justice Stevens upheld a local government's "economic development" policy in *Kelo*, emphasizing that the Court has consistently interpreted "public purpose" broadly and deferred to legislative judgments in this area.[30] As perhaps the Court's most controversial case concerning home rights, *Kelo* represented a missed opportunity to align the Takings Clause with the broader constitutional framework that safeguards the home. The case's narrative was quintessentially American and emotionally compelling. Ms. Kelo's modest pink house faced seizure through eminent domain to accommodate a large-scale economic-development project that ultimately never materialized.[31] However, Justice Stevens's opinion failed to recognize the home as deserving of heightened constitutional protections and made no reference to related constitutional provisions that have historically granted the home greater security.[32]

In his *Kelo* dissent, Justice Clarence Thomas criticized the majority's failure to extend similar protections to homes under the Takings Clause, highlighting the inconsistency of shielding homes in other constitutional contexts while leaving them vulnerable in property rights disputes.[33] Justice Thomas pointed out the inconsistency in the Court's reasoning, noting that while it has previously affirmed the sanctity of the home, the *Kelo* ruling left homes unprotected under the Takings Clause.[34] Perhaps most prescient is a passage from Thomas's dissent. He notes that "[t]he [majority] tells us that we are not to 'second-guess the [legislative] judgments,'" but the real issue is "whether the government may take the infinitely more intrusive step of tearing down petitioners' homes."[35] He continued, "We would not *defer to a legislature's determination* of the various circumstances that establish, for example, when a search of a home would be reasonable," because we have recognized the "overriding . . . sanctity of the home."[36]

Thomas's dissent alluded to a deeper unresolved issue. Why does the Court provide robust home protections in other constitutional doctrines but allows a significant gap in safeguarding homes from government takings?

Justice Thomas's dissent provides a useful transition to reconsidering the Court's public-use jurisprudence after twenty years, particularly regarding economic-development takings. Thomas highlighted that the Court does not typically defer to the government's judgment when it comes to searching and seizing a home without a warrant.[37] The Fourth Amendment explicitly safeguards against such government intrusions. In cases involving fundamental rights, the Court is often skeptical of deference to government determinations.[38]

30. Kelo v. City of New London, 545 U.S. 469, 480 (2005).
31. *See id*. at 473-75.
32. *Id*. at 472-90.
33. *Id*. at 505-17 (Thomas, J., dissenting).
34. *Id*. at 518.
35. *Id*.
36. *Id*. (emphasis added).
37. *See id*. at 517-18.
38. *Id*. at 518.

As Thomas explained, the Court does not allow law enforcement officials to unilaterally decide when to enter a home or seize property without a warrant. Why not apply the same interpretive creativity and doctrinal flexibility to takings as the Court does to search and seizure? The backlash following *Kelo* offers new insights and a possible foundation for carving out distinct protections for homes in the context of takings.

II. Takings Divergence

*A. Post-*Kelo *Centrifugal Shift*

Instances of outright state divergence from federal law rarely disrupt our collective understanding of federalism's power in American constitutional law. But *Kelo* stands as a significant exception, where long-standing conformity gave way to a property schism in constitutional law.[39] The backlash to *Kelo* triggered a centrifugal shift, marking a distinct moment in constitutional property. This shift created a fascinating disequilibrium in takings law. While regulatory-takings doctrine has remained largely unaffected by state-level resistance, public-use doctrine has become one of the most striking examples of state divergence from federal constitutional law.

In a narrow five-to-four decision, the Court in *Kelo* upheld economic-development takings as a valid exercise of public use.[40] Writing for the majority, Justice Stevens emphasized the Court's long-standing deference to legislative determinations in this area.[41] The decision reflected the Court's reluctance to intervene, reaffirming that legislative judgments on condemnation should be left to the political process. The majority took a cautious approach, reasoning that courts should avoid second-guessing local governments' assessments of economic-development plans.[42] Justice Stevens highlighted that public needs vary across different regions and that state legislatures and courts deserve substantial deference in defining those needs.[43] Given the historical trend of state courts aligning with federal public-use doctrine, the decision was unsurprising, with an expectation that states would continue following the federal framework as they had for decades before *Kelo*.

Contrary to expectations, state legislatures reacted strongly against *Kelo*, rejecting the notion that economic development qualified as a justifiable public use.[44] Justice Stevens, however, reminded states that they were not bound by the Court's ruling.[45] He emphasized that states remained free to amend their

39. Kelo v. City of New London, 545 U.S. 469 (2005).
40. *Id.* at 489-90.
41. *Id*. at 480.
42. *Id*. at 488.
43. *Id*. at 482.
44. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101-02 (2009).
45. *Kelo*, 545 U.S. at 489.

eminent-domain laws to provide stronger protections against takings. As an example, Stevens cited the Michigan Supreme Court's decision in *County of Wayne v. Hathcock*,[46] which had already invalidated economic-development takings. States took Stevens's remarks seriously, launching an "unprecedented" wave of legislative resistance.[47]

This backlash led to a historic movement aimed at curtailing economic-development takings at the state level. In the aftermath of *Kelo*, more than forty state legislatures amended their eminent-domain statutes to limit or ban the use of eminent domain for economic-development purposes.[48] Thirty states redefined the terms "public use" and "public purpose" to distance themselves from the broad justifications endorsed in *Kelo*.[49] Eleven states went even further, amending their state constitutions to impose stricter limitations on public-use takings than those set by the Supreme Court and the federal Constitution.[50]

The state-level resistance to *Kelo* extended beyond legislatures and into state courts, though to a lesser degree. In the three states that did not amend their constitutions or pass restrictive legislation, their highest courts nevertheless ruled in favor of stronger protections against takings for private use.[51] Seven other states, despite already enacting statutory amendments to their eminent-domain laws, saw their courts impose additional protections beyond the federal public-use doctrine.[52] The South Dakota Supreme Court went even further, outright rejecting *Kelo* and asserting that its state constitution provided stricter safeguards than the federal baseline.[53] The court held that "public use" requires direct use of condemned property by either the government or the general public, setting a higher standard than the federal approach.[54]

The Missouri Supreme Court determined that, under its post-*Kelo* statute, the use of eminent domain for economic-development purposes was not permissible.[55] In *City of Norwood v. Horney*,[56] the Ohio Supreme Court took a stance against *Kelo*, emphasizing that the dissenting opinions better aligned with the Ohio Constitution's Public Use Clause. The court explicitly stated that it was not obligated to adhere to the U.S. Supreme Court's interpretation of the federal Public Use Clause.[57]

The Pennsylvania Supreme Court, in *Reading Area Water Authority v. Schuylkill River Greenway Association*, focused on the statutory definition of public use, concluding that federal jurisprudence on the Public Use Clause was

46. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
47. *See* Somin, *supra* note 44, at 2103 (calling the backlash "massive and unprecedented").
48. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J.F. 82, 84 (2015).
49. *Id*. at 85 (citing states that redefined their statutory language).
50. *Id*. at 84 (citing states that amended their state constitutions).
51. *Id*.
52. *Id*.
53. *See* Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006).
54. *Id.* at 163.
55. State *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 481-82 (Mo. 2013).
56. City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).
57. *Id.* at 1136-37.

irrelevant to its ruling. The court underscored that, even if a condemnation met Fifth Amendment requirements, it still had to comply with state statutory limitations.[58] The Oklahoma Supreme Court invoked its own constitutional amendment to reject *Kelo*, warning that adopting its rationale would erase meaningful distinctions between public and private use, thereby undermining constitutional restrictions on eminent domain.[59] The post-*Kelo* landscape illustrates the resilience of federalism, as states continue to assert their authority in defining the limits of eminent domain within their jurisdictions.[60]

The post-*Kelo* shift in federalism marked a significant transformation in constitutional property law. While scholars continue to debate whether *Kelo* constituted a true "revolution," the decision undeniably disrupted the balance between federal and state approaches to takings doctrine.[61]

Historically, states had closely followed Supreme Court precedent in this area, as demonstrated by the aftermath of *Berman v. Parker*, where thirty-four state supreme courts adopted the Court's expansive definition of public use.[62] Based on this pattern of conformity, it was widely assumed that states would continue to adhere to the Supreme Court's framework, as they had in *Berman* and *Midkiff*. Contrary to expectations, states rejected the Court's broad interpretation in *Kelo*, signaling a stark departure from their traditional deference to federal public-use doctrine. Unlike the regulatory-takings doctrine, which remained largely intact, the public-use doctrine became a point of contention, with states actively resisting and redefining its scope in ways that deviated from Supreme Court precedent.

The post-*Kelo* state-level reforms did not entirely dismantle the public-use doctrine. Traditional takings for public infrastructure and services remain widely accepted across most states.[63] However, economic-development takings—the very category of public use at issue in *Kelo*—became a focal point of resistance, as many states moved to curtail or prohibit such uses of eminent domain. This marked a significant departure from historical patterns of federalism in eminent domain, where local governments had long relied on economic development as a justification for public-use takings. While state legislatures led the charge in rebuking *Kelo*, state courts also played a crucial role in rejecting the ruling's influence, signaling a broader departure from federal public-use jurisprudence. As a result, the Takings Clause's jurisprudential veins—from public-use doctrine

58. Reading Area Water Authority v. Schuylkill River Greenway Ass'n, 100 A.3d 572, 582 (Pa. 2014).

59. Bd. of County Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 652 (Okla. 2006).

60. Wesley W. Horton & Brendon P. Levesque, Kelo *is Not* Dred Scott, 48 CONN L. REV., 1405, 1420-24 (2016).

61. Bethany Berger, Kelo *and the Constitutional Revolution that Wasn't*, 48 CONN. L. REV. 1429, 1436 (2016).

62. Berman v. Parker, 348 U.S. 26, 32-33 (1954) (holding that "public use" under the Fifth Amendment is synonymous with "public purpose," encompassing broad public-welfare objectives, including aesthetic and redevelopment goals).

63. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORN. L. REV. 1, 45 (2006).

to regulatory-takings doctrine—has reflected a fractured legal landscape for twenty years.[64] Indeed, while regulatory-takings doctrine continues to be applied in line with federal precedent, the backlash against *Kelo* has created an imbalance in constitutional property law, dividing public-use doctrine along state and federal lines. Why did *Kelo* create such a schism between public-use and regulatory takings?

B. The Political Economy of Homes

The pressing question is why states decisively rejected the broad public-use doctrine articulated in *Kelo*, thus diverging from the federal floor and, in the process, creating stark contrast in how states continued to converge with the Supreme Court's regulatory takings jurisprudence, but diverged from the federal public use.[65] One possible explanation lies in political economy. That is, specifically, the nature of the property interest at stake and the public's perception of how well different forms of property ownership are protected play a significant role. In American legal culture, homeownership holds a uniquely elevated status, both socially and constitutionally. Unlike other property interests, the home is widely viewed as deserving of heightened legal safeguards. Federal and state constitutions, along with statutory frameworks, reinforce this principle by recognizing the home as a space distinct from other forms of property that are especially worthy of legal protection and preservation.[66]

D. Benjamin Barros observes that the home enjoys greater legal protection than other types of property, a distinction rooted in its deep personal and social significance.[67] Margaret Radin further explains that the home is not just property but an extension of personal identity, intertwined with family life and the broader fabric of society.[68] This elevated status is reflected in constitutional doctrine, where the home occupies a privileged position across multiple amendments. Courts have long recognized its unique role in safeguarding individual rights. The Supreme Court itself has repeatedly demonstrated a heightened concern for protecting the home, reinforcing its constitutional significance in various contexts, from privacy to property rights.[69] Given this longstanding legal tradition, it is unsurprising that *Kelo*, a ruling perceived as diminishing protections for homeowners, triggered a strong public reaction and a reevaluation of public-use doctrine at the state level.

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64. *See generally* Gerald S. Dickinson, *Federalism, Convergence and Divergence in Constitutional Property*, 73 U. MIA. L. REV. 139 (2018) (discussing the disequilibrium between state convergence in regulatory-takings doctrine and state divergence in public-use doctrine).

65. *Id*. at 145-46.

66. Fee, *supra* note 23, at 786-87.

67. *See generally* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (positing that the law's treatment of the home stems from evolving cultural recognition of its relation to personal identity, family, privacy, and belonging within a community).

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

69. *See* Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231 (2008).

The post-*Kelo* landscape of divergence and convergence hinges on whether the property owner contesting a regulation as a taking or condemnation is a homeowner or a developer.[70] Consider the precedents set in *Berman* and *Midkiff*. Neither the plaintiffs nor the specific takings in those cases were likely to trigger significant state-level backlash. Why? One might argue that these eminent-domain cases did not involve the involuntary seizure of a private homeowner's property.[71] In *Midkiff*, the state's use of eminent domain aimed to dismantle a land oligarchy, resulting in the transfer of rental properties from landlords rather than the forced removal of individual homeowners. *Berman*, on the other hand, concerned the use of eminent domain for urban renewal, and the plaintiff was a commercial-property owner whose department store was condemned and not a homeowner losing a primary residence. A central issue in *Berman* was whether commercial-property owners subject to condemnation could later repurchase the land and participate in redevelopment in accordance with the broader urban-renewal plan. In other words, the case primarily revolved around the taking of commercial property with the potential for subsequent private development, rather than the direct seizure of a single-family home. This is not to suggest that state courts never encountered public-use challenges involving non-homeowner plaintiffs.[72] However, the distinction between commercial redevelopment and the protection of individual homeowners' property rights remains a crucial factor in these cases, because homeowners are politically compelling parties.

Indeed, homeowners, like Ms. Kelo, are compelling parties because, compared to developers, they appear both relatable and in need.[73] As Jan Cohn observes, "[F]or the vast majority of Americans, house and home coexist; home flourishes most successfully in the privately owned, detached, single-family dwelling."[74] Bethany Berger similarly notes that the plaintiffs in *Kelo* shared characteristics that made them particularly compelling to both the media and the public, making their case resonate with a broad segment of Americans.[75] They were white homeowners living in single-family detached houses, embodying the image of suburban and rural voters.[76]

Homeowners also appear more in need of protection, financially, than developers do. Developers, unlike homeowners, have the ability to diversify their investments and often operate as repeat players across multiple jurisdictions.[77] For developers, the primary concern with overly burdensome regulations is their impact on land value, which can affect business operations and investments

70. Dickinson, *supra* note 64, at 188-90.

71. Barros, *supra* note 67, at 296.

72. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 443 (Cal. 1996).

73. Dickinson, *supra* note 64, at 193.

74. JAN COHN, THE PALACE OR THE POORHOUSE: THE AMERICAN HOME AS A CULTURAL SYMBOL 223 (1979).

75. Berger, *supra* note 61, at 1435.

76. *Id*.

77. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Taking*s, 58 WM. & MARY L. REV. 35, 75 (2016).

across a broad geographic area.[78] The extent to which a developer's diverse property holdings can absorb regulatory burdens determines whether such regulations meaningfully affect their overall financial position.[79] In contrast, homeowners face a concentrated risk tied to a single parcel of land, making them far more vulnerable to the consequences of regulatory restrictions. As James E. Krier and Stewart E. Sterk point out, this lack of diversification makes it more challenging for homeowners to mitigate financial risks.[80] Holistically, homeowners make more sympathetic litigants than developers do, and Krier and Sterk's research demonstrates that homeowners are significantly more likely than developers to succeed in state-level regulatory or implicit takings claims.[81]

Comparing the lack of energy around regulatory-takings reform to the backlash against *Kelo* presents an important question: at what point does a broad and emergent legal and policy consensus across the states become a rich source for interpreting the federal Constitution? Should state-court doctrines and state laws serve as interpretive sources for shaping and defining the scope of federal constitutional law?

III. Takings Federalization

Historically, the Supreme Court's federal takings jurisprudence has shaped how state courts interpret their own state-constitutional takings provisions. However, this relationship is not always one-directional; at times, state courts have influenced the Supreme Court's approach to takings law, a process known as "takings federalization."[82] This rare but significant aspect of judicial federalism occurs when the Supreme Court consults, adopts, and integrates well-established state-constitutional takings principles into its interpretation of the

78. *Id*. at 75-76.
79. *Id*.
80. *Id*. at 76.
81. *Id*.
82. *See generally* Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 679 (2023) (illuminating this phenomenon).

federal Takings Clause. Federalization occurs in two primary ways—judicial and legislative[83]—both of which are relevant to this discussion.[84]

The concept of judicial federalization describes instances where state courts take the lead in constitutional interpretation, influencing federal doctrine rather than simply following it. This phenomenon has been recognized in well-documented areas of federal constitutional law, including racially motivated peremptory challenges, the exclusionary rule, same-sex intimacy, same-sex marriage, and freedoms of speech and press.[85] Notably, many of these federal doctrines have state-level origins, demonstrating that constitutional innovation frequently starts at the state level before being adopted federally.[86] While this process does not always result in the wholesale federalization of a right or

83. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (borrowing state-court doctrines to craft the "actual malice" standard under the First Amendment); Mapp v. Ohio, 367 U.S. 643, 651 (1961) (adopting state-court rationale to nationalize the exclusionary rule); Batson v. Kentucky, 476 U.S. 79, 83-85 (1986) (crafting federal standards for peremptory challenges based on state-level doctrines); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) (relying on state exactions jurisprudence to develop federal standards); Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994) (consulting state-court decisions and doctrines to create the dual-rationality test); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (drawing on state-court rulings to expand substantive due process protections); Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (acknowledging state-court contributions in recognizing same-sex marriage rights); Moore v. Harper, 143 S. Ct. 2065, 2080-81 (2023) (relying on pre-Republic state-court rulings invalidating legislative enactments under state constitutions to conclude that the Elections Clause does not insulate state legislatures from judicial review). Many of these Justices have also relied heavily upon state legislation as a source for finding meaning in the federal Constitution. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313-17 (2002) (Stevens, J.) (relying on state legislative enactments prohibiting the death penalty for mentally disabled individuals to establish a national consensus under the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 567-69 (2005) (Kennedy, J.) (referencing state legislative bans on executing juveniles to support an Eighth Amendment prohibition); Graham v. Florida, 560 U.S. 48, 62-67 (2010) (Kennedy, J.) (using state laws to conclude life imprisonment without parole for juvenile non-homicide offenses violates the Eighth Amendment); Obergefell v. Hodges, 576 U.S. 644, 663-65 (2015) (Kennedy, J.) (drawing on state legislative and judicial recognition of same-sex marriage to inform substantive due process and equal protection analysis under the Fourteenth Amendment); Lawrence v. Texas, 539 U.S. 558, 571-73 (2003) (Kennedy, J.) (relying on state legislative repeals of anti-sodomy laws to reinforce evolving privacy protections under the Fourteenth Amendment); Burch v. Louisiana, 441 U.S. 130, 134-36 (1979) (Rehnquist, J., dissenting) (acknowledging state legislative practices regarding jury unanimity under the Sixth Amendment); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (White, J.) (incorporating the Sixth Amendment jury-trial guarantee to the states by examining state practices); United States v. Watson, 423 U.S. 411, 415-16 (1976) (White, J.) (citing state laws permitting warrantless felony arrests to inform Fourth Amendment reasonableness standards); Payton v. New York, 445 U.S. 573, 589-90 (1980) (Stevens, J.) (considering state legislative trends on warrantless home arrests in Fourth Amendment analysis). And one Justice, Antonin Scalia, once creatively used a variety of elements of bottom-up constitutionalism, such as state-court doctrines, laws, and constitutions to define federal constitutional rights. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (Scalia, J.) (analyzing "legal documents of the founding era, particularly individual-rights provisions of state constitutions," to determine the original understanding of the Second Amendment); *id*. at 592-95 (reviewing colonial and post-revolutionary state laws regulating militias and firearms to frame the scope of the Second Amendment); *id.* at 600-03 (examining state court decisions to support the interpretation of the right to bear arms as an individual right). *See also* Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICK. L. REV. 75, 77 n.1 (2023) (noting Scalia's use of state constitutions and state legal frameworks in crafting the Court's Second Amendment jurisprudence).

84. Gerald S. Dickinson, *Judicial Federalization Doctrine*, 75 BAYLOR L. REV. 85, 95 (2023).

85. *Id*. at 87.

86. *Id*. at 126.

protection, it reflects an ongoing dialogue between state and federal courts, reinforcing the dynamic and evolving nature of judicial federalism.[87]

Legislative federalization recognizes state legislatures and their laws as central to constitutional development, positioning state statutes as potential building blocks for federal constitutional interpretation. Each state-enacted law represents a policy response to evolving societal norms and values, offering a substantive legal framework that the Supreme Court may later draw upon to shape federal doctrine.[88] Under this model, state legislative enactments are not merely local regulations but integral components of state constitutional structures that can influence the Supreme Court's understanding of constitutional principles. State statutes serve as reflections of shifting norms and democratic experimentation, providing practical legal solutions that may eventually inform federal jurisprudence.[89] The reliance on state laws for constitutional interpretation underscores that states are not passive recipients of federal doctrine but active participants in shaping constitutional meaning—a process that may be understood as a form of constitutional codification.

A. Bottom-Up Exactions

A prominent example of federalization appears in the Supreme Court's bottom-up exactions jurisprudence, particularly in *Nollan v. California Coastal Commission*[90] and *Dolan v. City of Tigard*.[91] In these cases, the Court established a new standard for evaluating exactions by drawing upon well-established state doctrines. *Nollan* marked a significant departure from the Court's traditional reliance on federal takings precedent, as the Court unexpectedly consulted and incorporated state-court doctrines into its reasoning.

The case involved a property-owning couple who sought to replace a small beachfront bungalow with a larger house. The California Coastal Commission approved their permit on the condition that the couple grant a public easement allowing public access to the beachfront. The couple challenged this requirement, arguing that it amounted to an uncompensated taking of private property. The state, however, contended that the condition was a standard land-use regulation designed to serve public interests, including preserving scenic views, mitigating psychological barriers to beach access, and preventing congestion.

The Supreme Court rejected the state's argument, concluding that the permit condition lacked an essential nexus to the stated regulatory objectives.[92] The Court reasoned that while land-use restrictions may serve legitimate public interests, a requirement that effectively grants public access to private land must

87. *Id*. at 91.
88. *Id*.
89. Dickinson, *supra* note 83, at 93.
90. 483 U.S. 825 (1987).
91. 512 U.S. 374 (1994).
92. *Nollan*, 483 U.S. at 837.

be directly tied to those interests. Because the condition imposed on the Nollans did not serve the original purpose of the regulation, to preserve public views and reduce congestion, but instead functioned as a means for the state to acquire an easement without compensation, the Court deemed it an unconstitutional taking. This ruling reinforced the principle that government-imposed conditions on land use must bear a clear and direct relationship to the underlying regulatory objectives, a doctrine that was later expanded in *Dolan* and has since shaped modern takings jurisprudence.[93]

The *Nollan* opinion, authored by Justice Scalia, stands out as an anomaly within the Court's takings jurisprudence. Unlike previous eminent-domain and regulatory-takings decisions, *Nollan* lacks a thorough application of the Court's established regulatory-takings doctrine and contains little reliance on federal precedent.[94] Instead, the opinion heavily cites state-court rulings to justify its newly formulated essential-nexus standard.[95]

Justice Scalia explicitly acknowledged this departure, noting that "[o]ur conclusion on this point[,]" failure to satisfy an essential nexus, "is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts."[96] This statement is striking given the Court's historic dependence on federal jurisprudence in shaping regulatory-takings doctrine. While the Court had, on occasion, referenced state-court rulings in the late nineteenth and early twentieth centuries when adjudicating just-compensation and nuisance cases, it had never before derived a wholly new federal standard directly from state-court decisions. This method of doctrinal development suggests that the Court, rather than simply interpreting the Takings Clause through federal precedent, was actively borrowing from state judicial experiences to craft new federal constitutional standards.[97]

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93. *See id*. at 839.

94. *See id*. at 831-40 (citing four distinct Supreme Court cases and twenty-two distinct state-court cases in analyzing the federal exaction question).

95. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107-38 (1978) (engaging in lengthy and thorough discussion of justification and reasoning in the majority opinion); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421-42 (1982) (same); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006-32 (1992) (same); Kelo v. City of New London, 545 U.S. 469, 472-90 (2005) (same).

96. *Nollan*, 483 U.S. at 839 (citations omitted). Nollan is also unusually brief for a decision establishing an entirely new takings doctrine. Justice Scalia, in fact, made no effort to reconcile *Nollan* with the Court's decades of layered federal takings precedent.

97. Justice Scalia referenced the Supreme Court of Illinois decision in *Pioneer Trust & Savings Bank v. Mount Prospect* as a leading example of a state court establishing the most stringent version of the "essential nexus" test, known as the "specifically and uniquely attributable" test. 176 N.E.2d 799, 802 (Ill. 1961). This state-developed standard permitted an impact fee only if a local government provided evidence demonstrating that the fee was "directly proportional to the specifically created need." N. Ill. Home Builders Ass'n, Inc. v. Cnty. of DuPage, 649 N.E.2d 384, 389 (Ill. 1995) (quoting Dolan v. City of Tigard, 512 U.S. 374, 390 (1994)). Under this approach, an impact fee was upheld only if it required a developer to bear the costs of improvements necessitated by the developer's activity. *See id*. (citing Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 801-02 (Ill. 1961)). In effect, this standard provided stronger protections for developers and landowners while limiting the discretion of governments in imposing impact fees. *See* Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000). The Court found this case, along with numerous others, to be a compelling precedent for its reasoning in *Nollan*. Justice Scalia's reliance on the Supreme Court of Illinois also led

While *Nollan* may not be among Justice Scalia's most celebrated judicial opinions, it laid the groundwork for the Court's later decision in *Dolan v. City of Tigard* by incorporating state-court exaction doctrines into the federal constitutional framework. Chief Justice Rehnquist's opinion in *Dolan* built upon Scalia's foundation, addressing the analytical gaps left in *Nollan* and refining the federal exaction standard.

In *Dolan,* the Court ruled that a city's dedication requirement amounted to an unconstitutional taking, necessitating just compensation.[98] The case involved a city commission imposing conditions on a landowner's request to expand her business and pave her parking lot.[99] As a condition of approval, the landowner was required to dedicate portions of her property for a public greenway to mitigate flooding and for a pedestrian and bicycle pathway intended to reduce traffic congestion.[100]

From the outset, both the majority and dissent appeared to agree that incorporating state-court doctrines was appropriate for resolving the case. Writing for the majority, Chief Justice Rehnquist relied in part on *Nollan's* "essential nexus" test, concluding that the government had met this requirement, since its objectives—flood prevention and traffic reduction—were legitimate public purposes with a clear connection to the exaction.[101] Chief Justice Rehnquist reviewed the Court's earlier regulatory takings precedents, including *Penn Central* and *Agins*, acknowledging them as foundational to *Nollan*.[102] Yet, rather than relying primarily on federal precedent, Rehnquist turned to state supreme-court decisions to shape the federal exaction test.[103] Chief Justice Rehnquist justified this approach by noting that "state courts have been dealing with this question a good deal longer than we have," making their rulings valuable precedents.[104]

Chief Justice Rehnquist pointed out that in some states, courts accepted "very generalized statements as to the necessary connection between the required

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him to draw from other state courts that applied similarly strict nexus tests, including *Schwing v. City of Baton Rouge*, 249 So. 2d 304, 309-10 (La. 1971); *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182, 187-88 (Mont. 1964); *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981); and *Frank Ansuini, Inc. v. City of Cranston*, 264 A.2d 910, 914 (R.I. 1970). Additionally, Justice Scalia cited the Wisconsin Supreme Court's more moderated approach in *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wisc. 1965). *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987). This "rational nexus" test represented a middle ground between the reasonable-relationship test and the "specifically and uniquely attributable" test, offering a tempered level of scrutiny. John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale,* 52 CORNELL L.Q. 871, 917 (1967). At the time, the rational-nexus test was recognized as the most widely accepted standard and the test most frequently adopted by state courts. Dickinson, *supra* note 82, at 712-13 (noting that the "rational nexus" test was adopted by the majority of the state courts and that there was a trend in state courts of using the rational-nexus test).

98. *Dolan*, 512 U.S. at 395.
99. *Id*. at 379-80.
100. *Id*.
101. *Id*. at 387.
102. *Id*.
103. *See id*. at 388-91.
104. *Id*. at 389.

dedication and the proposed development."[105] California had been the leading state in adopting this more permissive approach, which granted local governments broad discretion to impose fees and exact concessions from developers for public benefit.[106] Chief Justice Rehnquist, however, rejected this lenient standard, arguing that it was "too lax to adequately" safeguard property rights under the Takings Clause.[107] He criticized the approach for granting governments "almost unfettered discretion" (to use the Ohio Supreme Court's words) and asserted that a higher level of judicial scrutiny was necessary to ensure constitutional protections.[108]

Chief Justice Rehnquist then examined state courts that imposed a "very exacting correspondence" requirement, commonly known as the "specific and uniquely attributable" test.[109] This was the most stringent standard, originating from the Supreme Court of Illinois—the same court Justice Scalia had cited in *Nollan* (but without conducting a thorough analysis of its implications).[110] While Justice Scalia referenced *Pioneer Trust & Savings Bank* as evidence of a state court embracing an exaction doctrine, Chief Justice Rehnquist gave little weight to the ruling or its stricter standard. He dismissed the need for such rigorous scrutiny at the federal level, reasoning that "[w]e do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved."[111] At the same time, he acknowledged that this demanding test had "now been adopted by a minority of other [state] courts."[112] Although the test provided the strongest protections for property owners, the Court viewed it as unduly restrictive, as it significantly curtailed the discretion of local governments to enact land-use regulations.

Chief Justice Rehnquist also recognized a third category of state courts that had adopted an "intermediate position," requiring the government to demonstrate a reasonable relationship between the imposed dedication requirement and the impact of the proposed development.[113] He cited multiple state-court rulings that applied this moderate approach, reinforcing the Court's rationale for crafting a federal standard that balanced property rights with government authority.[114] Notably, Chief Justice Rehnquist was now engaging in a substantive analysis of the same "intermediate position" cases that Justice Scalia had only briefly referenced in a string citation in *Nollan*.

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105. *Id*.

106. *See* Ayres v. City Council, 207 P.2d 1, 7-8 (Cal. 1949) (sustaining a city council's proposed subdivision map pursuant to its police powers).

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

108. Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000).

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

110. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) (citing Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

111. *See Dolan,* 512 U.S. at 389 n.7.

112. *Home Builders Ass'n of Dayton*, 729 N.E.2d at 35.

113. *Dolan*, 512 U.S. at 390.

114. *See id.* at 390-91 (citing cases from Nebraska, Wisconsin, Minnesota, and Texas that adopt a "reasonable relationship" test).

Dolan was not unanimous, however. A minority of justices disagreed with Chief Justice Rehnquist about which state exaction standards to adopt, how to formulate a federal standard from those doctrines, and whether the Court had correctly applied them in a federal context. Justice Stevens criticized the majority for misinterpreting and misapplying the state-court doctrines it relied upon in crafting the rough-proportionality standard.[115] He argued that the Court's chosen test was not a natural extension of those state-court decisions, stating that "not one of the state courts cited by the Court announces anything akin to a 'rough proportionality' requirement."[116] According to Justice Stevens, rather than supporting the *Dolan* ruling, the cited state-court cases either failed to provide adequate justification for it or outright contradicted its conclusions.[117] He also expressed concern that the state-court doctrines the Court invoked were grounded in state constitutional law rather than federal constitutional analysis, raising doubts about their applicability in defining a new federal takings standard.[118] As a result, Justice Stevens characterized the Court's reliance on state doctrines to create the second prong of the exaction test as "remarkably inventive."[119]

However, Justice Stevens was not opposed to the broader practice of takings federalization. He agreed that state-court decisions involving land-use regulations "provide useful guidance in a case of this kind."[120] He also observed that the majority had "candidly acknowledg[ed] the lack of federal precedent" in exactions rulemaking, and he found it "certainly appropriate . . . to find guidance in 12 'representative' state court decisions" accordingly, describing those rulings as "enlightening."[121] He noted that state exactions cases "permeate[] the Court's analysis of the appropriate test to apply in this case" and reinforced the Court's reaffirmation of *Nollan*'s reasonable-nexus requirement.[122] However, the extensive invocation of state-court doctrine prompted Justice Stevens to caution that "neither the [state] courts nor the litigants imagined they might be participating in the development of a new rule of federal law."[123] This critique was not about the act of drawing from state-court rulings but rather about the majority's failure to rigorously analyze and accurately interpret those precedents when crafting a new federal standard. By making this point, Justice Stevens demonstrated that he, too, had engaged in the practice of consulting state-court decisions in federal constitutional cases but had done so with greater precision and care. In *Dolan*, he simultaneously commended the majority for recognizing

115. *Id.* at 397 (Stevens, J., dissenting) ("The state cases the Court consults, however, either fail to support or decidedly undermine the Court's conclusions in key respects.").
116. *Id.* at 397-98.
117. *Id.* at 397.
118. *See id.* at 398.
119. *Id.* at 399.
120. *Id*. at 397.
121. *Id*. at 397, 400.
122. *Id*. at 399.
123. *Id*.

the value of state-court precedents while also critiquing their execution in applying those doctrines to federal takings law.[124]

B. A Federalization Framework

Three factors were key to the Court's decision to engage in takings federalization in *Nollan* and *Dolan*, despite choosing not to do so in other areas of its takings jurisprudence.[125] First, there was a void in federal precedent; the Court itself hinted at a lack of relevant federal precedent in the *Nollan* and *Dolan* cases.[126] Second, the legal principles governing exactions in state courts had undergone significant development over a thirty-year span before the issue came before the Court.[127] Third, the parties involved in the litigation and other interested groups effectively argued for the value of using state-court doctrines to inform federal takings law.[128]

These "ripeness conditions" can serve as a guide for legal experts to predict and understand when and how the Court might exercise its power to federalize takings law going forward.[129]

1. In Absentia

During the oral arguments for *Dolan*, the landowner's attorney noted that a growing number of state courts were recognizing the "rough proportionality" test that the Court was considering.[130] Justice O'Connor followed up by asking for the test to be articulated in simple terms.[131] The attorney conceded the difficulty of this request, explaining that the state courts themselves had not used simple language.[132] In a memorable moment, Justice O'Connor responded, "[b]ut if you can't do it, how do you expect us to?"[133] This exchange offers insight into the Court's process of federalizing state exaction doctrines.[134] Justice O'Connor's comment implied that defining these exaction standards was a challenge for the Court, just as it was for the attorneys and the state courts.[135] This difficulty provides a starting point for discussing how the lack of federal precedent might have prompted the Court to turn to state-level doctrines.[136]

124. *See id*.
125. Gerald S. Dickinson, *Takings Doctrinalization*, 81 WASH. & LEE L. REV. 2095, 2149 (2025).
126. *Id*. 2149-50.
127. *Id*.
128. *Id*.
129. *Id*.
130. *Id.* at 2150 (citing Transcript of Oral Argument at 14, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518)).
131. *Id* (citing Transcript of Oral Argument at 15, *Dolan*, 512 U.S. 374 (No. 93-518)).
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

The departure from federal doctrinalism in *Nollan* and *Dolan* might be best understood as the Court grappling with new constitutional questions without a clear roadmap.[137] According to Justices Rehnquist and Scalia, there was a notable gap in federal precedent.[138] The Court typically relies on its own precedent or that of lower federal courts when dealing with complex federal constitutional issues.[139] In theory, the Court could have developed a federal exactions doctrine from its existing body of regulatory takings tests and principles.[140] As Justice Stevens noted, the majority incorrectly assumed that state courts were the only available source for answering the complex question of exactions, overlooking the readily available *Penn Central* test.[141] At first glance, it seems as though the Justices had persuaded themselves that state exactions cases represented the only appropriate options for a new federal constitutional rule.[142]

But applying the Court's regulatory-takings doctrine, where few, if any, prior cases were directly applicable to the exactions issue, might have "needlessly complicate[d] an already complex area of law[.]"[143] The exactions inquiry appears to offer the Court a more "prescribed, focused logic" compared to the less defined formulation of *Penn Central*.[144] Justices Scalia and Rehnquist essentially admitted that it was simpler and more efficient to acknowledge that the state courts had largely gotten the doctrine right and to follow their lead, rather than creating a new path based on the Court's own muddled regulatory-takings precedent.[145] Additionally, forcing a "round peg in the square hole" might have been a reputational risk.[146] Overall, the Supreme Court's regulatory-takings jurisprudence provided them little precedent applicable to *Nollan* and *Dolan*.

Furthermore, there was no guidance from lower federal courts, as both *Nollan* and *Dolan* came to the Supreme Court from state supreme courts, without prior consideration by federal district or appellate courts.[147] Recognizing this

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137. *Id.*

138. *Id* (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839-40 (1987) (invoking twenty-two state-court cases to vindicate the Court's decision that the conditional grant of a permit was not an appropriate exercise of the land-use power); Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994) (analyzing tests used by state supreme courts in determining the constitutionality of the relationship between exactions imposed by municipalities and the proposed use thereof and adopting one of the state-created doctrines)).

139. *Id.* at 2152.

140. *Id.*

141. *Id.* at 2153 (citing *Dolan*, 512 U.S. at 400-01 (Stevens, J. dissenting) (criticizing the Court's reliance on state courts' jurisprudence at the expense of established Supreme Court precedent)).

142. *Id.* (citing Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequents of Clarity*, 92 CALIF. L. REV. 609, 629 n.91 (2004)).

143. *Id.* (citing Dickinson, *supra* note 64, at 199).

144. *See id* (citing Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 629 (2004)).

145. *Id.* at 2153-54 (citing *Dolan*, 512 U.S. at 389 ("Since state courts have been dealing withthis question a good deal longer than we have, we turn to representative decisions made by them.")).

146. *Id.* at 2153.

147. *Id.* at 2151 (citing Nollan v. Cal Coastal Comm'n, 479 U.S. 913, 913 (1986) (noting probable jurisdiction and thus accepting the case from the Court of Appeal of California); Dolan v. City of Tigard, 510 U.S. 989, 989 (1993) (mem.) (granting certiorari)).

lack of precedent, Chief Justice Rehnquist suggested that since "state courts have been dealing with th[e] question a good deal longer than we have," it was logical to "turn to representative decisions made by them."[148]

In his dissent, Justice Stevens agreed with the Chief Justice, pointing out that the majority had "candidly acknowledg[ed] the lack of federal precedent" and that state rulings supported the reaffirmation of the reasonable-nexus requirement from *Nollan*.[149] There seems to be little question that the Court felt it had a limited selection of federal case law to rely on. And, absent federal case law, the Court thought that the experiences of state courts facing similar controversies were a valuable guide for federal constitutional questions.[150]

2. Maturation

By the time of *Nollan* and *Dolan*, state-developed exaction doctrines had become well established over a thirty-year period across numerous states, so there was a substantial body of state doctrine concerning the legality of development or impact fees.[151] Chief Justice Rehnquist observed that the reasonable-relationship standard, which was adopted by most state courts, was more aligned with the "federal constitutional norm" than the two other tests used by a minority of states.[152] Although the Court did not federalize a national consensus, the extensive body of state law on exactions, along with the clear majority of states adopting the "reasonable relationship" standard, gave the Court confidence in the value of these state doctrines.[153]

State courts started to address exactions challenges in the 1960s.[154] An exaction "test created by one state court [would find] admirers among its sister states," spreading across the country over several decades.[155] Indeed, the accumulation of rulings within and across states demonstrated how state courts navigated the complexities of exactions through a process of trial and error.[156] The fact that the states had split into three different analytical approaches further supports the conclusion that the doctrine had reached a significant level of maturity.[157]

The maturity of the state doctrine was a critical factor in the Court's decision to draw from the states' experiences.[158] If the state courts had been in

148. *Id* (citing *Dolan*, 512 U.S. at 389).

149. *Id.* at 2153 (citing *Dolan*, 512 U.S. at 397 (Stevens, J. dissenting)).

150. *See id.*

151. *Id.* at 2154.

152. *Id* (citing *Dolan*, 512 U.S. at 391).

153. *Id.*

154. *Id* (citing Dickinson, *supra* note 84, at 108-09 (describing the chronology of state courts' exaction doctrines)).

155. *Id.* at 2154-55 (citing Dickinson, *supra* note 82, at 709).

156. *Id* at 2155-56.

157. State courts were not just borrowing from one another but also competing and developing different versions of exaction doctrines after comparing various approaches. Such an evolution requires considerable time and litigation, leading to a rich body of state-court rulings on the matter. *Id.*

158. *Id.*

the early stages of developing their exactions doctrines, the Court might have been more hesitant to federalize them.[159] But by the time the issue reached the Supreme Court, numerous state supreme courts had already addressed the question of exactions.[160] The "bottom-up" evolution of state exactions precedent over three decades ultimately became the main source for a new branch of federal takings jurisprudence.[161]

In fact, the Court may also have strategically waited for a dominant majority position to emerge among the state courts before exercising takings federalization when it was satisfied with a national trend.[162] In any case, the Court's choice to draw from state doctrines at such a late stage in their evolution indicates that doctrinal maturity is a key, if not decisive, factor in whether, when, and how the Court chooses to exercise takings federalization.[163]

3. Adequacy of Advocacy

One important takeaway from the *Nollan* and *Dolan* rulings, beyond their deviation from federal doctrine, is the information presented to the Court through litigant and amici briefs in both cases.[164] The arguments made to the Justices offer a valuable explanation for why the Court chose state sources over federal ones.[165] Typically, there are four main sources of information for the Court before a final opinion is published. Those include lower-court rulings, litigant briefs, amici curiae briefs, and oral arguments.[166] Studies indicate that the Court often incorporates arguments from both litigants and, increasingly, from amici briefs into the final opinion.[167] Even the "content of the Court's opinions" and the analytical techniques used can be influenced by these briefs.[168] Although not every brief will influence the final outcome of the case, even when the Court merely "uses the same language found in an amicus brief, that amicus brief has

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* In regulatory-takings cases where the Court established *new* analytical tests and legal principles—such as in *Pennsylvania Coal*, *Penn Central*, *Loretto*, and *Lucas*—state-court doctrines had not yet matured or even contemplated the very doctrines the Court was creating. Litigants and amici had no basis to suggest the federalization of state-court doctrine due to the absence of relevant state doctrine. The doctrinal development at both the Court and state levels was so limited that borrowing from the states would have been pointless. In *Lucas*, for example, the Court explicitly built upon its categorical takings rules from *Loretto*, establishing that the government must provide just compensation when a regulation deprives a landowner of all economically viable use of their property. The existing regulatory-takings doctrines were updated to create a new standard. At that time, state courts were not in a position to have experimented with such categorical rulemaking. *Id.* at 2166.

164. *Id.* at 2156.

165. *Id.*

166. *See id.*; Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 918-19 (2015).

167. *See* Dickinson*, supra* note 125, at 2156; Collins, Jr., Corley & Hamner, *supra* note 166, at 919.

168. *See* Dickinson*, supra* note 125, at 2156; Collins, Jr., Corley & Hamner, *supra* note 166, at 919.

affected the substance of the opinion, contributing to the development of federal law."[169]

The National Association of Home Builders is a prominent advocacy group for private property rights that often participates in state and federal court cases to advance its public-policy goals.[170] The National Association of Home Builders submitted a brief in *Nollan* where it outlined how different states had handled exaction doctrines under their own constitutional doctrines and laws. It is in this brief that the concept of "takings federalization" begins to take shape, with a request from an amicus for the Court to consult state experiences and, if convinced, to borrow or adopt state-court doctrine as a primary source for shaping federal takings jurisprudence.

The amici pointed out that the "[j]udicial reaction to such exactions has not been uniform" and had "produced varying responses from state courts."[171] They also noted that among the "several variants of the [exactions] test to determine whether an exaction is Constitutional," "most state courts occup[ied]" the "middle ground" approach.[172] This "middle ground" standard allowed exactions if there was a "rational relationship between the use proposed by the property owner and creation of the need for the exaction."[173] The amici also described the two extremes, such as California, where "virtually anything goes," and other states where "courts . . . have compared similar exactions to criminal acts."[174]

Moreover, the National Association of Home Builders' brief in *Nollan* argued that the government's imposition of an exaction was not a simple land-use regulation but a confiscation of private property.[175] The state doctrines presented in the brief were exclusively from cases where state action was viewed less as regulation and more as an uncompensated taking of property rights.[176] Thus, the three different tests followed by various states, as presented in the brief, highlighted not only the more lenient government-friendly test but also the stricter test that had the backing of a majority of states.[177]

Nollan and *Dolan* each take distinct approaches, but the two cases both clearly exemplify unique features that precipitated federalization: underdeveloped or nonexistent federal doctrine; layered and well-developed state doctrine; and, persuasive advocacy championing the latter as a solution to

169. *See* Dickinson, *supra* note 125, at 2157; Collins, Jr., Corley & Hamner, *supra* note 166, at 920. The amicus brief from the National Association of Home Builders in *Nollan* seems to have had a notable impact on Justice Scalia and his final majority opinion that federalized state exactions. This brief also appears to have had an indirect influence on Chief Justice Rehnquist's majority opinion in *Dolan* through its effect on the *Nollan* opinion. The brief starts by directly urging the Court to consider the exaction standards developed and used by state courts. This was a fresh idea that had not been put forward by the litigants or in any previous Court precedent. *See* Dickinson, *supra* note 125, at 2157-58.

170. *See* Dickinson, *supra* note 125, at 2160.

171. *Id.* at 2156.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 2160.

176. *Id.*

177. *Id.*

the former. These conditions are not a dispositive checklist where the failure of one condition fails the entire inquiry. But they are guideposts. The overwhelming strength in one or two conditions can more than compensate for weakness in another, revealing a different, but equally valid, path toward takings federalization. When some mix of the three are present in force, federalization may be appropriate.

4. Federalizing State Public-Use Statutes

Could the content of post-*Kelo* takings laws—designed to protect homeowners like Ms. Kelo from eminent domain by providing greater safeguards against economic-development takings—help shape the Supreme Court's understanding of federal public-use doctrine twenty years after *Kelo*? If the Supreme Court is prepared to revisit *Kelo*, would it be prudent to consider these very same post-*Kelo* state laws, draw upon Justice Thomas's *Kelo* dissent, and acknowledge the Court's history of takings federalization in exactions to establish special protections for home takings? Could the widespread enactment of post-*Kelo* backlash laws, which reflect an emerging state-level consensus, suggest a broader national shift in societal norms regarding economic-development takings as threats to homes and residential spaces? Perhaps.

While a rigid application of the ripeness framework might suggest the post-*Kelo* landscape is not yet fertile ground for federalization, the framework does not require a fixed, mechanical approach (as noted above). The post-*Kelo* backlash presents just such a scenario, where the sheer force of legislative maturity and the compelling narrative of national consensus may be enough to overcome the high barrier of entrenched federal precedent.

First, consider the scope and maturity of states' disapproval of *Kelo*. The post-*Kelo* landscape is marked by an emergent consensus that economic-development takings—particularly those targeting homes—must be curtailed. That consensus could justify a corresponding shift in the Court's takings jurisprudence.

Granted, the post-*Kelo* consensus has not been—nor is it expected to become—absolutely uniform in content or substance. But state courts' exactions doctrines were hardly uniform before *Nollan* and *Dolan* either. By the time the Court issued those rulings, nearly all states had adopted some version of an exactions doctrine, though the consensus was divided across three distinct frameworks, each available for the Court's consideration. The key point for the post-*Kelo* landscape is similar: states collectively moved toward a general consensus that treating economic-development takings as public uses was too expansive. The particular ways states narrowed their eminent-domain laws varied, but all fit within the broader trend of restricting eminent-domain powers.[178] If the Supreme Court is to revisit *Kelo*, it must not only recognize that

178. A select group of states took a categorical approach by outright banning the use of eminent domain for private economic development. These jurisdictions treated *Kelo* as a fundamental misreading

the vast majority of state laws have empirically moved away from a broad conception of economic-development takings, but also acknowledge the content of those laws and how they have provided greater protections for homes.

As Ilya Somin has shown, a majority of states have acted to narrow the definition of public use, largely in response to homeowner demands for stronger protections.[179] *Kelo* would have a roadmap already in place, including a set of state constitutional amendments, statutory enactments, and referenda that reflect a clear trend against economic-development takings. It would not be the first time the Court has relied on the substance of state laws and an emerging numerical consensus among the states to determine evolving social, legal, or

of public use, rejecting the notion that government could forcibly transfer property from one private owner to another for economic-revitalization purposes. Florida and New Mexico imposed some of the strongest protections by prohibiting both economic-development takings and blight condemnations—effectively closing off any path for municipalities to seize private homes under the justifications used in *Kelo*. Somin, *supra* note 44, at 2120. North Dakota and Nevada went even further, amending their state constitutions to categorically bar the transfer of property to private entities, ensuring that legislative attempts to dilute these protections would be structurally foreclosed. *Id*. These states understood that the *Kelo* backlash was not about eminent domain in the abstract, but rather about the prospect of local governments targeting residential property simply because another private party wanted it and could generate more tax revenue from it. A second category of states appeared to enact strong protections but, in practice, allowed economic-development takings to persist under the guise of blight condemnations. This approach was less of a rejection of *Kelo* than a rhetorical shift—takings for economic development continued, but through statutory definitions that gave municipalities broad discretion to label properties as "blighted." Ohio and Texas are prime examples of this dynamic. While both states ostensibly limited economic-development takings, they failed to tighten their definitions of blight, allowing cities to continue exercising eminent domain so long as they first designated an area as "blighted." *Id*. at 2125. Under these laws, a home need not be abandoned, structurally unsafe, or uninhabitable to be condemned. Rather, a home could be taken merely because it did not conform to aesthetic or economic-development goals. Similarly, Wisconsin restricted takings for single-family residences but left multi-family dwellings and commercial properties vulnerable to blight-based condemnations, perpetuating the same economic-development schemes that *Kelo* had legitimized. *Id*. at 2130. These states reflect an incomplete response to *Kelo*. While acknowledging public opposition to broad takings, they did not go so far as to carve out categorical protections for homes. Instead, their laws left open a path for local governments to continue seizing residential property through a flexible and expansive definition of blight that renders many protections illusory. The final category of post-*Kelo* reforms consists of states that responded to the public backlash in name only, enacting procedural barriers or minor restrictions that did little to actually constrain eminent-domain powers. Maryland, for instance, required that any property taken under eminent domain must be developed within four years, a procedural requirement that did nothing to prevent private-to-private takings. *Id*. at 2135. Local governments could simply reauthorize takings indefinitely, ensuring that property remained vulnerable despite the appearance of reform. Similarly, Delaware's law did not ban economic-development takings at all but merely imposed a six-month public-notice requirement, functionally leaving *Kelo*'s logic untouched. *Id*. at 2136. And then there is California, a jurisdiction that passed five separate eminent-domain reform bills post-*Kelo*, none of which actually prevented economic-development takings. *Id*. at 2140. Instead, these laws imposed minor procedural burdens, requiring local governments to conduct impact studies or hold additional hearings before taking private property. These procedural hurdles, however, did not alter the underlying authority to take homes for economic-development purposes, leaving California property owners in much the same position they were in before *Kelo*. The *Kelo* backlash made clear that the American public does not view homes as interchangeable market commodities, and many state-level legal responses reflect that reality. But the variation in those responses—some banning economic-development takings outright, others leaving gaping loopholes, and some enacting mere procedural formalities—suggests that the judiciary must step in to establish a uniform baseline of protection.

179. *Id*. at 2138.

constitutional norms, thereby interpreting federal constitutional provisions in light of state legislation.[180]

Just as legislative federalization has influenced other areas of constitutional law, the evolving state eminent-domain laws that provide stronger property protections could guide the Supreme Court in redefining federal public-use doctrine. These state-level reforms suggest that homes should be recognized as a distinct category of property deserving heightened protection from government seizures.

The nature of the forum debate between states is also, in a meaningful sense, mature. In the pre-*Dolan* era, *judicial* maturity was defined by a slow, competitive flow of judicial tests across state courts. The post-*Kelo* response, however, offers a different, arguably more potent, form of *statutory* maturity. In the two decades since *Kelo*, state legislatures have engaged in a nationwide dialogue on the meaning of "public use," resulting in a rich and varied statutory record. While this landscape is not composed of three clean, well-developed, and competing judicial doctrines across dozens of states, as was the case with exactions, it reveals a far more democratic and definitive form of a horizontal flow of state-law change that has the potential to percolate vertically to the Supreme Court's attention if *Kelo* were revisited. The state legislatures, as opposed to state courts, have, in effect, run the experiment. The Court would not be choosing between the nuanced reasonings of state high courts. It would instead be responding to the settled legislative will of the nation. This wave of statutory reform, which has matured well beyond the Supreme Court's public-use doctrine, persuasively argues that the public-use question is ripe for revisiting.

The advocacy condition also weighs heavily in this context. Litigants urging the Court to revisit *Kelo* would not be operating in a theoretical vacuum. Armed with two decades of tangible evidence from a national referendum expressed through these state statutes (and a few constitutional amendments), litigants' advocacy could be clear and persuasive. There is arguably a legitimacy deficit in the Court's existing public-use precedent, only made visible by advocates' success at the state level. Limiting economic-development takings would not necessarily be a radical judicial innovation, but rather judicial recognition of this deficit. Drawing on this history, skilled advocates could encourage the Court to align federal Takings Clause doctrine with the national consensus already forged in the laboratories of state legislatures.

Perhaps, then, the ripeness framework reveals not one, but two paths to federalization. The first, traced by *Nollan* and *Dolan*, is activated by a doctrinal vacuum, so the Court borrows from mature state judicial doctrines to fill a void in federal law. The second, presented by the post-*Kelo* landscape, is activated by a crisis of legitimacy in existing federal precedent. Here, the Court is not tasked with filling a void but rather with correcting a perceived error. In this second

180. Dickinson, *supra* note 83, at 78 n.3, 102-03 (explaining how the Supreme Court has used state laws and consensus trends to interpret federal constitutional provisions).

path, the overwhelming maturity of a national legislative consensus that was brought to the Court's attention through persuasive advocacy provides the necessary justification and political cover to revisit and reform its own doctrine.

If the Court were to integrate this state-level consensus into federal doctrine, it would not be engaging in judicial innovation. Instead, it would be aligning the Takings Clause with the way state legislatures and the public have already reinterpreted public use post-*Kelo*. The Court has repeatedly relied on the substance and content of state laws, as well as the degree of consensus among states, to identify shifts in social, legal, and constitutional norms and to assess whether a federal constitutional shift is warranted. There is good reason for the Court to follow this logic in the takings context and bring its takings jurisprudence in line with its other home-protective doctrines under the Bill of Rights.

IV. Taking Homes

The *Kelo* decision struck at the heart of the sanctity of the home, a fundamental constitutional expectation. Unlike commercial properties or vacant land, the home carries an elevated legal and cultural significance, one that has long received heightened protection under multiple provisions of the Bill of Rights. Yet, as *Kelo* made clear, this special constitutional status has failed to extend meaningfully to the Takings Clause. This doctrinal incoherence explains why the ruling provoked an unprecedented political backlash.

Somin argues that the sheer intensity of the *Kelo* response was rooted in the fact that homeowners, a politically dominant demographic, understood the ruling as a direct threat to the stability of homeownership. As he explains, "homeowners, a group that includes a majority of the electorate, were directly affected by the Court's ruling."[181] This was not, however, merely a reaction to property loss in the abstract, but also a response to the specific and intimate nature of the property at issue. He explains that "[p]eople tend to view their homes as more than just financial assets—they represent personal and family security, emotional attachment, and long-term investment."[182] The notion that the state could forcibly transfer ownership of one's home to a private developer in the name of speculative economic gain was, in Somin's words, "especially jarring to the public."[183]

This response was more than just emotional. It appeared to reflect an ingrained constitutional intuition. The home is not just another form of property, but a space that the First, Second, Third, Fourth, and Fifth Amendments have repeatedly insulated from excessive government intrusion. Yet, as *Kelo* illustrated, the Takings Clause remains the exception. That contradiction is precisely why homeowners, unlike other property owners, were uniquely

181. Somin, *supra* note 44, at 2109.
182. *Id*. at 2110.
183. *Id*.

positioned to mobilize against the ruling. The backlash was a demand for coherence. It was a demand that courts recognize, as state legislatures have increasingly done, that the home requires a distinct legal status in the realm of eminent domain.

Despite the overwhelming political response to *Kelo*, judicial doctrine has yet to integrate the home's heightened constitutional status into the Court's takings jurisprudence. Somin critiques the assumption that legislative reforms alone are sufficient to safeguard residential property, noting that "the argument that the backlash to *Kelo* demonstrates that legislative initiatives can protect property owners and that judicial intervention may be unnecessary is flawed."[184] Many state-level reforms (though some symbolically potent) have failed to impose meaningful constraints on eminent domain for private development. As a result, "many state laws passed in response are ineffective, leaving residential property still vulnerable in many jurisdictions."[185]

This legislative landscape suggests that judicial intervention remains necessary. If "a majority of states have acted to shield homes from *Kelo*-type takings," then the Court should recognize this as a constitutional development that reflects an evolving, narrower conception of "public use," one that requires "greater judicial protections for homes."[186] The backlash to *Kelo* was not simply about eminent-domain abuse in the abstract but about a fundamental recognition that the home occupies a privileged constitutional space. The Court's reluctance to acknowledge this reality leaves a glaring asymmetry in constitutional doctrine across the Bill of Rights. Just as it has in other areas of constitutional law, where the home has been elevated as a distinct legal category, the Court must extend this reasoning to takings. Failing to do so would leave the *Kelo* backlash only half-complete, with its legal implications unrealized.

The Supreme Court's exactions jurisprudence provides a clear doctrinal blueprint for how the Court could incorporate post-*Kelo* state reforms into a more protective federal public-use doctrine. Just as the Court borrowed heavily from state-court precedents to construct a federal exactions framework in *Nollan* and *Dolan*, it could federalize the emerging state consensus on economic-development takings. The key insight from exactions cases is that the Court has not hesitated to draw from state-level constitutional experimentation to shape federal constitutional baselines. This judicial practice now provides a compelling template for reconsidering *Kelo*. Just as the Court federalized state-exactions jurisprudence rather than inventing doctrine anew, it could import post-*Kelo* state public-use restrictions into its federal public-use jurisprudence.

The doctrinal rationale is relatively straightforward. In both exactions and public-use jurisprudence, state courts and legislatures have moved ahead of the federal judiciary, developing stricter property-rights protections than those currently recognized under the federal Takings Clause. In the wake of *Kelo*, more

184. *Id*. at 2103.
185. *Id*. at 2120.
186. *Id*. at 2138.

than forty states imposed heightened restrictions on eminent domain for economic-development takings, either through constitutional amendments, statutory reform, or judicial decisions. Many of these reforms were explicitly crafted to protect residential property—precisely the type of property that triggered the *Kelo* backlash in the first place. This movement presents a ripe opportunity for judicial federalization; the Supreme Court, in revisiting *Kelo*, could borrow from this state-led doctrinal shift, recognizing that the public-use concept has already narrowed through democratic processes at the state level.

Moreover, the Court's reliance on state consensus is not merely theoretical. It is a well-established mode of constitutional interpretation. In cases ranging from *Payton v. New York* to *Tennessee v. Garner*, the Court has repeatedly explored how state legal trends can inform federal constitutional meaning.[187] This interpretive practice is particularly relevant in the takings context, where the Court has historically treated state laws as bellwethers for constitutional development. As Justice Stevens acknowledged in *Kelo*, states remain free to provide greater protections than the federal baseline. Of course, that very freedom has created a divergence in takings doctrine. The Court now faces a critical choice as to whether to allow state-federal gaps to persist, or whether to harmonize federal takings jurisprudence with the dominant state-level approach. The logic and history of judicial and legislative federalization suggests the latter.

The home, as the constitutional outlier in takings law, presents a strong case for federal intervention. State legislatures have already responded to the lived constitutional reality that homes deserve special treatment in eminent domain. The Court, if it is to maintain doctrinal consistency, could take the next logical step, which would involve recognizing that, just as it borrowed from state doctrines to refine exactions law, it must now borrow from state public-use doctrines to ensure that the home receives the same elevated protection under the Takings Clause that it enjoys under the First, Second, Third, and Fourth Amendments. The Court has previously relied on state-legislative and state-judicial trends to inform federal constitutional meaning in other contexts; there is no principled reason why it should not do so here.

The *Kelo* decision did not just provoke a political backlash, it also ignited a jurisprudential debate over the status of the home in constitutional law. Akhil Reed Amar has argued that *Kelo* "provoked a firestorm of protest from grassroots activists and property rights advocates across America" precisely because it implicated something beyond economic theory.[188] It struck at the very core of what Americans understand as fundamental to their lived experience—the sanctity of the home.[189] As Amar explains, "your house is your home—the place, perhaps, where you grew up, where your children were born or your parents died,

187. *See* Payton v. New York, 445 U.S. 573, 598-600 (1980) (finding a "majority of the States" that had taken a position permitted warrantless home arrests, but noting a declining trend among states); Tennessee v. Garner, 471 U.S. 1, 15-16 (1985) ("In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions.").

188. Akhil Reed Amar, *America's Living Constitution*, 120 YALE L.J. 1734, 1777 (2011).

189. *Id*. at 1776.

where you have loved and been loved."[190] The real issue in *Kelo* was not simply a definitional inquiry into "public use" but rather a failure to recognize the unique constitutional and emotional status of the home.

This argument reinforces what Somin has demonstrated through state legislative responses, that the *Kelo* backlash was overwhelmingly focused on protecting residential property. Legislators, responding to public outrage, enacted reforms aimed at restricting economic-development takings primarily because homeowners, as constituents, demanded greater safeguards for their homes. This "special respect" for homeownership, Amar suggests, ought to be reflected in the legal structure of takings jurisprudence.[191]

Amar proposes that one way to incorporate home-centric protections into the Takings Clause is to "find a happy-medium doctrine amidst the dizzying array of available takings doctrines" that would provide "greater than fair market value in compensation for the taking" of a home.[192] This aligns with Somin's observation that the states, in responding to *Kelo*, have already begun recognizing the home as a distinct category, shielding it from takings that might be permissible for other forms of property. The critical point is that courts must take into account the accumulated expectations and values that shape how constitutional protections are understood in practice.[193] As Amar argues, *Kelo* showed that "how homeowners deserve to be treated under both the written and the unwritten Constitution" is the real issue in takings law.[194] If "a majority of states have acted to shield homes from *Kelo*-type takings," then the Supreme Court, in revisiting the doctrine, should heed this emergent consensus and constitutionalize what state law has already recognized.[195]

Justice Thomas's *Kelo* dissent provides the doctrinal clarity and historical grounding that the Court should adopt in revisiting its public-use jurisprudence. Thomas warned that the majority's broad interpretation of public use was not only inconsistent with the text and original meaning of the Fifth Amendment but also functioned as a mechanism of government overreach that disproportionately harmed politically disempowered communities.[196] His dissent did not simply challenge the majority's reading of *Kelo*. He called for a fundamental reconsideration of how the Court treats takings of homes, emphasizing that the Founders understood property rights as central to individual liberty and that the Takings Clause should be interpreted accordingly. His concerns have been vindicated by the overwhelming state-level rejection of *Kelo* and by the

190. *Id*.

191. *Id*.

192. *Id*.

193. Amar emphasizes that "it matters little whether judges enforce the idea that homes are special as a particular subdoctrine under the law of Fifth Amendment just compensation; or instead use the Fourth Amendment to craft special rules when the government tries to 'seize' a 'house.'" *Id.* at 1777. The critical point is that courts must take into account the accumulated expectations and values that shape how constitutional protections are understood in practice. *Id.*

194. *Id*.

195. Somin, *supra* note 44, at 2120.

196. *Kelo*, 545 U.S. at 518-521 (Thomas, J., dissenting).

continued recognition, across constitutional doctrine, that the home is not just another form of property but a distinct constitutional category deserving heightened protection.

The Court now has a compelling doctrinal roadmap to correct their error. It can federalize the emerging state consensus, align with Amar's insight into the special status of the home, and ensure that the Takings Clause receives the same home-specific protections embedded throughout constitutional law.

By adopting Justice Thomas's call for a special home protection under the Public Use Clause, the Court would not only reinforce a historically faithful reading of the Takings Clause, but it would also restore coherence and integrity to the constitutional home. Just as state courts and legislatures have moved to restrict economic-development takings, the Supreme Court could follow, ensuring that homes are not treated as mere commodities in the marketplace of redevelopment, but as constitutional spaces deserving the same heightened protection they receive elsewhere in American law.

Conclusion

The Takings Clause remains an outlier in constitutional doctrine. Across multiple amendments, the home has been recognized as a space warranting special protection. From the Fourth Amendment's safeguard against warrantless searches to the Third Amendment's ban on quartering soldiers, the constitutional protection of the home has remained a largely isolated doctrine, confined to scattered pockets of jurisprudence. Yet, when it comes to eminent domain, the home is treated as indistinguishable from other forms of property, vulnerable to seizure under deferential public-use jurisprudence. *Kelo* crystallized this doctrinal inconsistency, permitting the forced displacement of homeowners under the guise of economic development while reinforcing the absence of a home-centric principle in takings law. The backlash that followed, both legislative and judicial, underscores a growing recognition that takings doctrine must account for the unique constitutional status of the home.

This Article has argued that the Supreme Court's history of borrowing from state constitutional doctrines to inform federal takings jurisprudence offers a compelling model for realigning public-use doctrine. The post-*Kelo* divergence between federal and state law provides an opportunity to federalize emerging protections for homeowners, just as the Court has previously incorporated state-level developments in exactions jurisprudence. More than forty states have acted to narrow the scope of economic-development takings, signaling a shift toward heightened safeguards for residential property. By acknowledging this movement, the Court can resolve the long-standing asymmetry that places the Takings Clause at odds with other constitutional provisions safeguarding the home.

Twenty years after *Kelo*, the moment is ripe for doctrinal recalibration. Justice Thomas's dissent in *Kelo* warned of the risks posed by an unchecked public-use doctrine that subordinates individual property rights to legislative

discretion.[197] His concerns have been vindicated by the overwhelming state-led rejection of broad takings authority, reflecting a national consensus that the home occupies a distinct constitutional space. If the Court is to bring coherence to its takings jurisprudence, it must recognize what state legislatures and courts have already embraced. Indeed, the home is not merely a parcel of land but is a constitutional sanctuary that warrants greater protection under the Takings Clause.

197. *Id*. at 517-523.