

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2021

### Takings Localism

Nestor M. Davidson

*Fordham University School of Law*, [ndavidson@law.fordham.edu](mailto:ndavidson@law.fordham.edu)

Timothy M. Mulvaney

*Texas A&M University School of Law*, [tmulvaney@law.tamu.edu](mailto:tmulvaney@law.tamu.edu)

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Law Commons](#)

---

#### Recommended Citation

Nestor M. Davidson and Timothy M. Mulvaney, *Takings Localism*, 121 Colum. L. Rev. 215 (2021)

Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/1132](https://ir.lawnet.fordham.edu/faculty_scholarship/1132)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## ARTICLES

### TAKINGS LOCALISM

*Nestor M. Davidson\* & Timothy M. Mulvaney\*\**

*Conflicts over “sanctuary” cities, minimum wage laws, and gender-neutral bathrooms have brought the problematic landscape of contemporary state preemption of local governance to national attention. This Article contends that more covert, although equally robust, state interference can be found in property, with significant consequences for our understanding of takings law.*

*Takings jurisprudence looks to the states to mediate most tensions between individual property rights and community needs, as the takings federalism literature recognizes. Takings challenges, however, often involve local governments. If the doctrine privileges the democratic process to resolve most takings claims, then, that critical process is a largely local one.*

*Despite the centrality of local democracy to takings, state legislatures have restricted local authority on property issues in a range of ways. States have expanded compensatory liability for owners facing local regulations, imposed procedural constraints on local authority, and limited the exercise of foundational local powers. Seen in its entirety, this state intervention—like contemporary “new preemption”—is acontextual and unduly rigid, cutting at the heart of the devolutionary principles underlying takings jurisprudence.*

*This unbalanced state role requires a recalibration of decisionmaking power between state and local government to foster intersystemic dialogue and reflection. States certainly play a crucial role in defining and protecting property interests, but they must justify choices to constrain local discretion when state and local values conflict. The extant state statutory*

---

\* Albert A. Walsh Chair in Real Estate, Land Use and Property Law, Fordham Law School.

\*\* Professor of Law and Associate Dean for Faculty Research, Texas A&M School of Law.

The authors benefitted from the opportunity to present this project at Boston University School of Law, Cornell Law School, Syracuse University College of Law, and the University of Virginia School of Law. For their particularly helpful feedback, the authors thank John Echeverria, Lee Fennell, Vanessa Casado Pérez, Christopher Serkin, Joseph Singer, Kenneth Stahl, and Laura Underkuffler. The authors also thank Shivangi Bhatia, Anna Gregg, Charlie Metzger, Ryan Moore, Munis Safajou, and Cole F. Watson for their research assistance.

*regime dispenses with this justificatory task via a formalistic disregard for the contextualization that legitimates vertical allocations of authority. A corrective to decades of imbalance in state ordering of local authority would thus properly recognize “takings localism.”*

INTRODUCTION .....	217
I. FEDERALISM AND LOCAL GOVERNANCE IN TAKINGS.....	222
A. Understanding Takings Federalism .....	223
B. Unpacking the States: Local Governments in Constitutional Property .....	231
II. THE STATE–LOCAL DYNAMIC IN TAKINGS LAW .....	234
A. Liability Expansions .....	236
1. Compensation Remedies .....	236
2. Limitations on Takings Defenses .....	242
B. Procedural Impositions.....	244
C. Limitations on Specific Local-Government Powers.....	246
1. Limitations on Eminent Domain Authority.....	246
2. Anti-Lot-Merger Laws.....	248
3. Development Moratoria Preemption .....	249
4. Impact-Fee Limitations .....	250
5. Preemption of Tenant Protections and Other Local Housing Policies .....	251
6. Precluding Environmental Protection .....	253
7. Limiting Land-Use Variances .....	254
D. Property Owner Empowerments.....	255
1. Historic Preservation.....	255
2. Permitting Delays .....	256
3. Mandatory Permit Approvals.....	257
III. TAKINGS LOCALISM .....	259
A. The Disequilibrium of the New Preemption .....	260
B. Recalibrating State–Local Relations in Takings.....	265
C. Localism and Takings Theory .....	272
CONCLUSION .....	276

## INTRODUCTION

Takings jurisprudence defines when just compensation to those impacted by changes in property law is constitutionally required.<sup>1</sup> The case law, by and large, leaves many challenging questions of the balance between individual property rights and community imperatives to be resolved through the democratic process within the states. This doctrinal reality has generated a growing debate on takings federalism. Some scholars decry the lack of national uniformity and the seeming absence of robust protection for property that this devolution entails.<sup>2</sup> Others, by contrast, underscore the value of evaluating property transitions with greater regard for the states' traditional centrality in defining property interests.<sup>3</sup>

This debate obscures the fact that the conflicts that give rise to takings claims far more often than not are local in nature.<sup>4</sup> Indeed, many iconic takings cases involve local governments.<sup>5</sup> This is true in discerning the boundaries of public use for eminent domain,<sup>6</sup> in evaluating the

---

1. The Takings Clause of the United States Constitution states: “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

2. See, e.g., Michael M. Berger, *What’s Federalism Got to Do with Regulatory Takings?*, 8 *Brigham-Kanner Prop. Rts. Conf. J.* 9, 9–14 (2019) [hereinafter Berger, *What’s Federalism*] (arguing for a “system of uniformly applied standards” to ensure a “federal baseline of constitutional protection” from state and local regulations restricting the uses of property); Ilya Somin, *Federalism and Property Rights*, 2011 *U. Chi. Legal Forum* 53, 71–76 [hereinafter Somin, *Federalism and Property Rights*] (arguing that “rational political ignorance and irrationality” influence local land-use policy by reducing the quality of government decisionmaking and the ability to monitor abuses).

3. See, e.g., Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 205–06 (2004) [hereinafter Sterk, *Federalist Dimension*] (positing that the Supreme Court need not use its takings jurisprudence to articulate a comprehensive theory of regulatory power because any constitutional takings standard must incorporate the background principles of each individual state’s property laws).

4. See *infra* section I.B.

5. Notable takings cases have certainly involved the states. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 709–11 (2010) (Florida beach restoration program); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 533 (2005) (Hawaii commercial rent control); *Palazzolo v. Rhode Island*, 533 U.S. 606, 614–15 (2001) (Rhode Island Coastal Resources Management Council decision); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007–09 (1992) (South Carolina Coastal Council decision); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 404–05 (1922) (Pennsylvania statute). For additional cases, see *infra* note 69. The federal government generates its share of cases that shape takings doctrine as well. See, e.g., *Horne v. Dep’t of Agric.*, 569 U.S. 513, 516–19 (2013) (USDA raisin program); *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 26–28 (2012) (federal flood control); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3–7 (1984) (condemnation for a national preserve); *Armstrong v. United States*, 364 U.S. 40, 41 (1960) (federal contracting). But in the sweep of takings jurisprudence, local governments have consistently been front and center. See *infra* section I.B.

6. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 472–75 (2005) (eminent domain for local economic development); *Berman v. Parker*, 348 U.S. 26, 28–30 (1954) (eminent domain for urban renewal).

constitutional limits of exactions,<sup>7</sup> and across the heartland of regulatory takings.<sup>8</sup> And data on takings cases in the lower courts underscore the centrality of local governments to takings jurisprudence.<sup>9</sup>

Although local democracy stands at the center of takings jurisprudence, state legislatures have played a remarkably active role in structuring local power over property. This state legislative oversight has come in a variety of forms. Some state statutes make it easier for owners to obtain compensation when they face local regulations, by lowering the liability threshold below what case law sets or by limiting governmental defenses in takings cases.<sup>10</sup> Other state statutes impose significant procedural burdens on local governments, such as takings impact assessment requirements and individualized negotiation mandates, designed to discourage the adoption of local regulations.<sup>11</sup> Still other statutes constrain outright specific local-government powers in the realms of eminent domain, tenant protections, environmental preservation, and beyond.<sup>12</sup> A fourth category of statutes empowers owners to resist the exercise of local government authority in areas such as historic preservation and land-use permitting.<sup>13</sup>

Assessments of property rights statutes have long been a staple of the literature.<sup>14</sup> Scholars, however, have not framed the full range and depth

---

7. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 377–80 (1994) (local government flood prevention and transportation schemes). The term “exactions” describes “certain conditions that are attached to land-use permits issued at the government’s discretion” that “ostensibly oblige property owners to internalize the costs of the expected infrastructural, environmental, and social harms resulting from development.” Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 *Harv. Env’t L. Rev.* 137, 137–38 (2016).

8. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–38 (1978) (setting the modern framework for regulatory takings in a case challenging New York City’s historic preservation law). And, of course, the leading case on defining the relevant parcel for regulatory takings is a local government case. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939–40 (2017) (county-level lot-merger rules).

9. See generally James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 *Wm. & Mary L. Rev.* 35 (2016) (analyzing all lower court takings decisions between 1978 and 2012 and finding that the overwhelming majority involved local governments). For additional detail, see *infra* note 108.

10. See *infra* section II.A.

11. See *infra* section II.B.

12. See *infra* section II.C.

13. See *infra* section II.D.

14. On compensation statutes, see, e.g., Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *Ecology L.Q.* 187, 212–20 (1997) (examining Texas and Florida compensation statutes); John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories*, 28 *Stan. Env’t L.J.* 439, 447–99 (2009) (discussing Florida and Oregon property rights legislation); Robert H. Freilich & RoxAnne Doyle, *Takings Legislation: Misguided and Dangerous*, 46 *Land Use L. & Zoning Dig.* 3, 3–4 (1994) (discussing opposition to takings legislation, including criticism of its potential fiscal impact and bureaucratic costs); Nancie G. Marzulla, *State Private Property Rights Initiatives as a*

of this state ordering of local authority in core areas of takings jurisprudence as a fundamental question of state–local relations.<sup>15</sup> Understanding property rights statutes as state preemption highlights the connection between this state legislation and the rise of a broad and contentious contemporary wave of state intervention that is similarly sweeping.<sup>16</sup>

---

Response to “Environmental Takings”, 46 S.C. L. Rev. 613, 635–38 (1995) (discussing how compensation bills are a form of property rights protection); Glenn P. Sugameli, Takings Bills Threaten Private Property, People, and the Environment, 8 Fordham Env’t L.J. 521, 567–87 (1997) (arguing that compensation bills would harm property rights by undermining “environmental, conservation and other laws that prevent harms to . . . private property, health, and natural resources”). On eminent domain reform, see, e.g., James W. Ely, Jr., Post-*Kelo* Reform: Is the Glass Half Full or Half Empty?, 17 Sup. Ct. Econ. Rev. 127, 133–48 (2009) (reviewing states’ legislative and judicial efforts to reform eminent domain); Harvey M. Jacobs & Ellen M. Bassett, All Sound, No Fury? The Impacts of State-Based *Kelo* Laws, 63 Plan. & Env’t L. 3, 6–8 (2011) (outlining the impact of eminent domain reform legislation on land-use planning); Marc Mihaly & Turner Smith, *Kelo*’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later, 38 Ecology L.Q. 703, 726–27 (2011) (summarizing general trends in legislation relating to eminent domain); Andrew P. Morriss, Symbol or Substance? An Empirical Assessment of State Responses to *Kelo*, 17 Sup. Ct. Econ. Rev. 237, 270–76 (2009) (examining various reasons why states adopted eminent domain reform legislation through regression analysis); Ilya Somin, The Limits of Backlash: Assessing the Political Response to *Kelo*, 93 Minn. L. Rev. 2100, 2114 (2009) [hereinafter Somin, Political Response to *Kelo*] (challenging the claim that the state legislation enacted to limit the power of eminent domain in *Kelo*’s immediate wake largely serves the same end as a judicial bar on the use of eminent domain for economic development purposes).

15. Some scholars, to be sure, have fruitfully differentiated between states and local governments in takings law. See, e.g., Carol M. Rose, What Federalism Tells Us About Takings Jurisprudence, 54 UCLA L. Rev. 1681, 1693–701 (2007) [Rose, What Federalism Tells Us] (criticizing takings doctrine for failing to account for the distinct competencies of the various levels of government); Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. Rev. 1624, 1680–85 (2006) [hereinafter Serkin, Big Differences] (proposing a reduction in takings compensation awards leveled against local governments to account for their general risk aversion on fiscal issues); Christopher Serkin, Local Property Law: Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883, 905–08 (2007) [hereinafter Serkin, Local Property] (proposing that local governments generally should be allowed to determine the level of property protection they want to afford within their boundaries); see also William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies 4–5 (2005) [hereinafter Fischel, Homevoter Hypothesis] (contending that, given the incentives that arise from the concentration of investments in their homes, homeowners have more influence on the efficiency of local governments than they do on that of state or federal governments); William A. Fischel, Regulatory Takings: Law, Economics, and Politics 328–29 (1995) (arguing that local governments are more responsive to fiscal pressures than higher levels of government, and therefore, efficiency is best served by subjecting local governments to a more stringent level of takings scrutiny than their state and federal counterparts). This literature, however, has not focused on the broad ways in which property rights statutes have reordered the vertical allocation of authority within the states.

16. The literature on takings federalism attends as well to the horizontal distribution of decisionmaking power within the judiciary. Indeed, discerning which court system should resolve takings cases—a question that implicates the relative competency and theoretical

Over the past decade, state preemption of local authority has morphed from its traditional focus on justifiably advancing state regulatory standards and policing significant interlocal conflicts as specific contexts dictate, to the alarm of many state and local government legal scholars.<sup>17</sup> Today, states often do little to justify preemption that has become increasingly expansive, targeted, polarized, and even punitive. Examples of what Professor Richard Briffault has labeled the “new preemption”<sup>18</sup> range across almost every area of local authority, from employee protections to public health to housing to civil rights.<sup>19</sup> This has amounted to a fundamental reordering of the state–local legal relationship, generating calls for reform to protect against instances where states are unjustifiably undermining local democracy.<sup>20</sup>

The new preemption and burgeoning responses to concerns with unjustified state interference are instructive for evaluating state constraints

---

comparable costs and benefits of state or federal venues for the resolution of constitutional–property questions, as well as the relationship between courts and states—has long been the primary focus of the discourse. See, e.g., David A. Dana, Not Just a Procedural Case: The Substantive Implications of *Knick* for State Property Law and Federal Takings Doctrine, 47 Fordham Urb. L.J. 591, 593 (2020) [hereinafter Dana, Implications of *Knick*] (observing that the Supreme Court’s recent overturning of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), may be an “impediment to the productive adaptation of state property law to . . . climate change”); Daniel L. Siegel, Why We Will Probably Never See a Judicial Takings Doctrine, 35 Vt. L. Rev. 459, 459–62, 465–67 (2010) (arguing that the Supreme Court is unlikely to create a judicial takings doctrine because doing so would ignore state sovereignty and disregard common law). This vein of the literature, again, does not focus on the vertical distribution of decisionmaking power over takings within the states.

17. See, e.g., Richard Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 1999–2008, 2017–25 (2018) [hereinafter Briffault, Challenge of New Preemption] (analyzing the spread of a new, more punitive form of state preemption of local government action and legal doctrines available to challenge it); Nestor M. Davidson, The Dilemma of Localism in an Era of Polarization, 128 Yale L.J. 954, 984–1000 (2019) [hereinafter Davidson, Dilemma of Localism] (advocating, in the pursuit of equity, for a greater focus on the normative dimensions of localism); Erin Adele Scharff, Hyper Preemption: A Reordering of the State–Local Relationship?, 106 Geo. L.J. 1469, 1504–07 (2018) (arguing that “hyper preemption” statutes undermine local government action more than traditional preemption statutes); Richard C. Schragger, The Attack on American Cities, 96 Tex. L. Rev. 1163, 1184–88 (2018) [hereinafter Schragger, The Attack on American Cities] (asserting that current state–city conflicts represent a larger trend of state aggrandizement and hostility toward local power).

18. Briffault, Challenge of New Preemption, *supra* note 17, at 1997 (defining new preemption as “sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems”).

19. See generally Richard Briffault, Nestor M. Davidson & Laurie Reynolds, *The New Preemption Reader: Legislation, Cases, and Commentary on the Leading Challenge in Today’s State and Local Government Law* (2019) (collecting statutes, cases, and commentary on the new preemption).

20. See *infra* section III.A.

on local authority in the areas of property law most germane to takings.<sup>21</sup> Takings jurisprudence guides changes in property law in ways that maintain property's character as a healthy, fair, and just democratic institution. The formalist rigidity and undue uniformity imposed by state preemption make it difficult for takings law to serve this vital role. The current allocation of authority within the states, in short, fails to honor the deference and respect for local democracy so evident within the core of takings jurisprudence.<sup>22</sup>

In the face of this imbalance, this Article proposes a context-sensitive framework for rebalancing the vertical distribution of decisionmaking power within the states. Local governments are where the costs and benefits of property regulation are felt most immediately, making the local democratic process particularly apt for evaluating tradeoffs at the heart of takings law; moreover, local governments are well suited to respond to local preferences and innovate in the face of changing conditions.<sup>23</sup> At the same time, local governments can be parochial and exclusionary, and the immobility of property creates special vulnerabilities for owners in the local political economy. State interventions more directly targeted at those specific pathologies, however, may be preferable to approaches that broadly undermine important aspects of local democracy.<sup>24</sup>

Highlighting these and related characteristics of local governments is not to advocate, in some dispositive and general fashion, the preeminence of local decisionmaking over the states on the myriad property issues that animate takings law. Rather, these characteristics demonstrate the value of a more contextualized analysis that the rigid takings-related state statutes largely preclude.

This Article proceeds as follows. Part I explains the dynamics of federalism at the heart of contemporary takings jurisprudence and the underappreciated centrality of local governance within those dynamics. Part II turns to cataloguing the many ways that state legislatures have structured local authority in constitutional property—a comprehensive analysis of property rights legislation as state preemption absent in the current literature. Finally, Part III links this state ordering of local authority to the rise of new preemption and normative concerns the phenomenon has

---

21. This Article focuses on the Takings Clause, but it bears acknowledging that constitutional property also involves claims arising under the Due Process Clause, the Equal Protection Clause, and other federal and state constitutional provisions.

22. Takings is not the only mechanism within property law that strikes a balance between individual rights and community needs, of course. It is, however, a particularly salient and critical proving ground for that balance, with influence in property discourse that merits sustained focus.

23. See *infra* section III.B.

24. See Davidson, *Dilemma of Localism*, *supra* note 17, at 976–78 (reviewing normative and pragmatic critiques of local authority); see also David Schleicher, *Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century”* by the National League of Cities, 81 *Ohio St. L.J.* 883, 903–05 (2020) (critiquing a recent reform proposal for enhancing local authority).



engendered in the discourse on state and local government law. This Article accordingly concludes with a call for a recalibration that would give greater recognition—again, within the wide margins set by the jurisprudence—to the important role that local governance plays in takings law. This “takings localism” has the potential to deepen our understanding of the intersection between local authority and the construction of constitutional property at a moment when the most fundamental questions about that intersection are increasingly fraught.

### I. FEDERALISM AND LOCAL GOVERNANCE IN TAKINGS

The protections afforded by the Takings Clause are inextricably bound up with the fact that states in our legal system define the boundaries of many important property interests. While other federal constitutional rights, such as those protected by the Contracts Clause, interact with state-grounded aspects of common law doctrine, the definitional power of the states in the realm of property creates a particularly sharp dilemma: If states can define property, what baseline should courts use to determine whether there has been a change in property law requiring compensation?<sup>25</sup>

This state role risks undermining takings protections by ceding definitional authority to the states—what Justice Kennedy once described as placing a “Hobbesian stick into the Lockean bundle.”<sup>26</sup> Despite that risk, the Supreme Court has repeatedly reaffirmed state authority in takings, reflecting the highly contextual nature of the balance between individual rights and community imperatives in constitutional property. Thus, although demarcating some broad outer constitutional boundaries, the Court has seemed generally content to respond to Justice Holmes’s Zen-koan-like query—when does a regulation go “too far?”<sup>27</sup>—with a

---

25. As a doctrinal matter, the precise interplay between state law and constitutional protection for property rights continues to vex the courts. As Professor Thomas Merrill has noted, property for constitutional purposes could be understood as a purely state-defined concept (whether in positivist terms or as natural-law inflected), as having independent federal constitutional meaning, or as a federal–state hybrid—what he has described as a “patterning” definition. See Thomas W. Merrill, Choice of Law in Takings Cases, 8 *Brigham-Kanner Prop. Rts. Conf. J.* 45, 46–51 (2019) (identifying federal constitutional law and state law as sources of law in takings cases and advocating for “federal-patterning” as “a federal constitutional articulation of how the question should broadly be resolved, leaving the specific details to be filled in as a matter of state law”); Thomas W. Merrill, The Landscape of Constitutional Property, 86 *Va. L. Rev.* 885, 893, 942–54 (2000) (rejecting both “natural property” and “pure positivist” definitions of property and instead promoting a “patterning definition”). The Supreme Court’s most recent foray into this debate in *Murr v. Wisconsin* can be read as endorsing a federal approach to the definition of property for purposes of the Takings Clause, albeit an approach explicitly influenced by state doctrine. See 137 S. Ct. 1933, 1945 (2017) (listing as among the factors courts should consider in delineating a parcel “the treatment of the land under state and local law”). *Murr*, though, will hardly be the last word on this interplay.

26. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

27. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating that “if regulation goes too far it will be recognized as a taking”).

political-procedural answer: generally, where the public, through the democratic process within the states, has drawn the line.<sup>28</sup> Section I.A elaborates on this federalist dimension of takings and the debate it has spawned in the literature.

That most of the types of property disputes that have found their way to the center of takings law are resolved through the states' political processes, however, raises a less appreciated question of the allocation of power within the states. As section I.B explains, a notably broad swath of major takings cases have involved local governments. The deference the Supreme Court has shown to the democratic process in takings federalism thus raises critical vertical allocation-of-power questions that do not stop at the federal–state boundary.

#### A. *Understanding Takings Federalism*

The entire panoply of takings doctrine—not just regulatory takings, but related questions about the scope of eminent domain and the procedures that govern in takings cases—has long been decried as a muddle.<sup>29</sup> In practice, though, some basic patterns have emerged in the jurisprudence.<sup>30</sup> Cases involving the direct exercise of eminent domain tend to hinge on technical issues, like questions of valuation,<sup>31</sup> though there are some challenging outer-margin issues when the power is exercised for policies like economic development.<sup>32</sup> Regulatory takings claims, in turn, are either channeled into the small handful of nominally “per se” categories that generate very few actual cases,<sup>33</sup> or, in the

---

28. As Professors James Krier and Stewart Sterk have succinctly noted, “[b]y and large, political processes, not judicial doctrine, . . . serve as the primary check on government activity” in the takings context. Krier & Sterk, *supra* note 9, at 35.

29. See, e.g., Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 *Minn. L. Rev.* 826, 883 (2006); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 *S. Cal. L. Rev.* 561, 561 (1984).

30. On the emergence of patterns through the application of context-sensitive standards, see, for example, Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 71 *S. Cal. L. Rev.* (forthcoming 2021) (manuscript at 123–24) (on file with the *Columbia Law Review*); Joseph William Singer, *The Rule of Reason in Property Law*, 46 *U.C. Davis L. Rev.* 1369, 1402–05 (2013).

31. See Christopher Serkin, *The Meaning of Value, Assessing Just Compensation for Regulatory Takings*, 99 *Nw. U. L. Rev.* 677, 682–704 (2005) (noting that “[c]ourts . . . are much more likely to discuss compensation in the context of eminent domain proceedings” than in the context of regulatory takings challenges).

32. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 477–80 (2005) (considering the meaning of “public use”).

33. These categories include regulations that deny an owner “all economically beneficial or productive use of land,” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), and regulations that create a permanent physical occupation of property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–40 (1982). These categories only nominally create “per se” regulatory takings liability because embedded in them are threshold questions, such as determining how permanent is “permanent.” See,

overwhelming majority of cases, resolved through the open-textured framework laid out in *Penn Central Transportation Co. v. New York City*.<sup>34</sup> And while the Court is still grappling with the boundaries of “exactions”—a peculiar species of the unconstitutional conditions doctrine that is based on underlying takings claims<sup>35</sup>—the doctrinal contours of what has come to be known as exaction takings law have been in place for decades.<sup>36</sup>

Despite this relative stability, courts have not, at least in any strict sense, endorsed a single, overarching theoretical theme to justify this doctrinal landscape. Rather, they have all but engraved an invitation to scholars to advance competing normative and pragmatic conceptions of constitutional property protection. One prominent way of understanding the purpose and function of the Takings Clause, then, foregrounds the incentives that a constitutional compensation mandate provides for both governmental actors and owners. In this view, takings law polices against what scholars call fiscal illusion: the risk that public decisionmaking will be “mispriced” if government officials can act without internalizing the costs of their actions.<sup>37</sup> Similarly, scholars in this efficiency-oriented vein have

---

e.g., *id.* at 428. There are also additional qualifications. The state, for example, may eliminate all economic value without compensation if the relevant prohibition was embodied in background principles of state law. See, e.g., *Lucas*, 505 U.S. at 1027. On the paucity of cases that involve the Supreme Court’s categorical rules, see Krier & Sterk, *supra* note 9, at 55–62.

34. 438 U.S. 104, 124 (1978).

35. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (exaction takings case); see also *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari) (noting the ongoing uncertainty about whether administrative exactions should be evaluated differently than legislative exactions).

36. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (establishing that, under the Takings Clause, a condition attached to a development permit must exhibit “rough proportionality” to the approved development’s anticipated impacts); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (establishing that, under the Takings Clause, there must be an “essential nexus” between a condition attached to a development and the approved development’s anticipated impacts).

37. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 *Calif. L. Rev.* 569, 620–22 (1984) (explaining that “[f]iscal illusion arises because the costs of governmental actions are generally discounted by the decisionmaking body,” and that compensation can “serve as a corrective device” for this “governmental failure”). This rationale for compensation has been the subject of sustained criticism. See, e.g., Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 *Am. U. L. Rev.* 1, 16–37 (2016) [hereinafter Berger, *The Illusion*] (arguing that the fiscal-illusion hypothesis ignores governmental incentives to manage land use to maximize revenue through property taxation, and thus a compensation mandate undermines regulatory social-cost internalization); Ronit Levine-Schnur & Gideon Parchomovsky, *Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent-Domain Exercises*, 45 *J. Legal Stud.* 437, 457–63 (2016) (offering an empirical analysis that calls into question the centrality of the fiscal-illusion argument for mandating compensation); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 363–67 (2000) (arguing that political actors generally respond to political, not fiscal, incentives and that while the compensation mandate may deter some inefficient regulations, fiscal incentives generally will not systematically prevent inefficiency). Nevertheless, the fiscal-illusion rationale

argued that calibrating compensation properly is necessary to prevent moral hazard for owners, who might be inclined to *overinvest* in property in the presence of supramarket compensation.<sup>38</sup>

The Supreme Court itself has often, if not entirely consistently, been less concerned explicitly with public and private incentives and more focused on a different normative vision and operative principle. In *Armstrong v. United States*, the Supreme Court famously stated that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>39</sup> This concern with the allocation of the burdens of regulatory change echoes across many aspects of the jurisprudence,<sup>40</sup> and scholars have elaborated its implications in some detail.<sup>41</sup>

---

remains prominent in takings dialogue. See Christopher Serkin, Response, *The Fiscal Illusion Zombie: The Undead Theory of Government Regulatory Incentives*, 66 *Am. U. L. Rev.* 1433, 1457 (2017) (“[F]iscal illusion relies upon an implausible, even bizarre, assumption . . . [but] it continues to be invoked as a justification for expansive takings protection.”).

38. See, e.g., Abraham Bell, *Not Just Compensation*, 13 *J. Contemp. Legal Issues* 29, 35–38 (2003) (arguing for a “contributory negligence” rule in which property owners would not be compensated if they were to “overdevelop” their property).

A significant literature elaborates on takings as a means of optimizing the efficiency of regulatory transitions. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509, 615–17 (1986) (arguing that relying on market forces to determine the effect of government action is more efficient than transitional relief by the government); Glynn S. Lunney, Jr., Response, *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 *Mich. L. Rev.* 157, 167 (2000) (noting that takings compensation can create inefficiencies where short-term fiscal constraints prevent the government from proceeding with regulations that offer long-term benefits on net); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 *Utah L. Rev.* 1, 18–21 (describing regulatory takings law as serving to mediate regulatory transitions).

39. 364 U.S. 40, 49 (1960).

40. See, e.g., *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (describing the *Armstrong* principle as a guidepost that is “fundamental in . . . Takings Clause jurisprudence”); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978) (“[T]his court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1961))).

41. The literature on the role of fairness and justice—in distributional and other moral valences—of takings law is voluminous to say the least. See, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 *Va. L. Rev.* 741, 743 (1999) (offering a “doctrine that distinguishes a regulation from a taking with a view to both civic virtues and egalitarian concerns”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *Harv. L. Rev.* 1165, 1172 (1967) (arguing that “the attempt to formulate rules of decision for compensability cases has, with suggestive consistency, yielded rules which are ethically unsatisfying”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 *Calif. L. Rev.* 53, 162 (1990) (“The Justices appear to be following the intuition that fairness does not require that compensation be paid if the government is simply stopping the claimant from doing

The *Armstrong* principle, however, for all of its visceral appeal, hardly provides determinant jurisprudential answers in all cases, and the Supreme Court seems to have little interest in offering a clearer resolution.<sup>42</sup>

Approaching the jurisprudence and underlying conceptual tensions through a different lens, other scholars have tried to make sense of takings in institutional terms. Political-process theories of takings are ubiquitous,<sup>43</sup> and one relatively common element of those theories focuses on the allocation of decisional power. A particularly trenchant institutionalist approach emphasizes the relationship between federal constitutional doctrine and the states, in what Professor Stewart Sterk has labeled the “federalist dimension” of constitutional property.<sup>44</sup>

---

something wrong . . . .”); Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 61–76 (1964) (advancing a framework that “should determine the issue of compensation” in takings cases); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 155 (1971) [hereinafter Sax, Private Property and Public Rights] (“An important question is whether these [broadly felt] costs should be allowed to remain where they fall, or whether instead the interests which are diffusely held should be recognized and advanced in the form of ‘public rights.’”); Joseph William Singer, The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations, 30 Harv. Env’t L. Rev. 309, 328–38 (2006) [hereinafter Singer, The Ownership Society] (arguing that a property model focusing on citizens’ obligations and rights can help clarify takings jurisprudence).

42. It bears acknowledging, however, that the Supreme Court may be on the cusp of a shift in its Takings Clause jurisprudence as a matter of the realpolitik of the current alignment of Justices. In the years before his retirement in 2018, Justice Kennedy supplied the deciding vote in several closely contested constitutional property cases, much as he did in other contentious areas of law. See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939 (2017) (Kennedy, J.). Justice Kennedy has now been replaced by Justice Kavanaugh, who, by indications to date, will take a generally property rights-protective approach to takings cases. See Kimberly Strawbridge Robinson & Greg Stohr, *Kavanaugh Key Vote as Justices Overturn Property Rights Case (2)*, Bloomberg L. (June 21, 2019), <https://news.bloomberglaw.com/us-law-week/kavanaugh-key-vote-as-justices-overturn-property-precedent> [<https://perma.cc/F6HV-NE94>] (noting that Justice Kavanaugh was likely the deciding vote in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), a decision that overturned a decades-old precedent that had been seen as limiting property rights). As the Supreme Court’s recently constituted conservative majority does not seem particularly bound by fidelity to precedent, the democracy-reinforcing vein of takings jurisprudence predominant since *Penn Central* that defers to the political process may yield to more hard-edged categorical approaches. Cf. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (“Today’s decision can only cause one to wonder which cases the Court will overrule next.”).

43. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 855–87 (1995) (laying out a political-process-based theory of the Just Compensation Clause).

44. Sterk, *Federalist Dimension*, supra note 3, at 207. Other federalism-inflected takings literature attends less to the horizontal distribution of decisionmaking power between courts and the states and more to the vertical distribution of decisionmaking power within the courts. See, e.g., Dana, *Implications of Knick*, supra note 16, at 605–13 (discussing the substantive and procedural discourse in takings federalism); Siegel, supra note 16, at 461 (arguing that state courts have advantages over federal courts in developing property law that reflects each state’s “unique history and physical landscape”). Neither vein of

Professor Sterk’s account foregrounds the positivist puzzle inherent in constitutional property.<sup>45</sup> As the Supreme Court has made increasingly clear, “background principles” of a state’s law of property play a central role in the regulatory takings inquiry—a consideration that had always undergirded the jurisprudence but was made explicit by the Court in *Lucas v. South Carolina Coastal Council*.<sup>46</sup> Background principles are now central to a panoply of regulatory takings issues, including shaping the reasonableness of owner expectations<sup>47</sup> and even, following *Murr v. Wisconsin*, in terms of the definition of the property interest that is the object of regulation.<sup>48</sup> Centering the state’s definitional role in property risks circularity—how can a regulatory change to a property interest contravene the Takings Clause if the state is empowered to define property interests? In practice, however, this positivist puzzle is unavoidable.<sup>49</sup>

---

takings federalism literature, however, has sufficiently focused on the vertical distribution of decisionmaking power within the states. See *infra* Part III.

45. As Professor Frank Michelman described this legal-positivist puzzle:

By an argument that reaches back at least to Bentham, property’s scope and content—property’s existence, even—are completely dependent upon standing law. Thus, in contrast with liberty, property *cannot* stand while the laws fall. My property is that to which the laws currently in force give me a secured entitlement. In a vacuum of such laws, there can be no property . . . .

. . . .

. . . This state of the doctrine means that questions about the content and meaning of historical state property law are potentially in issue every time someone complains in court that a state government has violated the Federal Constitution by taking property without paying for it. If a taking of property can occur only when a government in some way perpetrates a departure from the then-existing body of property law, then in order to tell whether a given state action takes property you have to know what the State’s property law as a matter of fact is—what that law as a matter of fact says—at the moment when the action complained of takes place.

Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 Wm. & Mary L. Rev. 301, 305–10 (1993) (footnotes omitted).

46. 505 U.S. 1003, 1027–29 (1992) (holding that even regulations that deprive land of all economically beneficial use need not be compensated if the limitations in the regulation “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”).

47. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001) (noting that while not dispositive, a state’s law of property—even statutory enactments—can shape owner expectations over time).

48. See 137 S. Ct. 1933, 1945 (2017) (“[C]ourts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property.”).

49. This is not to suggest that the Supreme Court’s normative preference for state common law in defining “background principles,” at the expense of other sources of state law such as state statutory and administrative law, is at all justified. See Timothy M. Mulvaney, Foreground Principles, 20 Geo. Mason L. Rev. 837, 866–77 (2013) (advocating a contextualized analysis that recognizes that background principles of the common law are

Professor Sterk outlines some distinctive jurisprudential challenges arising from the intertwined state–federal structure of property rights. First, the variation inherent in state law makes takings claims more complex because “background principles” inherently vary from state to state (and even potentially from locality to locality).<sup>50</sup> What might constitute a perfectly acceptable limitation on the expectations of owners in New York City might be constitutionally intolerable in rural Montana. This variational complexity, in turn, undermines the value of Supreme Court guidance.<sup>51</sup> When the Court, as it does in most contexts, imports state-specific background principles into the equation, any resulting decisional guidance can hardly set clear rules for governmental and private actors—except, of course, to reinforce deference to the political process.<sup>52</sup>

For Professor Sterk, however, this variation and complexity has virtues worth embracing. The values of federalism, Sterk argues, support a distributed regime that places state institutions—state law and state courts—at the center of property protection.<sup>53</sup> State courts and state legislatures are institutionally well suited to oversee local land-use regulation, on this view, because they are “insulated from many of the pressures that face local regulators.”<sup>54</sup> Other scholars have elaborated on

---

insufficient, in and of themselves, to address modern problems and to serve modern human needs).

50. Sterk, *Federalist Dimension*, supra note 3, at 226–27; see also Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. Pa. L. Rev. Online 53, 56 (2017) (“*Murr* gives individual states’ positive law of property short shrift, replacing the inquiry into the form and content of property within a single jurisdiction with an analysis of reasonable property rules and expectations that is divorced from jurisdictional boundaries.”). Sterk focused on the federalist dimension of regulatory takings, but some of the same positivist complexity can be at play in aspects of eminent domain as well, particularly with respect to questions of valuation and, to a lesser extent (because it is not dependent on any given state’s definition of property) with respect to the scope of public use in eminent domain.

51. Sterk, *Federalist Dimension*, supra note 3, at 228–33.

52. This deference to the political branches has significant implications for the allocation of decisionmaking about the constitutional boundaries of property. See *infra* Parts II and III.

53. See Sterk, *Federalist Dimension*, supra note 3, at 257–71 (“[T]he Court’s limited intervention recognizes that property rights are the product of positive law created by the several states and preserves the freedom of the states to define and protect those rights.”). It bears drawing a distinction between federalism in the sense of *procedural* channeling—the interplay of state and federal courts as venues for resolving takings claims, as raised by *Knick*—and the *substantive* allocation of authority in terms of which body of law (federal, state, or a hybrid) actually defines the boundaries of constitutional property. Which venues are available and which substantive rules govern those venues are, of course, potentially connected. Federal courts might bring different perspectives, resources, and institutional capacity than state courts; state courts might be more attentive to local variation and political process. But which legal system decides constitutional questions and which body of law governs are not the same thing.

54. *Id.* at 206.

arguments for decentralizing to the states in constitutional property by emphasizing, for example, the values of experimentalism and interstate competition for mobile residents and capital.<sup>55</sup> And, as others have noted, the traditional values of federalism—accountability, distributed power, targeting, and responsiveness to preferences—can be a part of rationalizing the centrality of states to takings law.<sup>56</sup>

This federalist reality—and it is hard to deny that this is functionally how our system of constitutional property operates—has raised concerns for some scholars. Commentators, for example, argue that relegating run-of-the-mill takings concerns to the states treats property under the Takings Clause as a second-class right, especially given the low threshold for protecting property that the Supreme Court has set.<sup>57</sup> Takings federalism, the critique continues, undermines the value of uniformity no less in this context than a democratically minimalist First Amendment or equal protection doctrine would.<sup>58</sup>

A more targeted critique has come from scholars who question whether the basic values inherent in federalism (or at least the protection afforded by the states) bears out for takings. Professor Ilya Somin, for example, argues that federalism is an insufficient protection because the normal discipline of mobility does not work for owners unable to move their property without considerable difficulty.<sup>59</sup> And Professor Somin is even more skeptical of federalism arguments sounding in the value of superior knowledge at the state level, arguing that as between *any* governmental actor and owners themselves, the latter has greater expertise about their specific property and local conditions.<sup>60</sup>

Whatever one thinks of these critiques, however, the upshot of the actual landscape of takings doctrine presents, at least in a functional sense,

---

55. See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *Yale L.J.* 72, 92–101 (2005) (drawing on the literature on state competition in corporate law as well as the mobility and public goods paradigm associated with Charles Tiebout to argue for the utility of interstate competition in property).

56. See, e.g., Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 *Md. L. Rev.* 464, 490–513 (2000) (discussing the interplay between the values of federalism and takings doctrine); see also Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 888, 891–92 (2006) (defending deference in takings in light of federalism values).

57. See, e.g., Berger, *What's Federalism*, *supra* note 2, at 12 (“If there is a role for federalism, it lies in providing a mechanism for the states to provide *more* protection to individuals than the U.S. Constitution mandates. Period.”).

58. *Id.* at 12–14 (asserting that uniformity in decisions regarding constitutional rights typically supersedes federalism concerns and should do so for property rights as well).

59. Somin, *Federalism and Property Rights*, *supra* note 2, at 58 (“The main difficulty with such competitive federalism arguments is that they fail to take adequate account of the immobility of property rights in land.”).

60. *Id.* at 66; see also *id.* at 67 (arguing that “the argument from expertise and interstate diversity would, if applied consistently, justify eliminating judicial protection of a wide range of constitutional rights, not just property rights”).



a deeply *democratic* vision of constitutional property,<sup>61</sup> with the relevant democratic process grounded in the states.<sup>62</sup> This is not to argue that the right to property protected by the Fifth Amendment is inherently minimal—clearly that is not the case. But for the role that the Takings Clause plays in constraining regulatory choice and setting the limits of legitimate public use, the Supreme Court has made clear—again within broad outer boundaries—that the political arena is the appropriate one for resolving the tradeoffs inherent in balancing individual ownership and community imperatives. In practice, evaluating the allocation of burdens in property transitions demands deeply contextualized value judgments about owner expectations, the texture of harm to the public that any given regulation is addressing, and even more fundamental questions about the nature of markets and larger constitutional values.<sup>63</sup> Takings law thus serves in our legal system to vindicate a “right to justification,”<sup>64</sup> but it does so in a way that reinforces property’s role as a fundamentally democratic institution.

One way to understand Professor Sterk’s essential insight, ultimately, is that when the Supreme Court sets a relatively low baseline of property protection, it is implicitly empowering the states to determine the appropriate calibration of individual rights and community needs, and thereby endorsing variation on that calibration exercise, rather than a strong, singular standard. This is not dissimilar from how most rights work, such as in the context of speech, equality, due process, and other fundamental rights. Indeed, the Supreme Court always sets a floor of uniformity above which state and local political systems are free to offer *greater* protection. But constitutional property distinctively elevates, within very wide outer boundaries, the role of state positive law—and political process—in determining the baseline for federal constitutional protection.

---

61. See Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. Rev. 145, 150–58 (2018) [hereinafter *Mulvaney, Non-Enforcement Takings*] (articulating a democratic approach to regulatory takings law); Singer, *The Ownership Society*, supra note 41, at 330 (arguing that property law exhibits a “citizenship model” in which owners undertake duties to “refrain from actions that endanger . . . a free and democratic society that treats all individuals with equal concerns and respect”).

62. In a recent essay, Professor Carol Rose offers a more critical view. See Carol M. Rose, *Rations and Takings*, 2020 Wis. L. Rev. 343, 359 (suggesting that while the Court’s regulatory takings jurisprudence generally shows a “pattern of tolerance” toward state and local land regulation of property, the jurisprudence is “punctuated by cannonades that undermine state and local resource management”). This Article does not argue that the Supreme Court is intentionally deferential to state and local political processes out of some respect for the comparative advantages of subfederal governance. Rather, because the Supreme Court has developed a jurisprudence that relegates the overwhelming majority of cases to tests that are functionally politically deferential—albeit, as Professor Rose notes, with some blunt exceptions—the result is a doctrine that privileges the political process.

63. See *Mulvaney, Non-Enforcement Takings*, supra note 61, at 158.

64. *Id.* (internal quotation marks omitted) (quoting Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice 2* (Jeffrey Flynn trans., 2012)).

B. *Unpacking the States: Local Governments in Constitutional Property*

If much of the texture of property interests in takings law is determined democratically within the states, it is critical to remember that in that project of constitutional explication, states are not unitary. States govern in many fundamental ways through local governments, particularly so in policy domains such as land use and infrastructure that frequently raise constitutional property rights questions. As a result, local governments are central to the democratic construction of constitutional property. Although familiar ground, this section rehearses the litany of critical constitutional property cases that have involved local governments to illustrate their role across the breadth of the doctrine.

The proper regulatory role for local governments is increasingly contested,<sup>65</sup> but authority over land use and the built environment has always been at the center of local lawmaking in the United States.<sup>66</sup> That continues to be true today, with local governments playing the primary regulatory role not only on questions of zoning, subdivision regulation, development permitting, and other foundational matters of land-use law, but also—more controversially—in housing law, rent regulation, environmental protection, historic preservation, and the like.<sup>67</sup> All of these distinctly *local* regulatory regimes have generated important takings cases. There are, of course, many significant takings cases where the federal government is the defendant,<sup>68</sup> and the same can be said about the states.<sup>69</sup>

65. Compare Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 15–18 (1990) [hereinafter Briffault, *Our Localism*] (arguing that local governments have long “wielded substantial lawmaking power and undertaken important public initiatives”), with Schragger, *The Attack on American Cities*, supra note 17, at 1184–95 (arguing that “hostility to city regulation” is an “enduring feature of American federalism”).

66. See Stuart Banner, *American Property: A History of How, Why, and What We Own* 182–85 (2011) (discussing the long history of local government land-use regulation); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252, 1259–81 (1996) (recounting the Founding-era local-land-use regulatory landscape); see also Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 *Minn. L. Rev.* 231, 236 (2008) (“[T]he prevailing descriptive and normative view of land use involves, first and foremost, local control.”).

67. See, e.g., John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 *B.C. L. Rev.* 823, 832–34 (2019) (discussing the controversy regarding the “ideal vertical allocation of power between state and local governments” in housing regulation); Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 *Calif. L. Rev.* 305, 337–47 (2020) (describing a new wave of urban environmental laws as local governments begin regulating environmental protection).

68. See supra note 5.

69. For a seminal case, see *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 404–05 (1922) (challenging Pennsylvania’s Kohler Act). For others, see supra note 5; see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 474 (1987) (Pennsylvania Subsidence Act); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233 (1984) (Hawaii Land Reform Act of 1967); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 415–16 (1934) (Minnesota Mortgage Moratorium Law); *Mugler v. Kansas*, 123 U.S. 623, 653 (1887) (Kansas liquor law).

But a broad array of major takings cases over the century since *Pennsylvania Coal Co. v. Mahon*<sup>70</sup> have involved local governments.<sup>71</sup>

Not surprisingly, to begin, cases involving the boundaries of public use for condemning property implicate distinctly local challenges. A paradigm example is the case that set the contemporary terms of “public use” under the Takings Clause, *Berman v. Parker*.<sup>72</sup> *Berman* grew out of the post–World War II wave of urban redevelopment sparked by the federal American Housing Act of 1949 and grappled with the problem of blight and condemnation in the urban core (in this case, southwest Washington, D.C.).<sup>73</sup> A little more than fifty years later, the Supreme Court in *Kelo v. City of New London* again returned to the scope of public use, grappling with questions arising from modern iterations of urban renewal and whether eminent domain can be deployed for economic development.<sup>74</sup>

Defining the relevant property interest and parcel for purposes of regulatory takings has likewise implicated local governments. The leading case on point now, *Murr v. Wisconsin*, involved a challenge to a county-level ordinance that mandated lot mergers.<sup>75</sup> But the modern debate about conceptual severance—the question of the “denominator” in regulatory takings cases—can be traced in large measure to *Penn Central*’s debate about the appropriate parcel at issue in that case.<sup>76</sup>

Of course, the largest category of regulatory takings cases involves local authority over land use and the built environment. The litany of such cases is long and covers everything from basic zoning<sup>77</sup> to historic

70. 260 U.S. at 393.

71. Cf. Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 *Fordham Urb. L.J.* 1835, 1837–39 (2013) (noting the distinctly urban setting of many classic regulatory takings conflicts, from Scranton in *Mahon* to New York City in *Penn Central* and many other examples). Not to fetishize the Supreme Court, especially given the reality that most takings cases are resolved at the state level or by the lower federal courts, but the terms of the discourse *have* been framed by a relatively circumscribed set of landmark Supreme Court cases.

72. 348 U.S. 26 (1954).

73. *Id.* at 30 (explaining that sixty-four percent of dwellings in the area at issue were beyond repair). In the era of post-War urban renewal, *Berman* was a legal outlier, in that the statute at issue—the District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790 (1946) (codified at D.C. Code §§ 5-701 to 5-719 (1973))—was actually federal, not local, given the then-direct oversight that Congress exercised over the District of Columbia.

74. 545 U.S. 469, 477 (2005).

75. 137 S. Ct. 1933, 1941 (2017).

76. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978) (noting that the relevant parcel for evaluating the claim was the “city tax block designated as the ‘landmark site’”). *Contra id.* at 143 (Rehnquist, J., dissenting) (arguing that the city had taken the appellees’ air rights). Grand Central Station had been developed as part of a much larger city-within-the-city, and the appropriate boundaries for evaluating the alleged regulatory constraints at issue in the case were not as intuitive as it might seem at first blush.

77. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 624 (1981) (rezoning to an agricultural category); *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980)

preservation,<sup>78</sup> local environmental protection,<sup>79</sup> rent control,<sup>80</sup> and various other areas of local authority.<sup>81</sup> Similarly, local governments are central players in those cases at the intersection of takings law and the unconstitutional conditions doctrine involving challenges to conditions, or “exactions,” that are attached to development permits.<sup>82</sup>

In sum, local governments are by no means the only domain for generating significant constitutional property cases, but they inarguably provide the central arena through which constitutional property frictions are resolved.<sup>83</sup>

Although takings claims arise across the entire spectrum of property interests,<sup>84</sup> it is a curious aspect of the doctrine that the regulatory realm that is most local in nature—land use—seems to generate more claims than other regulatory regimes. It is hard to say exactly why, but perhaps there is a psychology to the tangible nature of the kinds of real property and land-related regulatory regimes that tend to generate constitutional property frictions at the local level.<sup>85</sup> There is also the logic—somewhat

---

(density restrictions); *Gorieb v. Fox*, 274 U.S. 603, 604–05 (1927) (building set-back ordinance); *Hadacheck v. Sebastian*, 239 U.S. 394, 404 (1915) (prohibition on brickyards); *Welch v. Swasey*, 214 U.S. 91, 103 (1909) (height limitation).

78. *Penn Central*, 438 U.S. at 107–15.

79. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 590 (1962) (reviewing a town ordinance regulating sand and gravel dredging and pit excavating).

80. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (reviewing a rent control ordinance applicable to mobile homes); *Block v. Hirsh*, 256 U.S. 135, 153–54 (1921) (reviewing a law requiring that existing tenancies continue after lease expiration in certain contexts).

81. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (reviewing a law requiring the installation of cable facilities).

82. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 601–02 (2013) (concerning the denial of a land-use permit after the applicant refused to consent to proposed wetland mitigation conditions); *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (concerning land-use permit conditions related to flood control and traffic improvements); see also *Ehrlich v. City of Culver City*, 512 U.S. 1231, 1231 (1994), remanded to 911 P.2d 429 (Cal. 1996) (concerning land-use permit conditions related to public recreational facilities and art, with the U.S. Supreme Court vacating and remanding in light of *Dolan*).

83. Local governments have also figured prominently in the two best-known cases involving the exhaustion of claims in the takings context. See *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186–94 (1985) (holding that the takings issue was not ripe before exhausting available administrative procedures); see also *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019) (overruling *Williamson County*).

84. Claimants raise Takings Clause challenges to interference with everything from personal property to intellectual property to more conceptually esoteric interests, such as federal fishing licenses and taxi medallions. See Christopher Serkin, *Penn Central Take Two*, 92 Notre Dame L. Rev. 913, 916 (2016) (“[R]egulatory property . . . includes such assets as pollution credits, fishing quotas, taxi medallions, financial guarantees, and the telecommunications spectrum, among many others.”); Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 Yale J. on Reg. 125, 137–39 (2013) (discussing whether taxicab medallions are property under the Takings Clause).

85. This could also help explain why so many claims against states seem to involve environmental limitations on real property.

circular, but real nonetheless—that the Supreme Court has signaled greater solicitude for real property, implicitly relegating personal and intangible property to a more peripheral status in takings jurisprudence.<sup>86</sup> That solicitude shapes expectations, which in turn can shape the kinds of claims owners feel entitled to bring.<sup>87</sup>

\* \* \*

Property paradigmatically allows owners to plan securely in a system that protects their reasonable expectations over time, but communities must also retain the ability to adjust the terms of ownership in response to changing social and economic exigencies. Takings law helps to manage that tension, but in doing so, raises fundamental questions about how to strike the right balance. The discourse on takings federalism answers those questions by emphasizing the state political process in defining the boundaries of constitutional property.

Many of the most iconic cases that have come to define the jurisprudence, however, have involved local governments. It is clear that local government regulatory authority—and broader action in domains such as condemnation for urban renewal and infrastructure—have put that level of government at the heart of takings. Regardless of whether the deference the Supreme Court has shown to state and local political processes is warranted, that deference is thus not merely a question of federalism. Rather, it is also a question of *localism*: how to allocate authority (in this instance over the boundaries of property rights) within the states? In the modern era of takings jurisprudence, state legislatures have not been passive on that question, as Part II explains.

## II. THE STATE–LOCAL DYNAMIC IN TAKINGS LAW

As Part I highlighted, the jurisprudence of the Takings Clause extends great deference to property redefinitions reached through state and local democratic processes. Beneath this takings federalism lies the question of how to allocate authority to delineate the contours of property interests between these subfederal levels of government. This Part turns to the

---

86. See Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *Ecology L.Q.* 227, 234–46 (2004) (documenting the distinctions often drawn between real and personal property across takings jurisprudence). The Supreme Court's recent decision in *Horne v. Department of Agriculture* can be interpreted to moderate the Court's prior support for this distinction, though the breadth or narrowness of the class of takings disputes to which *Horne* applies is not yet evident. See 57 U.S. 350, 357–58 (2015) (discussing the direct appropriation of personal property rather than regulation on the use of that property).

87. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *Ecology L.Q.* 89, 127–28 (1995) [hereinafter Byrne, *Ten Arguments*] (noting that landowners raising takings challenges stand a greater chance of prevailing than owners of personal property); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 *B.U. L. Rev.* 605, 653 (1996) (same).

state–local interplay on key touchpoints in the development of constitutional property law.<sup>88</sup> Despite case law that treats state and local levels of government with equal deference in takings cases, state legislatures have engaged in what can only be described as a broad, long-standing, and ongoing project of limiting local-government discretion in this space.

Many state statutes directly and exclusively constrain local-government authority. Yet even where, as is often the case, property rights statutes facially apply to both local and state levels of government, many of the regulatory tools the statutes constrain—such as zoning, eminent domain, development moratoria, contiguous lot mergers, impact fees, and historic designation—are of the variety that only local governments would have any regular occasion to implement.<sup>89</sup> Indeed, a vast portion of land-use regulation is local in nature; state and federal regulation of land uses complements this expansive body of local law only in relatively select contexts, perhaps most prominently in environmental protection and antidiscrimination.<sup>90</sup> Thus, even statutes that on their face apply to all governmental entities reflect burdens that are most acutely borne at the local level.<sup>91</sup>

This Part organizes these statutory checks on local governments into four categories: liability expansions, procedural impositions, specific

---

88. Property is, of course, a social institution in the sense that it regularly requires governmental entities to make choices in the face of conflicting claims to finite resources. See John A. Humbach, *Law and a New Land Ethic*, 74 *Minn. L. Rev.* 339, 344–45 (1989) (“[L]egal property rights are shaped and limited by the many competing needs of the general welfare.”); C.B. Macpherson, *The Meaning of Property*, in *Property: Mainstream and Critical Positions* 1, 1 (C.B. Macpherson ed., 1978) (“The actual institution [of property], and the way people see it, . . . all change over time. The changes are related to changes in the purposes which society . . . expect[s] the institution of property to serve.”). These social choices define the content of the relationships—between taxpayers and their representatives, employers and employees, developers and consumers, landlords and tenants, creditors and debtors, neighbors vis-à-vis neighbors, etc.—that we collectively have decided reflect the values of our democracy, such as liberty, equality, due process, and free speech. Whether, why, and how we might turn to local as opposed to state levels of government to exercise this decisional authority and, thereby, serve these fundamental values, are profound questions that sit at the heart of the U.S. legal system. This Article, though, concentrates on a *specific* set of property issues that are uniquely correlated with one particular—and particularly important—corner of law: constitutional takings jurisprudence.

89. See Robert Ellickson, Vicki L. Been, Roderick M. Hills, Jr. & Christopher Serkin, *Land Use Controls*, at xxxvii (5th ed. 2021) (“Three basic players participate in the land use ‘game’—landowners/developers, neighbors, and governments (usually local ones).”).

90. See, e.g., *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 985 (9th Cir. 2010) (affirming the designation of 850,000 acres of land as critical habitat for endangered species on which development would be severely restricted in accordance with a federal environmental statute); *Swanner v. Anchorage Equal Rts. Comm’n*, 874 P.2d 274, 276 (Alaska 1994) (enforcing a state statute prohibiting landlords from discriminating against prospective tenants on the basis of marital status).

91. This Part notes a few outlier property rights statutes that pertain as much to state authority as to local authority.

limitations, and property owner empowerments. Liability expansions include those legislative efforts that aim to increase the likelihood—relative to takings jurisprudence’s baseline—that a claimant will be awarded compensation as a result of alleged regulatory interferences with property rights. Procedural impositions create costly administrative hurdles that preemptively aim to discourage the adoption of regulations that might amount to takings in the first place. Specific limitations preempt or constrain the use of particular regulatory tools outright. And while property owner empowerments do not directly restrict the exercise of local regulatory authority, they equip landowners with tools to resist it.

In these categories, there are some instances of causal connections between individual takings cases and legislative measures. The principal aim of this section, however, is not to hone in on such connections but to highlight the breadth of situations in which the categories of state legislation identified in this Article correlate with the local regulatory tools and approaches that have driven takings jurisprudence in so many important respects.<sup>92</sup>

#### A. *Liability Expansions*

State legislatures have enacted various measures increasing the likelihood that claimants will be awarded compensation for alleged regulatory interference with their property rights. These measures either define the liability threshold more favorably to claimants than the threshold required by takings jurisprudence, or limit defenses available to government defendants in takings and related compensation cases.<sup>93</sup>

1. *Compensation Remedies.* — As to the first approach, statutes in some states create a remedy of compensation—separate and apart from constitutional takings remedies—when regulation diminishes land value beyond a defined threshold<sup>94</sup> or produces an “inordinate burden” on an

---

92. Some scholars have argued that state takings legislation can be purely symbolic. See, e.g., Morriss, *supra* note 14, at 240 (arguing that some of the post-*Kelo* state legislative response imposed no significant substantive change in the exercise of eminent domain). That is contestable for much of the sweep of the legislation this Part surveys; even statutes designed to signal, however, can matter substantively in chilling the scope of legal responses. See *infra* note 109 and accompanying text.

93. Legislators unsuccessfully attempted to enact both forms at the federal level in the 1990s. See Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 *Ecology L.Q.* 509, 509–11 (1996).

94. See La. Stat. Ann. § 3:3610 (2019) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than twenty percent of their preregulation value); Miss. Code Ann. § 49-33-7, -9 (2020) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than forty percent of their preregulation value); Or. Rev. Stat. § 195.305 (2019) (requiring compensation for prospective state and local regulations that reduce the market value of any property). The Oregon statute served to amend prior legislation adopted via a plebiscite that had generated billions of dollars in compensation claims as a result of its prospective *and retroactive* allocation. 1 Bill Bradbury,

individual claimant.<sup>95</sup> For example, Mississippi law requires compensation upon the adoption of regulations that reduce the market value of

---

Off. of the Sec'y of State, Voters' Pamphlet: State Measures 103–04 (2004), <http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873502> (on file with *Columbia Law Review*). A Texas statute requires compensation for prospective regulations affecting residential development and farming and forestry practices that reduce the market value of agricultural or forest lands by more than twenty-five percent of their prerule value. Tex. Gov't Code § 2007.002, .024 (2019). Peculiarly, however, municipalities are largely exempt from these strictures. Id. § 2007.003(a)–(b) (deeming municipal regulations subject to the statute only in those instances in which a municipal regulation impacts property owners within its extraterritorial jurisdiction but does not apply across the municipality's entire extraterritorial jurisdiction). Legislators in a number of other states proposed but were unable to gain passage of diminution-in-value statutes. See H.R. 1054, 2005–2006 Gen. Assemb., Reg. Sess. (Ga. 2006); Private Property Protection Act, H.R. 663, 121st Leg., 1st Reg. Sess. (Me. 2003); An Act Relating to State and Municipal Regulatory Actions Relating to or Affecting Private Property; and Providing for an Effective Date, H.B. 484, 22d Leg., 2d Sess. (Alaska 2002); Private Property Protection Act, H.R. 2773, 80th Leg., Continuing Reg. Sess. (Minn. 1998). In other states, voters rejected legislation of this nature through the initiative process. See 90 Government Acquisition, Regulation of Private Property: California Proposition 90, at 90–95, 187–89 (2006), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2257&context=ca\\_ballot\\_props](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2257&context=ca_ballot_props) [<https://perma.cc/CR98-D227>]; Cal. Sec'y of State, Statement of Vote, at xvii–xviii (2006), [https://elections.cdn.sos.ca.gov/sov/2006-general/complete\\_sov.pdf](https://elections.cdn.sos.ca.gov/sov/2006-general/complete_sov.pdf) [<https://perma.cc/2K28-EWTF>] (showing the defeat of Proposition 90 in the 2006 general election); see also 2006 Proposed Ballot Initiatives, Idaho Sec'y of State, <https://sos.idaho.gov/elect/inits/06init08.htm> [<https://perma.cc/2AM2-DB5D>] (last visited Nov. 2, 2020); November 7, 2006 General Election Results, Idaho Sec'y of State, [https://sos.idaho.gov/elect/results/2006/general/tot\\_stwd.htm](https://sos.idaho.gov/elect/results/2006/general/tot_stwd.htm) [<https://perma.cc/BRQ4-D58R>] (last visited Oct. 11, 2020) (recording the defeat of Proposition 2 in the 2006 general election). In still others, such initiatives never made it to the ballot in light of procedural illegalities. See *Nevadans for the Prot. of Prop. Rts., Inc. v. Heller*, 141 P.3d 1235, 1245 (Nev. 2006) (holding that the Nevada Property Owners' Bill of Rights Initiative violated the statutory single-subject requirements); *In re Initiative Petition No. 382*, 142 P.3d 400, 402 (Okla. 2006) (holding that the Protect Our Homes Initiative violated the single-issue rule by focusing on both eminent domain and regulatory takings); 2006 Initiative Petitions Approved for Circulation in Missouri: Constitutional Amendment to Article I—Eminent Domain (version 2), Mo. Sec'y of State, <https://www.sos.mo.gov/elections/2006petitions/ipEminentDomainI-36> [<https://perma.cc/3H5L-WGQN>] (last visited Oct. 11, 2020); 2006 Ballot Issue I-154, Mont. Sec'y of State, [https://sosmt.gov/elections/ballot\\_issues/2006-2/i-154](https://sosmt.gov/elections/ballot_issues/2006-2/i-154) [<https://perma.cc/U6XZ-D2ZS>] (last visited Oct. 11, 2020); Title Board Results: Proposed Initiative 2005–2006 #86, Colo. Sec'y of State, <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2005-2006/result86-0506.html> [<https://perma.cc/8EKZ-RS7Z>] (last visited Oct. 11, 2020).

95. See Fla. Stat. § 70.001 (2020) (requiring compensation for prospective state and local regulations that “inordinately burden” any property). An “inordinate burden” is defined as government action that

directly restrict[s] or limit[s] the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

Id. § 70.001(3)(e).



agricultural lands by more than forty percent of their preregulation value.<sup>96</sup>

In their best light, these statutes developed out of a view that litigating constitutional takings claims is often too costly, time-consuming, and unpredictable, and even where takings outcomes *are* predictable, those outcomes are unprincipled and insufficiently protective of property rights.<sup>97</sup> The foundation for this perspective commonly rests with the Supreme Court's 1978 decision in *Penn Central*, which identified a nonexclusive list of considerations that are relevant to a court's determination in an individual takings case as to whether an imposition stemming from a new regulatory safeguard or obligation is fair and just, absent compensation.<sup>98</sup> Interestingly, these compensation statutes originally arose in the years following several Supreme Court decisions that carved out instances in which *Penn Central's* "ad hocery" did *not* apply.<sup>99</sup> Perhaps proponents of these statutes saw momentum and guidance in these decisions;<sup>100</sup> or perhaps, instead, they saw these supposedly "bright-line" takings decisions as too limited in scope.<sup>101</sup>

Supporters claim that the clearer—indeed, categorical—standards set out in property rights statutes force government entities, via the fiscal pressure of a compensation remedy, to better account for the costs of

---

96. Miss. Code Ann. § 49-33-1 to -17.

97. See, e.g., Cordes, *supra* note 14, at 220 (suggesting that advocacy for compensation statutes and takings impact assessment statutes arose out of a perception of "growing government regulation" and "dissatisfaction with the current state of constitutional takings law").

98. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24, 130–31 (1978) (identifying "economic impact," interference with "distinct investment-backed expectations," and "the character of the governmental action" as relevant considerations).

99. The peak period of the compensation-statute movement came in the late 1980s and early 1990s. In this period, the Supreme Court subjected at least some permit conditions and all regulations that eliminate economically available uses to more probing levels of scrutiny than *Penn Central* commands. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (placing the burden of proof on the government, as the defendant in a takings case, to prove that a condition attached to a development permit is in "rough proportionality" with the approved development's anticipated impacts); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992) (declaring that regulations that deprive land of all economically valuable uses generally trigger takings liability); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (placing the burden of proof on the government, as the defendant in a takings case, to prove that a condition attached to a development permit bore an "essential nexus" to the approved development's anticipated impacts).

100. See, e.g., William A. Van Vactor, Jr., Note, *The Backlash to Land Use Regulation Continues: An Analysis of Oregon's Measure 37*, 26 *J. Land, Res. & Env't L.* 221, 222–24 (2005) (arguing that the Supreme Court's decision in *Lucas v. South Carolina Coastal Commission* galvanized proponents of compensation statutes).

101. See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *Stan. L. Rev.* 1369, 1369–70 (1993) (describing *Lucas* as "something of a high water mark in takings jurisprudence" but declaring the Court's attempt to distinguish between total and partial takings as "so rickety that it must fall under its own weight").

regulatory programs.<sup>102</sup> This accountability, the argument continues, promotes more transparent, cost-conscious choices about which potential regulations to adopt and which to forego.<sup>103</sup> With these measures, then, state legislatures sought to create a regulatory environment more favorable to property owners fearful of interference with existing property rights than the politically deferential model under extant judicial interpretations of the Takings Clause.<sup>104</sup>

These statutes pursue this goal through two general means. First, the bulk of these statutes create liability structures that rest solely on the lost value generated by regulation.<sup>105</sup> This shifts the focus from a broad inquiry that accounts for the extent to which regulation prevents conduct that burdens other properties and the community at large,<sup>106</sup> to a narrow

---

102. See Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 *Fordham L. Rev.* 1281, 1284 (2009) (describing the evidence for and against the claim that governments will consider regulatory costs if subjected to compensation requirements for the impairment of property values).

103. In the face of critiques that property rights legislation would bankrupt local governments, supporters asserted that these statutes would actually impose very few costs because government entities would avoid having to make payments by adopting a more limited set of regulations. See, e.g., Jeffrey W. Porter, *Will Property Rights Legislation Endanger Smart Growth Efforts?*, 30 *Real Est. L.J.* 275, 299–302 (2002) (“If legislators know that the cost [of regulations] will be borne by state and local governments, they have an incentive to make the regulation as focused and limited as it can be . . .”).

104. Critics contend that such statutes fail to acknowledge the many benefits regulation confers, thereby effectively requiring government entities to pay landowners not to harm others via pollution, wetland degradation, and the like. See, e.g., Berger, *The Illusion*, *supra* note 37, at 11, 40. The extensive costs of doing so will, in turn, create a chilling effect to regulation that resultantly leaves the lands of those downwind/downstream/downslope in harm’s way. See *id.* at 34–37 (“Full compensation requirements do not lead to more efficient regulations; they simply shut regulation down.”); Echeverria & Hansen-Young, *supra* note 14, at 444 (“The virtually invariable effect of successful state takings legislation has been to force state and local governments to not adopt laws and regulations they otherwise would have adopted and to not enforce restrictions already on the books.”); Sugameli, *supra* note 14, at 579–80 (“Provisions . . . that mandate that payments will come out of the budget of the agency . . . provide a powerful incentive for agencies to grant permits that will harm the health, safety and property of neighbors . . .”). But see Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 *Sup. Ct. Econ. Rev.* 141, 177–78 (2007) (“It is not clear . . . whether (and to what extent) the existence of these takings statutes has induced state and local governments to reduce regulatory impositions in order to avoid liability for compensation . . .”).

105. Florida’s law is the exception in that it focuses less on the diminution in value than it does on the extent to which the claimant’s investment expectations have been dashed. See Fla. Stat. § 70.001(3)(e) (2020). Still, any award under Florida’s statute seeks to bridge the difference in value between the value of the property with and without the regulation creating the “inordinate burden.” *Id.* § 70.001(6)(b).

106. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993) (rejecting diminution in value as a dispositive variable in a regulatory takings case). The lone exception in Supreme Court takings jurisprudence involves those instances in which regulation denies all economically viable uses of a parcel of land and thereby reduces the value of that parcel to zero. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–20, 1030 (1992). This “exception” is subject to its own

inquiry focused exclusively on the economic burdens of regulation. Second, these statutes dissolve the traditional takings claimant's burden to prove that the government is not justified in proceeding absent compensation and instead impose the burden on government defendants to prove that they are so justified.<sup>107</sup> This burden, according to a recent empirical study, falls heavily on local governments, who serve as the defendant in a far higher percentage of regulatory takings cases than their state counterparts.<sup>108</sup>

That such statutes constrain land-use regulation—either through explicit application or by creating a chilling effect—is self-evident,<sup>109</sup>

---

qualifications and, thus, has hardly been applied categorically. See Timothy M. Mulvaney, *Property-as-Society*, 2018 Wis. L. Rev. 911, 953–54 [hereinafter Mulvaney, *Property-As-Society*] (“[T]he *Murr* Court described *Lucas* as merely offering ‘guidelines’ relevant to ‘determining when government regulation is so onerous that it constitutes a taking.’” (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017))).

107. But these statutes often allow the government to repeal or modify its proposed action to avoid the compensation requirement. Therefore, only if a government action amounted to a taking under the Constitution (not merely the statute) would compensation be appropriate for the interim period during which the regulation was in effect before the government withdrew it, in accord with the Supreme Court's temporary takings jurisprudence. See *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (“[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

108. Professors Krier and Sterk recently conducted an exhaustive empirical assessment of the more than 2,000 reported takings decisions handed down in the lower courts between 1978 and 2012. Krier & Sterk, *supra* note 9. Of the approximately 1,200 reported cases in which a property owner challenged a regulation as a taking (excluding takings challenges to regulations designed to prevent against flooding, which the researchers addressed separately), nearly 900 involved claims against local government entities, while fewer than 300 involved claims against state government entities in federal courts. *Id.* at 71 tbl.5, 78 tbl.8. The small remainder involved claims against federal government entities. *Id.* at 78 tbl.8.

109. In terms of explicit applications, for example, before Oregon's voters substantially reduced the impact of Measure 37 through another ballot initiative three years after the measure's passage in 2004, more than 7,000 claims had been filed against state and county governments seeking a total of \$17 billion in compensation. See Or. Dep't of Land & Conservation Dev., *Ballot Measures 37 (2004) and 49 (2007) Outcomes and Effects 5* (2011), [https://www.oregon.gov/lcd/Measure49/Documents/M49\\_BallotMeasures37\\_and\\_49\\_OutcomesEffects\\_2011.pdf.pdf](https://www.oregon.gov/lcd/Measure49/Documents/M49_BallotMeasures37_and_49_OutcomesEffects_2011.pdf.pdf) [<https://perma.cc/9Y5U-UNKA>]. These local governments found no viable fiscal option but to forego enforcement of regulations on zoning, subdivision, farming and forestry practices, transportation, and the like that allegedly diminished property values. See Berger, *The Illusion*, *supra* note 37, at 34. That a statute has been applied in only a small number of instances, however—or even has not been applied in any instances at all, as has reportedly been the case with Mississippi's forty percent diminution-in-value statute—is not necessarily evidence that the statute lacks substantive effect. See Miss. Code Ann. § 49-33-7, -9 (2020); Echeverria & Hansen-Young, *supra* note 14, at 518 (noting Mississippi's forty percent diminution-in-value statute has never been litigated). Rather, the statute may well be doing its work by incentivizing regulators to avoid even approaching the forty-percent threshold and potentially triggering a claim for compensation. See Echeverria & Hansen-Young, *supra* note 14, at 518 (noting the lack of

although this is made especially clear where statutes exempt government actions that provide *relief from* existing regulations. For example, under Florida's statute, landowners cannot claim compensation on the ground that the government's granting of a variance to a neighbor triggered a reduction in the value of their property.<sup>110</sup> Given the overall size of local-government budgets and the relatively more limited avenues by which they can raise revenues, local entities in all but perhaps the nation's largest cities are more fiscally risk averse than their state-level counterparts.<sup>111</sup> For this reason, any chilling effect resulting from compensation statutes is considerably more pronounced at the local level. Academic disagreement regarding these statutes centers not on whether they impose a chilling effect on local land-use regulation but rather on how extensive that effect might be.<sup>112</sup>

---

litigation "is probably in part because Mississippi has never pursued strict regulations of farm and agricultural lands"); see also *supra* note 104.

110. Fla. Stat. § 70.001(3)(e). On the possibility of nonenforcement of existing regulations giving rise to takings liability, see Mulvaney, *Non-Enforcement Takings*, *supra* note 61, at 185.

111. See Serkin, *Big Differences*, *supra* note 15, at 1665–70. This Article assumes that democratic measures hold government officials to some account for their budgetary management. It does not contend, however, that monetary costs are always wholly commensurate with political costs. See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 *Mich. St. L. Rev.* 957, 994–95 (noting that it is not "realistic to think that higher levels of compensation will necessarily dissuade governmental entities from succumbing to political pressures" because the "pain from budgetary outlays" is "attenuated by the operation of the political process"); Levinson, *supra* note 37, at 346–47 (discussing how any model of the interaction between monetary and political costs is "highly contextual, complex, and controversial"); Serkin, *Big Differences*, *supra* note 15, at 1644–65 (explaining that local governments may exhibit a stronger relationship between monetary and political costs "because the costs and benefits of local government actions are born[e] by the same people who control the political process"); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 *U.C. Davis L. Rev.* 239, 246–48 (2007) (noting that monetary costs do not directly translate into political costs because "taxpayers, not government decision makers, pay the monetary costs of government decisions").

112. Compare Charles C. Carter & John Taylor, *Current Status of Property Rights Compensation Statutes*, 35 *Real Est. L.J.* 405, 411 (2006) (presenting the argument that "Florida's legislature wouldn't have gone to so much trouble if all they meant to do was to make it a little easier for land owners to gain compensation"), with Richard Grosso & Robert Hartsell, *Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 1712*, 79 *Fla. Bar J.* 41, 44 (2005) (suggesting that Florida's statute was "not intended to drastically affect Florida's growth management or environmental laws"). In the face of claims for compensation, local governments almost universally agree to waive enforcement of the challenged regulation. See Echeverria & Hansen-Young, *supra* note 14, at 488 (noting the local concern that paying compensation to a party allegedly burdened by a generally applicable regulation in one case would generate many more claims from owners subject to the same regulation).

Examples of local-government decisions to abandon proposed regulation or weaken existing regulation in the face of a threat of compensation claims under these statutes abound. See, e.g., *id.* at 462–69. While the actual impacts of these statutes have not been empirically assessed, they assuredly vary across the adopting jurisdictions in light of their distinctive backdrops. The statutes in Florida and Oregon, and similarly though to a lesser

2. *Limitations on Takings Defenses.* — Some state statutes increase the likelihood that claimants will be awarded compensation for alleged regulatory interference with property rights by limiting the defenses available to the government. In some instances, such limitations are explicit. Consider, for example, the takings defense that a regulation merely precludes a land use that could have been declared a nuisance at common law, as set out explicitly in *Lucas v. South Carolina Coastal Council*<sup>113</sup> and underpinning a lengthy run of cases that preceded it.<sup>114</sup> State legislatures have limited this defense with ubiquitous “right-to-farm” statutes that excuse at least some agricultural activities from nuisance liability.<sup>115</sup> In these circumstances, local governments are precluded from regulating the harmful impacts that farm operators can impose on their neighbors.<sup>116</sup>

Like nuisance law, the customary use doctrine and the public trust doctrine have also shielded local governments from liability in numerous takings cases.<sup>117</sup> But some state legislatures have narrowed the

---

extent in Arizona, were adopted against the backdrop of fairly extensive land-use regulatory programs. The statutes in Louisiana, Mississippi, and Texas, on the other hand, were adopted in states that lack strong traditions of land-use regulation.

113. 505 U.S. 1003, 1028–29 (1992).

114. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 277–80 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394, 406 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915); *Mugler v. Kansas*, 123 U.S. 623, 658, 667 (1887).

115. See, e.g., Ark. Code Ann. § 2-4-107 (2020) (“[A]n agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production.”); Ga. Code Ann. § 41-1-7 (2020) (“No agricultural facility . . . shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such facility or operation if the facility or operation has been in operation for one year or more.”); Miss. Code Ann. § 95-3-29 (2020) (“In any nuisance action, public or private, against an agricultural operation, including forestry activity, proof that . . . [it] has existed for one (1) year or more is an absolute defense to the nuisance action . . . .”); Vt. Stat. Ann. tit. 12, § 5753 (2020) (creating a rebuttable presumption that agricultural activity is not a nuisance if it is consistent with good agricultural practices, is established prior to surrounding nonagricultural activities, has not significantly changed since commencement of surrounding activities, and complies with other applicable law). The Iowa Supreme Court’s decision in *Bormann v. Board of Supervisors ex rel. Kossuth County* presents the rare exception calling these statutes into question absent takings compensation. See 584 N.W.2d 309, 319–22 (Iowa 1998) (declaring that, by licensing one landowner’s creation of a nuisance, the county effectively transferred to that landowner a property interest in the form of an easement across a neighbor’s land and finding that such a transfer is the proper subject of takings review).

116. See, e.g., Jennifer L. Beidel, *Pennsylvania’s Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 Penn St. L. Rev. 163, 171 (2005) (“The law limits the ability of municipalities to create local ordinances that define ‘normal agricultural operations’ as public nuisances.”).

117. See, e.g., *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002) (concluding that a Washington land owner did not hold a compensable property interest in his proposal to build private residences on elevated platforms above navigable tidelands because the construction’s purpose “was inconsistent with the public trust that the State . . .

circumstances in which the government can assert that a regulation supporting public access to beaches preserves a customary use,<sup>118</sup> while others have considered eliminating altogether the defense that a challenged regulation protects property held in trust for the public.<sup>119</sup>

In other instances, state legislation walks back available takings defenses in more subtle ways. For example, a number of state property rights statutes exempt regulations enacted to protect public “health and safety.”<sup>120</sup> In so doing, they silently omit the more capacious, traditional takings defense that a regulation serves the public *welfare* by precluding detrimental and often localized impacts that are less directly connected to public health and safety. These impacts include the often diffused harms that odors, noise, pollution, and the like can impose on natural resources;<sup>121</sup> development designs that run counter to the aesthetic desirability and cohesion of neighborhoods;<sup>122</sup> and degradation of communities’ cultural and historic character.<sup>123</sup>

---

is obligated to protect”); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993) (“We . . . hold the doctrine of custom as applied to public use of Oregon’s dry sand areas is one of ‘the restrictions that background principles of the State’s law of property . . . already place upon land ownership.’ . . . [P]laintiffs have never had the property interests that they claim were taken . . . .” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992))).

118. See, e.g., Fla. Stat. § 163.035 (2020) (requiring that the government, before adopting a beach access regulation on the grounds that it preserves a customary recreational public use, provide notice of a public hearing at which it bears the burden of proving that the use has been “ancient, reasonable, without interruption, and free from dispute”).

119. See, e.g., H.R. 597, 54th Leg., Reg. Sess. § 3(8) (Mont. 1995) (“The public trust doctrine is specifically excluded as a defense of any taking of private property or real property by private persons or public agencies.”).

120. See, e.g., Ariz. Rev. Stat. § 12-1134(B)(1) (2020) (exempting from diminution-in-value remedies those “land use laws that . . . [l]imit or prohibit a use or division of real property for the protection of the public’s health and safety”); Miss. Code Ann. § 49-33-7(e)–(f) (exempting from diminution-in-value remedies regulations that restrict activities that “constitute a public nuisance under common law” or are “harmful to the public health and safety”); Or. Rev. Stat. § 195.305(3)(a)–(b) (2019) (exempting from diminution-in-value remedies regulations that restrict activities “commonly and historically recognized as public nuisances under common law” or that otherwise were enacted “for the protection of public health and safety”).

121. See, e.g., *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 298 (Alaska 2001) (rejecting a takings challenge to a setback requirement that was part of a wetlands protection scheme due to “the unique ecological and economic value that wetlands provide in protecting water quality, regulating local hydrology, preventing flooding, and preventing erosion”).

122. See, e.g., *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (open space); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396–97 (1926) (zoning); *Welch v. Swasey*, 214 U.S. 91, 107–08 (1909) (building height limitation); see also *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) (“A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, *morals*, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” (emphasis added)).

123. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (noting, in rejecting a takings claim, that New York City’s historical landmark designations were “substantially related to the promotion of the general welfare”); *id.* at 145–46 (Rehnquist, J.,

### B. *Procedural Impositions*

Unlike the statutes discussed in the prior section, the legislation reviewed in this section does not affect the standard employed to determine whether a regulation requires compensation or the defenses available against such a claim. Instead, these statutes create costly procedural requirements that preemptively aim to discourage the adoption of regulations that might amount to takings in the first place.

In several states, legislation requires local-government entities to perform a “takings impact assessment” before deciding whether to adopt a land-use regulation.<sup>124</sup> While the details vary from state to state, such assessments generally require the government to prepare, within a matter of weeks, a written analysis responding to a series of what are, at times, data-dependent questions respecting individual properties that would potentially be subject to the regulation under consideration.<sup>125</sup> These statutes, again seen in their best light, aim to minimize interference with property rights by forcing the government to prospectively consider the future impacts of proposed regulations on property rights.<sup>126</sup> In turn, the

---

dissenting) (“Appellees are not prohibiting a nuisance. The record is clear that the proposed addition . . . would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture.”).

124. See Idaho Code § 67-8003 (2020) (requiring a takings impact assessment upon written request of the private property owner); Tex. Gov’t Code § 2007.043 (2019) (requiring a takings impact assessment only in select circumstances); Utah Code § 63L-3-202 (2009); Wash. Rev. Code § 36.70A.370 (2020). Other states passed legislation that seemingly—and somewhat peculiarly, given the reality that so much of land-use regulation occurs at the local level—only require state government entities to conduct takings impact assessments. See Del. Code tit. 29, § 605 (2020); Ind. Code § 4-22-2-32 (2020); Kan. Stat. Ann. § 77-704 (West 2020); Me. Rev. Stat. Ann. tit. 5, § 8056(1) (a), (6) (2020); Mich. Comp. Laws Ann. § 24.424 (West 2020); Mo. Ann. Stat. § 536.017 (West 2020); Mont. Code Ann. § 2-10-105 (West 2019); N.D. Cent. Code § 28-32-09 (2020); Tenn. Code Ann. § 12-1-203 (2020); Va. Code § 25.1-417 (2020); W. Va. Code Ann. § 22-1A-3 (LexisNexis 2020); Wyo. Stat. Ann. § 9-5-303 (2020). Meanwhile, California, Colorado, and Nebraska did so by following Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988), which outlines requirements for federal departments and agencies to follow when they act in a way that might constitute a taking. Cal. Exec. Order No. D-77-89 (June 22, 1989), <https://www.library.ca.gov/Content/pdf/GovernmentPublications/executive-order-proclamation/5949-5950.pdf> [<https://perma.cc/K2LX-HS5M>]; Neb. Exec. Order No. 95-9 (June 3, 1998), <https://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/95-9.pdf> (on file with the *Columbia Law Review*); Gus Bauman, Supreme Court Takings Rule, SC43 ALI-ABA 91, 99 (1998). Many takings impact assessment bills moved forward as political compromises after diminution-in-value compensation bills did not garner sufficient support. See Robert Meltz, Property Rights Legislation: Analysis and Update, SB14 ALI-ABA 551, 570 (1996).

125. See, e.g., Idaho Att’y Gen. Off., Idaho Regulatory Takings Act Guidelines 5 (2020), <https://www.ag.idaho.gov/content/uploads/2018/04/RegulatoryTakings.pdf> [<https://perma.cc/Q53Z-29P7>] (noting that the completed takings analysis shall be provided no more than forty-two days after a filed request).

126. See, e.g., Marzulla, *supra* note 14, at 636 (“Planning bills merely require state agencies to assess the takings implications of their regulations before they are adopted.”); Michael M. Berger, Dollars and Damages: A Debate, *Planning*, Mar. 1996, at 22, 24 (“[W]hat

argument goes, these assessments help the government avoid inadvertent takings and protect the public fisc.<sup>127</sup> In other states, government entities are encouraged and, in select instances, even *required* to engage in settlement discussions upon property owners' claims that a regulatory action interferes with their preferred land uses.<sup>128</sup>

In the face of heightened fiscal pressures facing local governments,<sup>129</sup> takings impact assessments and mandatory-settlement statutes may well have the effect of chilling even those local regulatory efforts that are extremely unlikely to broach the takings liability line.<sup>130</sup> The cost of completing takings impact assessments is extensive.<sup>131</sup> An analysis of Washington State's takings impact assessment statute—which the state's voters repealed via referendum before it was implemented—estimated that state and local entities would collectively sustain annual costs ranging

---

the pending legislation is designed to do is to force society to examine the true cost of its programs . . . .”). Opponents, meanwhile, see an assessment statute as “red tape” that demands expensive speculation that cannot achieve the stated aim, given the challenges inherent in determining via a facial analysis the likelihood that a generally applicable law will be unfair and unjust to an individual claimant absent compensation. See, e.g., Byrne, *Ten Arguments*, supra note 87, at 137–38 (arguing that property assessment statutes have little benefit in terms of protecting property rights because agencies are not equipped to “rationally consider whether a proposed regulation will effect a taking on any piece of property”); Cordes, supra note 14, at 241 (“[I]t is questionable whether the marginal benefits of such assessments will be worth the considerable effort of their preparation.”); Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the “Just Compensation” Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 *Fordham L. Rev.* 787, 814 n.168 (1997) (arguing that assessment requirements that rely on facial assessments are unlikely to “weed out a great number of regulations” because they cannot show harm to every affected person); Freilich & Doyle, supra note 14, at 4–6 (“[A]ssessment type takings laws could not accomplish anything more than creating a huge expense and chilling the efforts of state agencies and local governments charged to protect the health, safety, and welfare of our communities.” (footnotes omitted)).

127. See, e.g., Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 *Geo. J.L. & Pub. Pol’y* 77, 120–21 (2002) (“[T]akings impact assessment] statutes are broadly beneficial in the sense that they force agencies and attorneys general to give at least some thought to property rights and the takings issue.”).

128. See Fla. Stat. § 70.001(1), (4)(c) (2020) (requiring the government to “make a written settlement offer” within a specified period following a property owner’s filing a claim that “a new law, rule, regulation, or ordinance . . . unfairly affects real property”); Me. Rev. Stat. Ann. tit. 5, § 3341(3) (allowing a landowner to “apply for mediation” if the landowner believes they have “suffered significant harm as a result of a [local] governmental action regulating land use” and have “pursued all reasonable avenues of administrative appeal”).

129. See supra note 111 and accompanying text.

130. See, e.g., Sugameli, supra note 14, at 573 (asserting that takings impact assessments “can incur high costs in time, effort and expense and can function, intentionally or not, to delay or block implementation of laws that protect people, property and communities”).

131. See S. Rep. No. 104-239, at 75 n.21 (1996) (“[T]he Congressional Budget Office and the Office of Management and Budget have estimated the cost of this [takings impact assessment] provision to be between \$30 and \$40 million over 5 years.”); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 *Wash. & Lee L. Rev.* 265, 288 (1996) (“At best, such overblown procedural requirements are simply wasteful . . .”).



from \$513 million to \$2.3 billion in 1994 dollars to fulfill their assessment requirements.<sup>132</sup>

The costs of mandatory-settlement discussions can also be significant. The government is at an “information asymmetry” in these discussions given that it is required to engage with each property claimant about the impact of a regulation on that claimant’s individual property—about which likely only that claimant is intimately familiar—even where that regulation applies generally to hundreds or even thousands of properties.<sup>133</sup> Simply arranging such individualized discussions is an administratively expensive task,<sup>134</sup> let alone the possibility of having to hire additional government personnel to acquire the background information needed to conduct these individualized discussions in any meaningfully thorough way.

### C. *Limitations on Specific Local-Government Powers*

The statutes in this section do not aim to chill land-use regulation substantively or procedurally, but instead preempt or constrain the use of specific local regulatory tools at the center of takings law *outright*. The legislation in this category includes provisions respecting eminent domain, lot-merger ordinances, development moratoria, impact fees, tenant protections and other housing policies, environmental preservation, and zoning variances. Unsurprisingly, given the breadth of this range, the motivations behind and rationalizations for adopting these statutes vary considerably. In general, though, it is fair to suggest these statutes are rooted in the implicit assumption that local governments are wholly *incapable* of being channeled into making prudent, cost-conscious choices in these areas.

1. *Limitations on Eminent Domain Authority.* — The first category of outright limitations on specific local-government powers involves eminent domain. These statutes are intimately tied up with takings jurisprudence, perhaps most notoriously after the Supreme Court’s decision in *Kelo v. City of New London*.<sup>135</sup> In *Kelo*, the Court concluded that condemnation of non-blighted properties for economic redevelopment purposes is consistent with the Fifth Amendment’s “public use” clause.<sup>136</sup> This holding prompted

---

132. See Inst. for Pub. Pol’y & Mgmt., Univ. of Wash., Referendum 48—Economic Impact Study of the Property Rights Initiative 5 tbl.1, 6 tbl.3 (1995) (on file with the *Columbia Law Review*). In 2020 dollars, the cost would be approximately \$892 million to \$4 billion, according to calculations from the Consumer Price Index Inflation Calculator of the U.S. Bureau of Labor Statistics. See CPI Inflation Calculator, U.S. Bureau of Labor Statistics, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Jan. 28, 2020).

133. See Sylvia R. Lazos Vargas, Florida’s Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks, 23 Fla. St. U. L. Rev. 315, 389–91 (1995).

134. See *id.* at 388–89 (“[T]he land use entity must make a careful, individualized determination for each claim filed . . . This personnel cost will have to be absorbed by the agency, since administrative costs of the Act are not funded.”).

135. 545 U.S. 469 (2005).

136. *Id.* at 484.

dozens of state legislatures to pass statutes limiting eminent domain for economic development purposes.<sup>137</sup> In some of these states, the restrictions are limited in that they continue to allow the taking of properties that fit a broadly worded definition of “blighted.”<sup>138</sup> In others, though, the statutory measures are quite constraining. Some states partner their prohibitions on economic development takings with a narrowing of the definition of “blight”;<sup>139</sup> others go so far as to prohibit economic development takings regardless of blight.<sup>140</sup>

---

137. Among the plethora of law review articles recounting and assessing the state legislative responses to *Kelo*, careful contributions include: Ely, *supra* note 14, at 133–38 (critically assessing post-*Kelo* statutes in light of expansive “blight” exemptions and “motive” requirements); Jacobs & Bassett, *supra* note 14, at 6–8 (arguing that state laws passed in response to *Kelo* have had little substantive impact, but may have heightened public awareness of takings); Mihaly & Smith, *supra* note 14, at 726–27 (noting, at the time of writing, that out of the forty states that enacted post-*Kelo* legislation, only fourteen state legislatures enacted laws that either banned or significantly restricted condemnation for economic development); Morriss, *supra* note 14, at 240–43 (offering explanations for the differing effectiveness of post-*Kelo* statutes); Somin, *Political Response to Kelo*, *supra* note 14, at 2114–16 (categorizing post-*Kelo* legislative efforts as either effective or ineffective); Hannah Jacobs, Note, Searching for Balance in the Aftermath of the 2006 Takings Initiatives, 116 *Yale L.J.* 1518, 1522–27 (2007) (surveying the regulatory takings reform movement and its success at the state level).

138. See Alaska Stat. §§ 09.55.240(a)(2), 18.55.950(2) (2020); Cal. Health & Safety Code §§ 33030–33037 (2020); Colo. Rev. Stat. §§ 31-25-103(2), 38-1-101(2)(b) (2020); 65 Ill. Comp. Stat. Ann. 5 / 11-74.4-3(a)(1) (West 2019); Iowa Code § 6A.22 (2020); Ky. Rev. Stat. Ann. §§ 99.340(2), 99.370(6) (West 2020); Me. Rev. Stat. Ann. tit. 1, § 816 (2020); Me. Rev. Stat. Ann. tit. 30-A, § 5101 (2020); Mo. Ann. Stat. §§ 100.310.2, 353.020.2, 523.271.2 (West 2020); Mont. Code Ann. §§ 7-15-4206(2), 70-30-102 (West 2019); Neb. Rev. Stat. §§ 18-2103 (2012), 76-701 (2018); Nev. Rev. Stat. §§ 37.010(1)(o), 279.388 (2019); N.C. Gen. Stat. §§ 160A-503(2), 160A-515 (2020); Ohio Rev. Code Ann. § 1.08(B)(2)(a)-(p), 303.26(E) (2007); 42 R.I. Gen. Laws § 42-64.12-6(d) (2020); 45 R.I. Gen. Laws § 45-31-6 (2020); Tenn. Code Ann. § 13-20-201(a) (2020); Tex. Gov’t Code § 2206.001(b)(3) (2019); Tex. Loc. Gov’t Code § 374.003(3) (2019); Vt. Stat. Ann. tit. 12, § 1040 (2020); Vt. Stat. Ann. tit. 24, § 3201(3) (2019); W. Va. Code Ann. §§ 16-18-3(c)–(d), 16-18-6 (LexisNexis 2020); Wis. Stat. § 32.03(6)(a) (2020). Maryland law allows economic development and blight takings but requires that they be accomplished within four years of their authorization. See Md. Code Ann., Real Prop. § 12-105.1(a) (West 2020). Connecticut places a different though similarly limited constraint on the exercise of eminent domain by precluding its use in instances in which the condemnation would be “for the primary purpose of increasing local tax revenue.” See Conn. Gen. Stat. § 8-193(b)(1) (2020).

139. See Ala. Code § 24-2-2(c) (2020); Ga. Code Ann. § 22-1-1(1), (10) (2020); Idaho Code § 7-701A(2)(b) (2020); Ind. Code § 32-24-4.5-7 (2020); Mich. Comp. Laws Ann. § 213.23(1), (3), (8) (West 2020); N.H. Rev. Stat. Ann. § 205:3-b (2020); Va. Code § 1-219.1 (2020); Wyo. Stat. Ann. § 1-26-801(c) (2020). The Pennsylvania legislature precluded economic development takings with a narrow definition of blight but included geographic exemptions for major urban areas. See 26 Pa. Cons. Stat. §§ 203(b)(4), 204(a), 205(b)–(c) (2018).

140. See Fla. Stat. § 73.013(1), (4) (2020); N.M. Stat. Ann. § 3-18-10 (West 2020). These statutes largely mirror a Utah statute that had been enacted shortly before the Supreme Court released its decision in *Kelo*. See S.B. 184, 56th Leg., Gen. Sess. (Utah 2005) (repealed by H.B. 365, 57th Leg., Gen. Sess. (Utah 2006)). Two other state legislatures have gone nearly as far. See Kan. Stat. Ann. § 26-501b (2020) (precluding nearly all exercises of eminent domain that would be followed by a transfer to a nongovernmental third party);

2. *Anti-Lot-Merger Laws*. — The power to define lot-line boundaries is a second area of state intervention in specific local-government authority. In the recent Supreme Court case *Murr v. Wisconsin*, a landowner challenged a county regulation requiring the merger of commonly owned adjacent properties that, separately, are not sufficiently large under current zoning law to erect residential structures in light of flooding and other topographical risks.<sup>141</sup> Consistent with the lower courts that had addressed earlier takings challenges to merger laws,<sup>142</sup> the Court unanimously agreed that the county's merger ordinance did not amount to a compensable taking of the claimant's property.<sup>143</sup>

Shortly after the *Murr* decision came down in 2017, the Wisconsin legislature passed a statute—effective retroactively—that preempts any law that requires lots to be merged without the owners' consent.<sup>144</sup> This course followed that of several state legislatures that had restricted local use of merger laws prior to *Murr*. Several of these pre-*Murr* antimerger laws directly mirror Wisconsin's statute in important respects.<sup>145</sup> Of the others, one state's statute limits mergers to those instances involving local efforts to enforce setback requirements and subdivision standards,<sup>146</sup> while several other states place similar, if less stringent, constraints on the application of merger laws.<sup>147</sup>

S.D. Codified Laws § 11-7-22.1(1) (2020) (precluding economic development takings and all takings—including in blighted areas—that would be followed by a transfer of the condemned interest to a nongovernmental third party).

141. 137 S. Ct. 1933, 1941 (2017).

142. See, e.g., *Booth v. Zoning Bd. of Rev., Barrington*, No. PC97-3515, 1999 WL 566128, at \*6–7 (R.I. Super. Ct. July 14, 1999); *Mancino v. Purcell*, No. 95-6007, 1997 WL 1051036, at \*5 (R.I. Super. Ct. Aug. 7, 1997).

143. *Murr*, 137 S. Ct. at 1946–49; *id.* at 1950 (Roberts, C.J., dissenting) (explaining that the majority's conclusion that the merger ordinance did not affect a compensable taking “d[id] not trouble [him]”). The Justices were divided, though, on the appropriate approach for determining the baseline property interest at stake in a regulatory takings case. See Mulvaney, *Property-As-Society*, *supra* note 106, at 964–66.

144. Wis. Stat. § 66.10015(4) (2020).

145. New Hampshire's statute most directly mirrors that of Wisconsin. See N.H. Rev. Stat. Ann. § 674:39-a (2020) (“No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner.”). In Colorado, counties considering a merger of lots must afford the landowner the opportunity to request a hearing. Landowner consent is required for the merger to proceed only if the landlord requests a hearing. Colo. Rev. Stat. § 30-28-139(1)–(2) (2020). In effect, then, in all cases in Wisconsin and New Hampshire, the owner must give the government consent, whereas in Colorado, the owner must take the step of requesting a hearing to place that burden on the government.

146. N.M. Stat. Ann. § 47-6-9.1 (West 2020) (precluding counties from merging parcels considered separate in the chains of title prior to transfer into common ownership and where the common owner has “taken no action to consolidate the parcels” except “for the purpose of enforcing minimum zoning or subdivision standards”).

147. Cal. Gov't Code § 66451.10–11 (2020) (precluding the application of local merger laws unless some combination of conditions relating to existing development, lot size, sewage and water service, slope stability, vehicular and safety equipment access, health and safety hazards, and comprehensive plan consistency are satisfied); 45 R.I. Gen. Laws Ann.

3. *Development Moratoria Preemption.* — Local governments at times impose moratoria on development in order to facilitate planning. By temporarily limiting growth, development moratoria provide officials with time and space to address their jurisdiction’s myriad community goals—such as safeguarding sites of historic and cultural value, preserving open space and other environmental resources, and providing affordable housing—in a more coordinated and comprehensive fashion than they otherwise could.<sup>148</sup>

The Supreme Court has determined that adjudicating takings challenges to these moratoria “requires careful examination and weighing of all the relevant circumstances” via the “*Penn Central* inquiry.”<sup>149</sup> Development moratoria, like merger ordinances, have consistently survived constitutional challenge under this standard.<sup>150</sup> Many state legislatures, however, have capped the length of time that local governments may adopt development moratoria to periods as short as four months.<sup>151</sup>

---

§ 45-24-38 (2020) (requiring that the standards employed at the local level to determine whether a merger is appropriate must allow for consideration of infrastructure availability, neighborhood character, and comprehensive plan consistency); Vt. Stat. Ann. tit. 24, § 4412(2)(B) (2020) (precluding the application of municipal merger laws where “the lots are conveyed in their preexisting, nonconforming configuration” and, prior to the effective date of the merger law, each lot was connected to an operable water supply and wastewater system). One state legislature uniquely constrains county government authority to adopt and apply merger laws by setting out criteria for those contiguous “shoreland” lots that local governments *must* merge. See Minn. Stat. § 394.36 (2019).

148. Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 264–65 (1999).

149. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 327 n.23, 334 (2002) (internal quotation marks omitted) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)). While the Supreme Court determined in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* that the state cannot avoid having to pay compensation by repealing the offending law, 482 U.S. 304, 322 (1987), the California courts held on remand that an interim local ordinance precluding construction in a flood-prone area did not amount to a compensable “temporary” taking, *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893, 906 (Ct. App. 1989). In *Tahoe-Sierra*, the Supreme Court later rejected a claimant’s contention that a thirty-two-month development moratorium should be deemed a taking of all economically viable uses regardless of any public interests advanced by the moratorium. See *Tahoe-Sierra*, 535 U.S. at 320–21.

150. See, e.g., *Wild Rice River Ests., Inc. v. City of Fargo*, 705 N.W.2d 850, 859 (N.D. 2005); *Nolen v. Newtown Twp.*, 854 A.2d 705, 709–10 (Pa. Commw. Ct. 2004).

151. See *Ariz. Rev. Stat. § 11-833(E)* (2020) (120-day limit with one possible renewal); *Cal. Gov’t. Code § 65858(a)* (forty-five-day limit with up to a two-year extension); *Colo. Rev. Stat. § 30-28-121* (2020) (six months); *Ky. Rev. Stat. Ann. § 100.201(1)* (West 2020) (one year); *Me. Rev. Stat. Ann. tit. 30-A, § 4356(2)* (2020) (180-day limit with one possible renewal); *Mich. Comp. Laws Ann. § 125.3404* (West 2020) (one-year limit with one possible renewal); *Minn. Stat. § 394.34* (one-year limit with a possible two-year renewal); *Mont. Code Ann. § 76-2-206(2)* (West 2019) (one-year limit with one possible renewal); *N.H. Rev. Stat. Ann. § 674:23(III)(c)* (2020) (one year); *Or. Rev. Stat. § 197.520(4)* (2019) (120-day limit with up to a possible six-month renewal); *S.D. Codified Laws § 11-2-10* (2020) (one-year limit

4. *Impact-Fee Limitations.* — Fees by local governments assessed to mitigate the impact of development constitute another area of state interference. Takings jurisprudence somewhat peculiarly saddles the government, as the defendant in takings cases, with the burden of proving that certain types of permit conditions are sufficiently connected to and roughly proportionate with the anticipated impacts stemming from the approved development to avoid liability.<sup>152</sup> In turn, though, this means that in those many routine instances in which this burden either is met or is considered inapplicable to the type of permit condition at issue, takings liability is inapposite.<sup>153</sup> One approach to offset development impacts—particularly those that are cumulative in nature, such as stresses on local schools, roadways, and traffic patterns—involves conditioning development permits on the requirement that the applicant pay impact or “linkage” fees that the local government pools.<sup>154</sup>

Some state legislatures, however, have precluded impact fees outright in certain circumstances,<sup>155</sup> and many others have placed stringent limitations on their use even in cases in which the government would have little difficulty demonstrating that the fees meet the connectivity and proportionality strictures of takings law were it required to do so.<sup>156</sup>

---

with one possible renewal); Utah Code § 10-9a-504 (2005) (six-month limit with a possible eighteen-month renewal); Wash. Rev. Code § 35A.63.220 (2020) (six-month limit with possible unlimited renewals); Wis. Stat. § 62.23(7)(da) (2020) (two-year limit with a possible one-year renewal). New Jersey precludes development moratoria for the purpose of preparing a comprehensive plan or drafting development regulations, though they are authorized for up to six months “where the municipality demonstrates on the basis of a written opinion by a qualified health professional that a clear imminent danger to the health of the inhabitants of the municipality exists.” N.J. Stat. Ann. § 40:55D-90(b) (West 2020).

152. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“rough proportionality”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (“essential nexus”).

153. There is general agreement that the nexus and proportionality standards apply when the state issues or proposes a land-use permit administratively conditioned on applicants providing strangers permanent access to their land or drawing on a “specific pool” of the applicants’ money. The lower courts are divided, however, on the question of whether these standards apply in the various other contexts involving conditional permits (situations in which permit conditions are unrelated to access by strangers or a specific pool of funds, situations in which permit conditions are required by broadly applicable regulation, etc.). For a recent exploration of the topic of when courts apply the heightened scrutiny of *Nollan* and *Dolan* and how restraint in its application stems from normative concerns regarding fair allocation, see generally Timothy M. Mulvaney, *The State of Exactions*, 61 *Wm. & Mary L. Rev.* 169 (2019) [hereinafter Mulvaney, *State of Exactions*].

154. See William W. Merrill III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 *Urb. Law.* 223, 234–37 (1993) (explaining how linkage fees are formulated to be proportional to the development’s impact).

155. See Ariz. Rev. Stat. § 9-463.05(B)(5) (prohibiting development fees for construction or repair for public facilities and associated operation costs); Del. Code tit. 14, § 2006(b) (2020) (precluding impact fees for improving water supply or wastewater capacity); N.M. Stat. Ann. § 5-8-5 (West 2020) (prohibiting impact fees for construction or repair of public facilities, operating costs of a municipality, and debt payments).

156. See Ariz. Rev. Stat. § 9-463.05(A) (allowing municipalities to assess development fees to offset costs for necessary public services); Ark. Code Ann. § 14-56-103(b) (2020)

5. *Preemption of Tenant Protections and Other Local Housing Policies.* — Rent control and related tenant protections have often survived takings challenges where they assure landlords a reasonable rate of return on their investment under the circumstances. A century ago, in *Block v. Hirsh*, the Supreme Court rejected a takings challenge to a law that, in the face of a housing shortage, allowed tenants to retain possession of their units after the end of their leases at rents determined by a government commission.<sup>157</sup> The Court reaffirmed *Block* seventy years later in holding that a law allowing mobile home owners to continue renting the land on which their mobile homes sat after the termination of the lease term did not amount to a categorically compensable regulation authorizing an unwanted physical invasion by a stranger.<sup>158</sup> Consequently, lower courts almost

---

(allowing municipalities to assess impact fees to offset costs for necessary public facilities); Cal. Gov't Code § 66001 (establishing requirements for any imposed development fee by a local agency); Colo. Rev. Stat. § 29-20-104(2)(c) (allowing a local government to impose an impact fee); Del. Code tit. 29, § 9124 (allowing a county government to establish an impact fee for services for which the county will bear increased costs of development); Fla. Stat. § 163.31801 (2020) (establishing minimum requirements for impact fees by a municipality); Ga. Code Ann. § 36-71-3 (2020) (authorizing municipalities and counties to impose development impact fees); Haw. Rev. Stat. § 46-142 (2020) (allowing impact fees to be assessed); Idaho Code § 67-8204 (2020) (allowing government entities to impose development impact fees as a condition of development); 605 Ill. Comp. Stat. Ann. 5/5-904 (West 2020) (establishing requirements for any impact fee by a local government); Ind. Code § 36-7-4-1311 (2020) (allowing local units to impose an impact fee); La. Stat. Ann. § 33:3091 (2019) (establishing requirements for impact fees); Me. Rev. Stat. Ann. tit. 30-a, § 4354 (establishing requirements for impact fees); Md. Code Ann., Loc. Gov't § 5-102 (West 2020) (requiring that impact fees have a “rational nexus” to the project); Mont. Code Ann. § 7-6-1602 (establishing requirements for impact fees); Nev. Rev. Stat. § 278B.160 (2019) (allowing a local government to impose an impact fee); N.H. Rev. Stat. Ann. § 674:21 (requiring an impact fee to be proportional to the improvement costs); N.M. Stat. Ann. § 5-8-3 (prohibiting municipalities or counties from enacting impact fees unless specifically authorized); N.C. Gen. Stat. § 162A-203 (2020) (establishing limits on impact fees); Okla. Stat. tit. 62, § 895 (2020) (limiting development fees to public infrastructure expansion); Or. Rev. Stat. § 223.302 (authorizing “system development charges”); 53 Pa. Stat. § 10503-A (West 2020) (authorizing only transportation fees); 45 R.I. Gen. Laws § 45-22.4-3 (2020) (establishing requirements for impact fees); Tenn. Code Ann. § 67-4-2902 (2020) (allowing funding for schools in high growth areas by taxing residential developments); Tex. Loc. Gov't Code § 395.011–395.012 (2019) (prohibiting government entities from imposing impact fee unless specifically authorized); Vt. Stat. Ann. tit. 24, §§ 5200, 5202, 5204 (2020) (limiting impact fees to the “proportionate share” of a development’s cost); Va. Code § 15.2-2319 (2020) (allowing localities to impose impact fees for the cost of reasonable road improvements); Wash. Rev. Code § 82.02.060 (establishing requirements for impact fees); W. Va. Code Ann. § 7-20-7 (LexisNexis 2020) (limiting impact fees to the “proportionate share” of any realized benefit); Wis. Stat. § 66.0617 (allowing a municipality to impose an impact fee to pay for necessary land development costs). Select states require takings impact assessments—described above in the context of generally applicable regulations—before conditioning a permit on the dedication of a property interest. See Mich. Comp. Laws Ann. § 24.424; Utah Code § 11-36a-201 to -202.

157. 256 U.S. 135, 157–58 (1921).

158. *Yee v. City of Escondido*, 503 U.S. 519, 539 (1992).

universally reject *Penn Central* claims in this context.<sup>159</sup> But at least twenty-nine states preempt rent control ordinances.<sup>160</sup> Relatedly, in two states, state legislatures have preempted local governments from enacting ordinances that preclude landlords from discriminating against prospective tenants on the grounds that they hold government-provided housing vouchers.<sup>161</sup>

In this same vein, some local governments have sought to combat housing-affordability crises by turning to inclusionary zoning ordinances. These ordinances condition residential development permits on applicants ensuring that permitted development will include a share of units that are affordable for low-income families.<sup>162</sup> The lower courts have rejected takings challenges to such ordinances,<sup>163</sup> and the Supreme Court has denied numerous petitions for writs of certiorari raising the issue.<sup>164</sup> A number of state legislatures, however, have precluded local governments

---

159. See, e.g., *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010); *Yee v. City of Escondido*, 274 Cal. Rptr. 551, 557–58 (Ct. App. 1990), *aff'd*, 503 U.S. 519; *Heyert v. Taddese*, 70 A.3d 680, 711 (N.J. Super. Ct. App. Div. 2013).

160. Ala. Code § 11-80-8.1 (2020); Ariz. Rev. Stat. § 9-461.16; Ark. Code Ann. § 14-16-601; Colo. Rev. Stat. § 38-12-301; Conn. Gen. Stat. § 7-148b (2020); Fla. Stat. § 125.0103; Ga. Code Ann. § 44-7-19; Idaho Code § 55-307; 50 Ill. Comp. Stat. Ann. 825/5 (West 2020); Ind. Code § 32-31-1-20; Iowa Code § 331.304 (2020); Kan. Stat. Ann. § 12-16,120 (West 2020); Ky. Rev. Stat. Ann. § 65.875 (West 2020); La. Stat. Ann. § 9:3258; Mass. Gen. Laws Ann. ch. 40P, § 4 (West 2020); Mich. Comp. Laws Ann. § 123.411; Minn. Stat. § 471.9996 (2019); Miss. Code Ann. § 21-17-5 (2020); Mo. Ann. Stat. § 441.043 (West 2020); N.C. Gen. Stat. § 42-14.1; N.D. Cent. Code § 47-16-02.1 (2020); Okla. Stat. tit. 11, § 14-101.1 (2020); S.C. Code Ann. § 27-39-60 (West 2020); S.D. Codified Laws § 6-1-13 (2020); Tenn. Code Ann. § 66-35-102; Tex. Loc. Gov't Code § 214.902; Utah Code § 57-20-1 (2006); Wash. Rev. Code § 35.21.830; Wis. Stat. § 66.1015 (2020).

161. Ind. Code § 36-1-3-8.5; Tex. Loc. Gov't Code § 250.007.

162. For a helpful national survey of such ordinances, see generally Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* (Lincoln Inst. of Land Pol'y, Working Paper No. WP17ET1, 2017), [https://www.lincolninst.edu/sites/default/files/pubfiles/thaden\\_wp17et1\\_0.pdf](https://www.lincolninst.edu/sites/default/files/pubfiles/thaden_wp17et1_0.pdf) [<https://perma.cc/ZWL6-EFLT>].

163. See, e.g., 2910 Ga. Ave. LLC v. District of Columbia, 234 F. Supp. 3d 281, 294 (D.D.C. 2017); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 979 (Cal. 2015); *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60, 61–62 (Ct. App. 2001). Questions as to which takings standards apply to inclusionary housing programs and whether such programs violate those standards remain the subject of fierce debate within academic literature. Compare, e.g., Richard A. Epstein, *The Unassailable Case Against Affordable Housing Mandates*, in *Evidence and Innovation in Housing Law and Policy* 64, 66 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (contending that inclusionary housing programs amount to compensable takings), with Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 Iowa L. Rev. 2145, 2180–84 (2017) (asserting that inclusionary housing ordinances should survive challenges under both *Penn Central* and *Nollan/Dolan*).

164. Most recently, the Supreme Court denied a petition for a writ of certiorari in *Cherk v. County of Marin*, allowing to stand a California appellate court decision rejecting a claim that an inclusionary housing program amounted to an unconstitutional condition. See No. A153579, 2018 WL 6583442, at \*1 (Cal. Ct. App. Dec. 14, 2018).

from adopting mandatory inclusionary zoning ordinances, regardless of the circumstances.<sup>165</sup>

6. *Precluding Environmental Protection.* — By and large, environmental laws have survived takings challenges outside the incredibly rare instance in which a law deprives the claimant's property of all economic value.<sup>166</sup> A number of states, though, have precluded local governments from seeking to prevent environmental degradation via land-use regulation in the

---

165. See, e.g., Ariz. Rev. Stat. § 9-461.16; Fla. Stat. § 163.31771; Ind. Code § 36-1-24.2-1; Tenn. Code Ann. § 66-35-102(b); Tex. Loc. Gov't Code § 214.905; Wis. Stat. § 66.1015(3). One state follows the same course, though only with respect to manufactured homes. See Ark. Code Ann. § 14-54-1604. In other states, legislation limits local discretion in designing voluntary inclusionary housing policies. See, e.g., Mass. Gen. Laws Ann. ch. 40B, §§ 20–23 (West 2020); 45 R.I. Gen. Laws 45-24-46.1 (2020). Inclusionary zoning ordinances also have been invalidated by courts as inconsistent with the states' prohibitions on rent control. See, e.g., *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303, 307 (Colo. App. 1998), *aff'd*, 3 P.3d 30 (Colo. 2000); *Apt. Ass'n of S. Cent. Wis., Inc. v. City of Madison*, 722 N.W.2d 614, 625 (Wis. App. 2006). In other states, state legislation limits *exclusionary* zoning practices at the local level. See, e.g., Cal. Gov't Code §§ 65580–65589.9 (2020); Or. Rev. Stat. § 197.005 to .850 (2019).

166. The Supreme Court recently concluded that a “reasonable land-use regulation[] enacted . . . to preserve the river and surrounding land” does not “work a taking” under the *Penn Central* framework. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947–50 (2017). Lower court cases rejecting regulatory takings challenges to environmental regulations abound. See, e.g., *Wyer v. Bd. of Env't Prot.*, 747 A.2d 192, 193 (Me. 2000) (denial of variance under sand dune laws); *Neifert v. Dep't of Env't*, 910 A.2d 1100, 1114 (Md. 2006) (denial of sewer service and wetland fill permits); *Erb v. Md. Dep't of Env't*, 676 A.2d 1017, 1027 (Md. Ct. Spec. App. 1996) (denial of permit for septic system); *Bernardsville Quarry v. Borough of Bernardsville*, 608 A.2d 1377, 1390 (N.J. 1992) (ordinance limiting quarry operations); *Save the Pine Bush v. Albany*, 530 N.Y.S.2d 295, 298 (N.Y. App. Div. 1988) (environmental review of minimum preserve acreage); *Milardo v. Coastal Res. Mgmt.*, 434 A.2d 266, 268 (R.I. 1981) (denial of permit for sewage system construction); *McQueen v. S.C. Coastal Council*, 530 S.E.2d 628, 634–35 (S.C. 2000) (denial of permits to bulkhead and fill lots).



context of pesticides,<sup>167</sup> factory farms,<sup>168</sup> oil and gas operations,<sup>169</sup> plastic bags,<sup>170</sup> and, in one state, Styrofoam.<sup>171</sup>

7. *Limiting Land-Use Variances.* — A final area of state reordering to note in this category of state statutes involves local discretion in applying the strict terms of zoning codes. No court has found a taking based on the nonenforcement of an existing regulation against a third party, and most courts that have addressed such claims have rejected them summarily.<sup>172</sup> Some state legislatures, however, have limited the circumstances in which local governments can grant waivers from generally applicable land-use controls and thus, the extent to which local governments can inject flexibility into their regulatory regimes.<sup>173</sup>

167. See Ala. Code § 2-27-5.1 (2020); Ariz. Rev. Stat. § 3-349; Ark. Code Ann. § 20-20-266; Cal. Food & Agric. Code § 11501.1 (2020); Colo. Rev. Stat. § 35-10-112(3) (2020); Conn. Gen. Stat. § 22a-54 (2020); Del. Code tit. 3, § 1203 (2020); Fla. Stat. § 482.242; Ga. Code Ann. § 2-7-113.1 (2020); Idaho Code § 22-3426 (2020); 415 Ill. Comp. Stat. Ann. 60/3 (West 2020); Ind. Code § 15-16-5-71; Iowa Code § 206.34 (2020); Kan. Stat. Ann. § 2-2480 (West 2020); Ky. Rev. Stat. Ann. § 217b.270 (West 2020); La. Stat. Ann. § 3:3224 (2020); Mass. Gen. Laws Ann. ch. 132b, § 1 (West 2020); Mich. Comp. Laws Ann. § 324.8328 (West 2020); Minn. Stat. § 18b.02 (2019); Miss. Code Ann. § 69-23-9 (2020); Mo. Ann. Stat. § 281.005 (West 2020); Mont. Code Ann. § 80-8-120 (West 2019); Neb. Rev. Stat. § 2-2625 (2012); N.H. Rev. Stat. Ann. § 430:49 (2020); N.M. Stat. Ann. § 76-4-9.1 (2020); N.Y. Env't Conserv. Law § 33-0303(1) (McKinney 2020); N.C. Gen. Stat. § 143-435 (2020); N.D. Cent. Code § 4.1-34-06 (2020); Ohio Rev. Code Ann. § 921.02 (2020); Okla. Stat. tit. 2, § 3-84 (2019); Or. Rev. Stat. § 634.057; 3 Pa. Stat. § 111.57 (West 2020); 23 R.I. Gen. Laws § 23-25-9 (2020); S.C. Code Ann. § 46-13-30 (2020); S.D. Codified Laws § 39-1-17 (2020); Tenn. Code Ann. § 43-8-114; Tex. Agric. Code Ann. § 76.003 (2019); Va. Code § 3.2-3907 (2016); Wash. Rev. Code § 17.21.010 (2020); W. Va. Code Ann. § 19-16a-2 (LexisNexis 2020); Wis. Stat. § 94.701; Wyo. Stat. Ann. § 35-7-352 (2020).

168. See, e.g., Fla. Stat. § 580.0365; Kan. Stat. Ann. § 12-16,137; Ky. Rev. Stat. Ann. § 413.072; Mich. Comp. Laws Ann. § 287.538; 3 Pa. Cons. Stat. § 313 (2020); S.D. Codified Laws § 39-1-17; *Township of Franklin v. Hollander*, 769 A.2d 427 (N.J. Super. App. Div. 2001), *aff'd*, 796 A.2d 874, 878 (N.J. 2002).

169. See, e.g., N.C. Gen. Stat. § 119-55; Okla. Stat. Ann. tit. 52, § 137.1 (2019); Tex. Nat. Res. Code § 81.0523 (2019).

170. See Ariz. Rev. Stat. §§ 9-500.38, 11-269.16; Del. Code tit. 7, § 6099A (2020); Fla. Stat. § 403.7033; Idaho Code § 67-2340; Ind. Code § 36-1-3-8.6; Iowa Code § 331.301(6)(c); Mich. Comp. Laws Ann. § 445.592; Minn. Stat. § 471.9998; Miss. Code Ann. § 17-1-73; Mo. Ann. Stat. § 260.283; Tex. Health & Safety Code Ann. § 361.0961 (2019); Wis. Stat. § 66.0419.

171. Fla. Stat. § 500.90.

172. See Mulvaney, *Non-Enforcement Takings*, *supra* note 61, at 161–64.

173. In some instances, these statutes operate to constrain local governments in the sense that they appear to have been adopted out of concern that variances otherwise would be granted too generously at the local level. See, e.g., N.J. Stat. Ann. § 40:55D-70 (2020) (declaring that no variance may be granted “without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance”). In others, though, these statutes may have been enacted to ensure that local governments do not adopt what in the state legislature’s mind is an unduly narrow definition of the contexts within which a variance is appropriate. See, e.g., Tex. Agric. Code Ann. § 201.133 (authorizing “variance[s] from the land-use regulations that will: (1) relieve the great

D. *Property Owner Empowerments*

The statutes in this section do not directly restrict the exercise of local regulatory authority but instead have the same effect by empowering landowners to resist local authority in historic landmark designations, development approvals, and permitting.

1. *Historic Preservation.* — Many local ordinances identify neighborhoods as composed of structures that are of architectural or other historic significance.<sup>174</sup> Structures within these districts are subject to design guidelines that check construction activities to ensure that they do not unduly interfere with the neighborhood's historic integrity.<sup>175</sup> Constitutional takings challenges to such broadly applicable historic district designations have found little success.<sup>176</sup>

Local governments have had slightly more difficulty justifying impositions on owners of structures individually deemed historic landmarks given that such impositions are less likely to offer the reciprocal advantages experienced by property owners within historic districts.<sup>177</sup> Still, the imposition on the owner of landmarked property may not be particularly severe—the owner's current use may continue (so only a potential opportunity is lost), limitations generally “apply only to the structure's exterior,” and “the land and structure remain marketable.”<sup>178</sup> For these reasons, even many historic landmark designations have survived regulatory takings review.<sup>179</sup>

---

practical difficulties or unnecessary hardships; (2) not be contrary to the public interest; (3) observe the spirit of the land-use regulations; (4) secure the public health, safety, and welfare; and (5) do substantial justice”). In this sense, while a large bulk of the state statutes constraining or preempting local-government authority seem aligned with the perspective of those who advance a broader view of takings liability than the courts have offered, the former class of variance statutes serves as an illustration of state legislatures' moving to prevent local governments from regulating property in a manner that is perhaps *too* friendly to conventional takings claimants.

174. See Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 *Urb. Law.* 405, 407 (1998) (noting how “local governments in almost every state regulate historic properties”).

175. See Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 *Urb. Law.* 163, 170 (2006) (describing how many localities have tried to use a “design guidelines” regime to balance between discretion and prescription).

176. See J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *Fordham Env't L. Rev.* 313, 332–34 (2004) (describing how statutory hardship exceptions have made such claims difficult to litigate).

177. See, e.g., *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 888 (D. Md. 1996) (finding a compensable taking where the city refused to issue a certificate of appropriateness to a monastery seeking to demolish one of its buildings even though it conceded that there was no economically viable plan to preserve the building).

178. *Mulvaney, Non-Enforcement Takings*, supra note 61, at 161.

179. See, e.g., *Van Horn v. Town of Castine*, 167 F. Supp. 2d 103, 105–06 (D. Me. 2001); *Casey v. Mayor of Rockville*, 929 A.2d 74, 108 (Md. 2007); *State ex rel. Powderly v. Erickson*, 285 N.W.2d 84, 88 (Minn. 1979); *United Artists' Theater Cir., Inc. v. City of Philadelphia*, 635 A.2d 612, 614 (Pa. 1993); *Miller & Son Paving, Inc. v. Pa. Hist. & Museum*

Despite all this, several states have enacted statutes requiring that local governments allow property owners to refuse designation of their properties as historic.<sup>180</sup> Some statutes even mandate that local governments allow the *removal* of prior historic designations.<sup>181</sup>

2. *Permitting Delays.* — The Supreme Court has sought to distinguish normal delays in the land-use permitting process, which do not implicate takings protections, from extraordinary delays that might.<sup>182</sup> One state supreme court described takings liability as potentially appropriate only when the government’s silence on a permit application is “so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it.”<sup>183</sup> In many states, however, state legislation categorically provides for the automatic approval of subdivision and related development applications if the local regulatory authority does not act on that application within a defined period, regardless of the circumstances.<sup>184</sup>

---

Comm’n, 628 A.2d 498, 502 (Pa. Commw. Ct. 1993); 2218 Bryan St., Ltd. v. City of Dallas, 175 S.W.3d 58, 61 (Tex. App. 2005).

180. See, e.g., Tex. Loc. Gov’t Code § 211.0165 (2019) (requiring that local governments obtain the owner’s consent to landmark that owner’s property as one of historic significance).

181. See, e.g., Or. Rev. Stat. § 197.772 (2019) (authorizing owners to refuse to consent to historic designations or to remove the imposition of such designations).

182. See *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (limiting the holding that a temporary restriction may constitute a taking by stating that the court “do[es] not deal with the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like”).

183. *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1199 (Cal. 1998); see also *Cooley v. United States*, 324 F.3d 1297, 1307 (Fed. Cir. 2003) (stating that, in the temporary takings context, “[a] combination of extraordinary delay and intimated bad faith, under the third prong of the *Penn Central* analysis, influence the character of the governmental action”); *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79, 87 (Ct. App. 2002) (explaining the relevance of the fact that the city’s action was not taken “solely to delay the proposed project”).

184. See, e.g., Ala. Code § 11-52-32 (2020) (“[T]he municipal planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, the plat shall be deemed to have been approved . . . .”); Alaska Stat. § 29.40.110 (2020) (providing sixty days for plat approvals); Cal. Gov’t Code § 65952 (2020) (providing 180 days for “lead” agencies and ninety days for “responsible,” or nonlead, agencies for most “development project[]” approvals, but not for rezoning requests); Del. Code tit. 9, § 4811 (2020) (providing forty-five days for plat approvals); 65 Ill. Comp. Stat. Ann. 5/11-12-8 (West 2020) (providing ninety days for preliminary plat approvals and sixty days for final plat approvals); Kan. Stat. Ann. § 12-752 (West 2020) (providing sixty days for subdivision plats); La. Stat. Ann. § 33:113 (West 2019) (providing sixty days for subdivision plats); Md. Code Ann., Land Use § 5-201 (West 2020) (providing thirty days for subdivision plats); Mass. Gen. Laws Ann. ch. 41, § 81U (West 2020) (providing forty-five days for a health board decision on subdivision plats and, thereafter, 135 days for a planning commission decision); Mich. Comp. Laws Ann. § 560.109 (West 2019) (providing forty-five days for preliminary plat approvals and sixty days for final plat approvals); Minn. Stat. § 15.99 (2020) (providing sixty days for zoning and septic system decisions); Mo. Ann. Stat. § 89.420 (West 2020) (providing sixty days for subdivision plats); N.J. Stat. Ann. § 40:27-6.7 (West 2020)

3. *Mandatory Permit Approvals.* — While there remains some uncertainty in this regard, takings jurisprudence seems to suggest that a proposed land-use permit condition that is not appropriately connected or proportional to the permitted development's impacts is to be enjoined.<sup>185</sup> It is conceivable that a court could require the payment of compensation for the interim period during which such an unconstitutional condition was in force.<sup>186</sup> But no court has asserted that a claimant who successfully challenges a land-use permit condition as unconstitutional is also entitled to issuance of an unconditional permit; instead, the decision has been left to local governments to determine whether to issue new conditional permits that survive the nexus and proportionality strictures.<sup>187</sup>

In some states, however, legislation authorizes property owners to proceed with development while simultaneously seeking compensation via a challenge to an allegedly unconstitutional condition attached to

---

(requiring county approval for a site plan or development permit and specifying that towns must submit to the county planning board for review, and that the board has thirty days to report back before it is deemed to have approved the submission); N.M. Stat. Ann. § 3-20-7 (West 2020) (providing thirty-five days for plat approvals); N.Y. Town Law § 276 (McKinney 2020) (providing sixty-two days for preliminary plat approvals and sixty-two days for final plat approvals); N.D. Cent. Code § 40-48-21 (2020) (providing thirty days for subdivision plats); Ohio Rev. Code Ann. § 711.05 (2020) (providing thirty days for subdivision plats); Okla. Stat. tit. 11, § 47-115 (2020) (providing thirty days for subdivision plats); 53 Pa. Stat. § 10508 (West 2020) (providing ninety days for subdivision plats); 45 R.I. Gen. Laws § 45-23-37 (2020) (providing fifteen days for administrative review of a subdivision application and, thereafter, sixty-five days for a planning board decision); S.D. Codified Laws § 11-2-24.1 (2020) (providing sixty-five days for subdivision plats); Tenn. Code Ann. § 13-4-304 (2020) (providing sixty days for plats); Tex. Loc. Gov't Code § 212.009 (providing thirty days for plat approvals); Wis. Stat. § 236.11 (2020) (providing ninety days for preliminary plat approvals and sixty days for final plat approvals); Wyo. Stat. Ann. § 18-5-307 (2020) (providing forty-five days following the due date for the department of environmental quality's review). Two commentators have queried whether the reality that automatic approval statutes eliminate the opportunity for neighbors to express opposition to the approval raises due process concerns. See Gregory G. Booker & Karen R. Cole, *Automatic Approval Statutes: Escape Hatches and Pitfalls*, 29 Urb. Law. 439, 470 (1997).

185. See Mulvaney, *State of Exactions*, supra note 153, at 211 (“Interestingly, the *Koontz* dissenters asserted that they agreed with the majority that a condition violative of *Nollan* and *Dolan* should be enjoined, even though the majority reached no such explicit conclusion.”).

186. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 n.2 (Fla. Dist. Ct. App. 2014) (“The fact that the government has the ‘greater authority’ to deny a permit does not imply the ‘lesser power to condition permit approval on petitioner’s forfeiture of his constitutional rights.’” (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013))).

187. See *Cheatham v. City of Hartselle*, No. CV-14-J-397-NE, 2015 WL 897583, at \*4–5 (N.D. Ala. Mar. 3, 2015); *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1088–89 (N.D. Cal. 2014).

their development permits.<sup>188</sup> In these jurisdictions, then, landowners can potentially both reap compensation and obtain an unconditioned permit.

\* \* \*

Land uses are interdependent in the sense that they necessarily and directly—if at times only cumulatively—impact others’ land uses in both positive and negative ways. It is not possible, therefore, to protect the wishes or expectations of everyone with a plausible claim to a property interest in land.<sup>189</sup> Government entities must make choices among conflicting property claims. These choices confer power on one party over others and, thereby, expose these others’ vulnerabilities.<sup>190</sup> In theory, the government has a suite of regulatory tools at its disposal to execute choices among the competing interests at the heart of such conflicts. State legislatures have, however, preempted or constricted the local deployment of many tools tied to takings law, often without contextualized justification. State legislatures no doubt have general authority to adopt preemptive and constrictive measures.<sup>191</sup> But that such authority exists is a separate issue from the ramifications of the sheer breadth of measures that have been adopted with little effort on the states’ part to justify them.

When state legislatures preempt or constrict the deployment of regulatory tools that local governments rely on to balance competing property claims, the states are not merely shielding property owners from purportedly unfair burdens; they are also *assuming responsibility* for making choices among competing property claimants themselves. In assuming this

---

188. See, e.g., Colo. Rev. Stat. § 29-20-204 (2020) (“An owner may proceed with development without prejudice to that owner’s right to pursue the remedy provided by this section.”).

189. See Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 13 (1928) (contending that “dominion over things” necessarily impedes the interests of other people); Eric T. Freyfogle, Taking Property Seriously, in 11 Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges 43, 50 (David Grinlinton & Prue Taylor eds., 2011) (asserting that property is an evolving social institution that involves the calibration and recalibration of private interests over time); Laura S. Underkuffler-Freund, Property: A Special Right, 71 Notre Dame L. Rev. 1033, 1039 (1996) [hereinafter Underkuffler-Freund, A Special Right] (arguing that protecting a property interest for one person “necessarily and inevitably” denies that same interest to someone else).

190. See Marc R. Poirier, Property, Environment, Community, 12 J. Env’t L. & Litig. 43, 44 (1997) (describing property as an “ongoing fight[] about who gets what, why, and how much”); Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1, 41 (1991) (“The grant of a property right to one person leaves others vulnerable to the will of the owner. Conversely, the refusal to grant a property right leaves the claimant vulnerable to the will of others . . .”); Laura S. Underkuffler-Freund, Takings and the Nature of Property, 9 Canadian J.L. & Juris. 161, 202–03 (1996) (“Property’s function, as a social and governmental institution, is the resolution of conflicting claims, visions, values, and histories. In this process, some individuals win, and others lose; the protection of some is, inevitably, sacrificed for the protection of others.”).

191. See Richard Briffault & Laurie Reynolds, Cases and Materials on State and Local Government Law 432–93 (8th ed. 2016) (discussing state preemption authority).

responsibility, the states could very well utilize the tools they are preventing or constraining local governments from deploying. In select instances, states have done just that; for instance, some state legislatures have passed statutes declaring when neighboring lots must be merged.<sup>192</sup> In most cases, though, states are deciding not to utilize these tools.

These decisions are not neutral stances by state legislatures to protect from local interference a set of property interests that all naturally and concurrently enjoy.<sup>193</sup> Rather, decisions mediating rivalrous rights to property necessarily set out the interests some have at the expense of the claimed interests of others.<sup>194</sup> It follows that, through state legislatures' use of—or, perhaps more often, choice *not* to use—the land-use regulatory tools that they are preventing local governments from deploying, states are deciding between competing alleged property rights. While conflicting property claims reflect the values that underlie both the conflicts and the solution to those conflicts, the takings-related state statutes described here resolve such conflicts in rigid, unmediated ways.

This squarely raises normative and practical questions as to the respective roles that states and local governments *should* be playing in resolving the difficult tradeoffs inherent in the types of property disputes that are at the root of takings law—questions to which this Article now turns.

### III. TAKINGS LOCALISM

Contemporary takings jurisprudence—as Part I explained—privileges the democratic resolution of conflicts between individual property rights and community imperatives. Although many of these conflicts involve local, not state, democracy, state legislatures—as Part II made clear—have shaped and limited local authority across a range of policy domains at the core of constitutional property.

This Part accordingly turns to how best to understand this broad state reordering of local authority. To do so, this Part begins by situating

---

192. See, e.g., Minn. Stat. Ann. § 394.36 (2019).

193. See Laura S. Underkuffler, When Should Rights “Trump?” An Examination of Speech and Property, 52 Me. L. Rev. 311, 316–17 (2000) (explaining that many constitutional rights other than property—free speech, due process, free exercise, and the like—can be considered public goods because consumption by one person generally does not detract from consumption by others and no one can be easily prevented from enjoying it). The claim that many constitutional rights other than property rights are appropriately considered public goods is not without reservation. For example, to the extent hate speech silences its targets, the government's noninterference with one's claim to free speech—for instance, a newspaper's desire to publish hate speech—*does* interfere with another's claim to the same. Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 129–30 (1987).

194. See Eric T. Freyfogle, Property and Liberty, 34 Harv. Env't L. Rev. 75, 79–87 (2010) (describing, through a series of hypotheticals, how advancing one property interest comes at the expense of others).

property rights statutes in the context of the increasingly contentious landscape of contemporary conflicts over intergovernmental relations within the states, where states are increasingly constraining local power in almost every area of governance. Building on this connection, this Part then argues that the values inherent in takings jurisprudence would be best served by restoring an equilibrium between states and local governments that would foster intersystemic dialogue and promote a more contextual, nuanced approach to resolving the challenging tradeoffs inherent in takings law's balance between individual rights and community imperatives.

A. *The Disequilibrium of the New Preemption*

To begin, it is important to take a step back and situate the array of state statutes restructuring local authority in the property rights arena in the context of a rapidly changing landscape of contemporary state–local relations. In particular, scholars and popular commentators have raised concerns about the rise of a new form of state preemption that is increasingly polarized in its valence, targeted in its focus, far-reaching in its sweep, and even outright punitive in its application.<sup>195</sup>

Local-government legal authority is determined by a variety of state and federal doctrines that sound in constitutional structure, legislation, and even individual rights.<sup>196</sup> Traditionally, at least since the middle of the nineteenth century, states were understood to exercise plenary authority over local governments.<sup>197</sup> But waves of home-rule reform since Missouri

---

195. See, e.g., Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 *Publius: J. Federalism* 403, 407–08 (2017) (surveying empirical trends in state preemption of “local fracking bans, minimum wage ordinances, sanctuary city policies, LGBT rights ordinances, and the rising use of ‘blanket preemption’”). Contemporary conflicts over state reordering of local authority have generated a significant body of literature in recent years. See *supra* note 17.

196. See Briffault, *Our Localism*, *supra* note 65, at 4, 111–12. Home rule generally refers to the legal authority of local governments independent of specific state delegation. See Briffault & Reynolds, *supra* note 191, at 349. By contrast, the regime of formal local legal powerlessness is generally known as “Dillon’s Rule,” in reference to former Iowa Supreme Court Justice and United States Circuit Judge John F. Dillon, who crystalized the conception of local governments as creatures of the state and a corresponding jurisprudence that requires specific legislative delegation, narrowly construed, for local governments to act. *Id.* at 327–30.

197. The classic statement of this plenary-authority view can be found in *Hunter v. Pittsburgh*, a case involving a challenge to the merger between the cities of Pittsburgh and Allegheny. 207 U.S. 161, 165–67 (1907). There, the Supreme Court stated that

[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure may modify or withdraw all such powers, . . . expand or contract the territorial area, unite

adopted the first home-rule constitutional amendment in 1875 (empowering St. Louis to adopt the nation's first municipal home-rule charter) have carved out important areas of local authority.<sup>198</sup> State oversight of local governance is also constrained by federal and state individual rights that impact the state–local relationship,<sup>199</sup> as well as general limitations on state legislation, such as state constitutional “single subject” requirements and state constitutional bans on “special legislation.”<sup>200</sup> Within this framework, states have long played a constructive role policing particularly significant interlocal conflicts and setting baseline rules for policy areas of statewide concern.<sup>201</sup>

---

the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done . . . with or without the consent of the citizens, or even against their protest.

Id. at 178–79.

198. See David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2257, 2277–322 (2003) (noting that participants in early home-rule reform movements thought that “to treat cities as mere creatures of the state with no independent responsibility” would “not suffice” and eventually carved out independent local powers).

199. For example, the Supreme Court in *Gomillion v. Lightfoot* held that Black residents of Alabama had validly asserted claims under the Fourteenth and Fifteenth Amendments challenging the state's redistricting of the City of Tuskegee. 364 U.S. 339, 347–48 (1960). In the words of Justice Frankfurter, if the facts as alleged were true, the state redistricting legislation was “solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.” Id. at 341. In this context, then, the individual rights of disenfranchised residents posed a meaningful barrier to the supposedly plenary exercise of state authority over local government boundaries. For a more recent example of an individual-rights constraint on supposedly plenary state authority, the Supreme Court held that a state constitutional amendment that prohibited policies to protect against discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” violated the Equal Protection Clause. See *Romer v. Evans*, 517 U.S. 620, 624, 635 (1996) (internal quotation marks omitted) (quoting Colo. Const. art. II, § 30b (1992)).

200. See Martha J. Dragich, State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 Harv. J. on Legis. 103, 124–51, app. I at 165–66 (2001) (surveying state constitutional legislative procedural constraints). Single-subject rules, as their name suggests, limit the substance of legislation (and popular democracy through initiatives and referenda) to related policy matters, so that legislators do not join disparate subjects for horse trading, legislative brinkmanship, or the kind of transparency challenges that can arise when a topic is hidden in a larger, unrelated bill. Bans on “special legislation” and “general laws” requirements, by contrast, operate as a quasi-equal protection generality constraint, imposing limitations on legislation that illegitimately singles out or irrationally impacts limited categories, including local governments. See generally Anthony Schutz, State Constitutional Restrictions on Special Legislation as Structural Restraints, 40 J. Legis. 39 (2013) (offering a structural, rather than an individual-rights, rationale to explain state special-legislation provisions).

201. This Article returns, in section III.B, to the question of whether “property rights” as such—beyond the baseline level of protection set by takings jurisprudence—should be considered a valid statewide interest sufficient to displace local authority in areas such as land use and the environment.



In recent years, however, the balance between local decisionmaking and state intervention has fallen into disequilibrium in many areas of policy.<sup>202</sup> States, for example, have barred or limited local employee-benefits laws, such as minimum wage, fair scheduling, and paid sick leave;<sup>203</sup> sought to limit local immigration approaches often labeled as “sanctuary”;<sup>204</sup> preempted local antidiscrimination protections;<sup>205</sup> and taken aim at local housing policies that seek to advance equity and integration, including rent regulations and local source-of-income antidiscrimination ordinances.<sup>206</sup> State preemption has been similarly widespread in traditional areas of local concern, such as public health,<sup>207</sup> as well as emerging areas of local innovation, such as fracking,<sup>208</sup> municipal broadband,<sup>209</sup> and the sharing

---

202. These conflicts have been fueled by the ascendancy of coalitions of interest groups in many state legislatures that are generally hostile to regulation and people working to advance social-conservative policies, converging on a strain of anti-localism that bridges both perspectives in opposition to the relatively more progressive regulatory leanings of cities. See Davidson, *Dilemma of Localism*, supra note 17, at 964.

203. Briffault, *Challenge of New Preemption*, supra note 17, at 1999.

204. See Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 *Colum. L. Rev.* 837, 839 (2019) (“[Texas’s anti-sanctuary law] limits endorsement of sanctuary policies, cuts down on the discretion of local agencies to disentangle themselves from federal enforcement, and creates civil and criminal liability for officials who maintain certain types of noncooperation policies on aiding federal immigration enforcement.”).

205. See Davidson, *Dilemma of Localism*, supra note 17, at 964–65 (describing how North Carolina, Arkansas, and Tennessee preempted local antidiscrimination laws, including a local ordinance enacted to protect against LGBT discrimination); Schragger, *The Attack on American Cities*, supra note 17, at 1178 n.81, 1183, 1223–25 (noting how certain states, such as North Carolina and Colorado, sought to preempt local LGBT-protective antidiscrimination laws).

206. See Nat’l League of Cities, *Homeward Bound: The Road to Affordable Housing* 45, 59 app. B (2019), [https://www.nlc.org/wp-content/uploads/2020/10/nlc-Homeward-Bound\\_The-Road-to-Affordable-Housing\\_WEB-1.pdf](https://www.nlc.org/wp-content/uploads/2020/10/nlc-Homeward-Bound_The-Road-to-Affordable-Housing_WEB-1.pdf) [<https://perma.cc/E7BN-E6D6>] (“[V]arious state preemption of local authority over land use and protected classes has created an uneven and inequitable marketplace of housing across the country.”). Local rent-regulatory regimes have generated takings cases, e.g., *Yee v. City of Escondido*, 503 U.S. 519 (1992), marking yet another policy domain where states have overridden the authority that the Supreme Court has validated for local governments in takings law, see *infra* section II.C.5.

207. See Davidson, *Dilemma of Localism*, supra note 17, at 966–67 (noting that in the area of public health, various states have preempted local regulation in tobacco products, e-cigarettes and other alternative tobacco products, and nutrition and food policies).

208. See Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 *Ecology L.Q.* 575, 596 (2017) (contrasting the differing approaches of states like West Virginia, Colorado, New York, and Pennsylvania with respect to implied preemption of local limits on fracking).

209. See Nat’l League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* 3–4, 17–19 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/RD6R-QXR>] (“State preemption of municipal broadband generally falls into two categories: either explicitly prohibiting a public entity from providing broadband, or . . . placing sufficient barriers before local governments attempt to pursue municipal broadband.”).

economy.<sup>210</sup> And, crucially, this state reordering of local authority often plucks at policy areas big and small without any analogous state regulatory regime, leaving regulatory voids on issues pressing to local governments.<sup>211</sup>

State–local conflicts no longer reflect simply competing understandings about which specific policy questions are more readily addressed at the state or local level. Instead, these conflicts are becoming weaponized and increasingly partisan.<sup>212</sup> Arizona, for example, now uses its power over state revenue-share funding to force local governments to repeal local laws that the state deems preempted, setting litigation barriers to deter local governments from challenging such determinations.<sup>213</sup> And states are now seeking to penalize individual local officials—threatening to fine and remove them from office if they take actions in areas that the states consider preempted. In 2003, Oklahoma enacted a law that created individual civil liability for officials who vote for laws that conflict with the state’s firearm preemption statute, a practice that has since proliferated.<sup>214</sup>

---

210. *Id.* at 3–4, 12–16 (examining how state legislatures have preempted local laws in ride-hailing and home-sharing platforms).

211. The phenomenon of what one scholar has called “null preemption”—eliminating authority without a corresponding higher-level regulatory regime to replace it—has not traditionally been a feature of state preemption conflicts, though it has become a significant element of the new preemption. See generally Jonathan Remy Nash, *Null Preemption*, 85 *Notre Dame L. Rev.* 1015 (2010) (describing null preemption and its lack of normative justifications). Some of the new preemption involves state legislation that sweeps away areas of local authority in their entirety. Michigan, for example, passed a statute that the press has dubbed the “Death Star bill”—H.B. 4052, the Local Government Labor Regulatory Limitation Act. See Emily Lawler, *Gov. Rick Snyder Signs ‘Death Star’ Bill Prohibiting Local Wage, Benefits Ordinances*, *Mlive* (June 30, 2015), [https://www.mlive.com/lansing-news/2015/06/gov\\_rick\\_snyder\\_signs\\_death\\_st.html](https://www.mlive.com/lansing-news/2015/06/gov_rick_snyder_signs_death_st.html) [<https://perma.cc/A226-HNRE>]. The act preempted local governments from “adopting, enforcing or administering local laws or policies concerning employee background checks, minimum wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, or remedies for workplace disputes”—essentially the entire range of employee protections in one sweeping bill. Briffault, *Challenge of New Preemption*, *supra* note 17, at 2000.

212. See Briffault, *Challenge of New Preemption*, *supra* note 17, at 1997 (“The rise of the new preemption is closely connected to the interacting polarizations of Republican and Democrat, conservative and liberal, and nonurban and urban.”); Scharff, *supra* note 17, at 1479 (stating that preemption battles often happen when interest groups lose a fight on the local level and use intrastate preemption as a weapon to oppose local policies they dislike); Schragger, *The Attack on American Cities*, *supra* note 17, at 1232 (“To be sure, the state–city split reflects a Democratic/Republican split—and the fact that the ideological distance between the parties is significant and growing”).

213. *Ariz. Rev. Stat. § 41-194.01* (2020); see also *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 671–72 (*Ariz.* 2017) (upholding portions of the statute). For discussion of *Brnovich* and its significance, see Scharff, *supra* note 17, at 1510–15.

214. *Okla. Stat. tit. 21, § 1289.24(D)* (2019) (“When a person’s rights pursuant to the protection of the preemption provisions of this section have been violated, the person shall have the right to bring a civil action against the persons, municipality, and political subdivision jointly and severally for injunctive relief or monetary damages or both.”); see also *Ariz. Rev. Stat. Ann. § 13-3108 (I)–(K)* (private right of action for personal sanctions against local officials, including termination, removal, and civil penalties); *Miss. Code Ann. § 45-9-53(5)(a), (c)* (2020) (private right of action and creating civil liability for local elected

And more than one state now even subjects local officials to potential *criminal* penalties for testing the boundaries of preemption.<sup>215</sup>

This new targeted and punitive preemption, which reflects long-standing but growing anti-urban hostility in many states,<sup>216</sup> has highlighted contemporary democratic challenges at the state level. Most prominent among them, as Professor Paul Diller has argued, are state legislative gerrymandering efforts that have left the composition of many state legislatures starkly unrepresentative of the actual partisan composition of their states.<sup>217</sup> But state preemptive legislation also reflects breakdowns in our modern system of campaign finance, as well as the rise of interest groups able to promulgate model legislation from state to state.<sup>218</sup>

Political-process failures occur at the local level, as well—if not gerrymandering at the scale of the states, then certainly low participation, local interest-group capture, and the like that provide reminders to avoid overly valorizing local democracy.<sup>219</sup> But in the contemporary landscape of state–local relations, it is striking the extent to which assumptions about the Madisonian argument for broader-scale politics is being tested. Indeed, the “new preemption” has led to calls for reforming contemporary state–local legal relations to modernize home rule to better protect local democracy from unreasonable state interference.<sup>220</sup> The details of

officials up to \$1,000, plus attorney’s fees and costs). State courts struck down similar provisions of a Florida statute. See *City of Weston v. DeSantis*, No. 2018 CA 0699, 2019 WL 4806195, at \*7 (Fla. Cir. Ct. July 29, 2019) (striking down the punitive preemption provisions, Fla. Stat. Ann. § 790.33(3)–(4) (2019), on grounds of legislative immunity, governmental function immunity, state contract clause, and state constitutional limitations on removal); *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314, at \*4 (Fla. Cir. Ct. June 2, 2014) (holding Fla. Stat. Ann. § 790.33(3) (e) unconstitutional).

215. See Ky. Rev. Stat. Ann. § 65.870(4) (West 2020); S.B. 4, 85th Leg. § 5.02 (Tex. 2017).

216. See Schragger, *The Attack on American Cities*, *supra* note 17, at 1166 (“Even so, one might be surprised that the old rural–urban political dynamic that characterized early-twentieth-century hostility to cities has reasserted itself in the beginning of the twenty-first century.”).

217. See Paul A. Diller, *The Political Process of Preemption*, 54 *U. Rich. L. Rev.* 343, 370–71 (2020) (explaining how gerrymandering in Michigan, for example, has led to “[t]he skewing of the Michigan legislature away from statewide voter preferences”).

218. *Id.* at 362–63.

219. See, e.g., Schleicher, *supra* note 24, at 3–5 (listing some of the problems of local government, such as a lack of representation, low participation in local elections, and interest group capture).

220. The National League of Cities (NLC), an organization representing roughly 19,000 local governments, recently published a document with a new comprehensive approach to home rule, including a model constitutional article that states could adopt in whole or in part. See Richard Briffault, Nestor M. Davidson, Paul A. Diller, Sarah Fox, Laurie Reynolds, Erin A. Scharff, Richard Schragger & Rick Su, *Nat’l League of Cities, Principles of Home Rule for the Twenty-First Century 8* (2020), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3613&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3613&context=faculty_scholarship) [https://perma.cc/QMR9-LJDJ]. This recent publication returns NLC to a role that its predecessor, then known as the American Municipal Association, played in the last major wave of home-rule reform.

these proposed reform efforts are beyond the scope of this Article, but this renewed interest in home rule is notable for what it indicates about the salience of the current texture of state oversight. Regardless of the prospects for reform, it is clear that state–local relations have reached an inflection point.

In this light, it is possible to understand the broad, long-standing, and ongoing project of state legislatures limiting local-government discretion on property issues at the core of takings law as both a precursor to and an example of new preemption. The overlap between the two phenomena is, to be sure, not complete. State property rights legislation, for example, resulted from a difficult-to-pinpoint combination of grassroots “property rights” movements, organized interest-group advocacy, and reactions to Supreme Court case law as too permissive. Much of the new preemption, by contrast, has involved more directly partisan conflicts between progressive cities and conservative state legislatures.<sup>221</sup>

At bottom, though, there is a notable substantive confluence of long-developing takings-related state statutes and the sweeping state interference with local governance that is generating debate and consternation today. Akin to the new preemption, state preemption of local authority on land-use issues at the center of takings law approaches the resolution of local conflicts in an overly rigid and unduly uniform manner, eliminating even the possibility that local governments can serve as valuable partners in responding to local conditions.

#### B. *Recalibrating State–Local Relations in Takings*

Understanding that there are conceptual linkages—though not, of course, perfect symmetry—between the new preemption and state takings-related legislation underscores what is problematic about the rigidity and undue uniformity of that legislation. This section builds on these linkages to argue not for a pro-localist approach to constitutional property per se but instead for a rebalancing of the state–local relationship toward a more nuanced, context-sensitive approach that resists the anti-localist bent of contemporary state statutory law on issues most often at the center of takings cases.

There is much to commend in the potential inherent in local governance for the democratic decisionmaking that animates takings jurisprudence. It is always difficult to generalize about local governments

---

Jefferson B. Fordham, *Am. Mun. Ass’n, Model Constitutional Provisions for Municipal Home Rule 5* (1953).

221. See Davidson, *Dilemma of Localism*, *supra* note 17, at 963–64 (noting how “[f]ollowing the 2010 census, many state legislative districts were redistricted in ways that locked in partisan advantages”).

given the tremendous variety in their form, size, and authority.<sup>222</sup> Still, some broad themes can fairly characterize what often distinguishes local governments from their state counterparts, particularly in the context at issue here. Local governments, for example, generally offer more meaningful opportunities for civic participation,<sup>223</sup> can often respond more swiftly to pressing challenges,<sup>224</sup> and hold the promise of innovation and experimentation,<sup>225</sup> all in the shadow of a special sensitivity to costs given their comparatively limited ability to raise revenues.<sup>226</sup> All of these markings of local democracy bear relevance to the types of issues that most often animate takings jurisprudence.

The ability of the citizenry to participate in the workings of democracy in direct ways, to begin, can be stronger at the local level than at the state level. Local officials often work and reside near their constituents, naturally making them more accessible—particularly in those smaller municipalities—than state legislators who regularly deliberate in the confines of their state capitals.<sup>227</sup> Civic engagement at the local level, Alexis de Tocqueville argued, has the ancillary benefit of putting democracy “within people’s reach,” ultimately strengthening more centralized levels of governance.<sup>228</sup>

A second core set of arguments for localism that resonates for constitutional property centers on responsiveness and accountability. In their best light, local communities consist not of arbitrarily arranged individualists, but of groups of people who seek to develop and pursue shared goals.<sup>229</sup> Local governance allows for distinct localities to adopt

---

222. See, e.g., Scharff, *supra* note 17, at 1474–75 (noting that there are over 90,000 local governments, with a mix of general-purpose governments—such as counties, municipalities, and townships—and special purpose governments).

223. See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 *Urb. Law.* 253, 258 (2004) [hereinafter Briffault, *Home Rule*] (“Democratic participation is more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national levels.”).

224. See Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 *Urb. Law.* 257, 274–75 (1999) (describing how local government is more responsive to “discrete communities” because minorities may be found in numbers “disproportionate to their representation in the statewide population” at the local level).

225. See Barron, *supra* note 198, at 2337 (describing the degree of local discretion over policy choices).

226. See, e.g., Serkin, *Big Differences*, *supra* note 15, at 1680–85 (discussing the relative cost sensitivity of local governments); see also Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay for” Model of Local Government*, 56 *Fla. L. Rev.* 373, 392 (2004) (“[A] fairly large number of states have imposed stringent limits on their local governments’ ability to raise revenue.”).

227. See Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 *Temp. Pol. & C.R.L. Rev.* 371, 373–74 (2008) (“It is far more likely that average citizens may interact with their city councilmember or mayor than their state legislator or governor.”).

228. See Alexis de Tocqueville, *Democracy in America* 62–63 (J.P. Mayer ed., 1969).

229. *Id.* at 259.

different policies and approaches to advancing the diverse range of these goals via the provision of services and the promulgation of regulations.<sup>230</sup> This informational advantage of localism is reinforced by the immediacy of the ability of local governments to hold civic leadership accountable when governance diverges from local preferences.

While by no means exhausting the valence of localism, a third argument for devolution that resonates for constitutional property sounds in the value of policy experimentalism. Justice Brandeis famously spoke to the ability of a “single, courageous” state to serve as a “laboratory” to conduct “novel social and economic experiments.”<sup>231</sup> Justice Brandeis’s logic naturally extends downward from the fifty states to the nation’s 3,000 counties and 15,000 municipalities.<sup>232</sup> These localities not only conduct policy experiments but also serve as testing grounds for the results, with the extent to which other localities import policies initiated elsewhere substantiating the value of those experiments.<sup>233</sup>

Highlighting these traditionally beneficial features of local governance is not to deny the existence of long-avowed reasons for caution in devolving decisionmaking responsibility over property issues at the center of takings disputes. In Federalist No. 10, James Madison famously depicted local governments as of insufficient size and capacity to engage in the type of long-term democratic give-and-take necessary to reach shifting majorities at more centralized levels of government.<sup>234</sup> On this view, there is special concern that a single interest group can transform into a solidified majoritarian faction at the local level, wielding its power to take what it pleases from opposing factions without needing to give

---

230. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1413 (2006) (“Flowing from the creation of more responsive governments are the related benefits of . . . better government reflecting constituents’ diverse social values . . .”).

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

232. See Briffault, *Home Rule*, supra note 223, at 259. But see Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, Urb. Law. (forthcoming) (manuscript at 15), <https://ssrn.com/abstract=3485872> (on file with the *Columbia Law Review*) (suggesting that local policies rarely diverge in practice, at least with respect to basic land-use controls).

233. See Briffault, *Home Rule*, supra note 223, at 259. Local experimentalism can also foster policy diffusion, generating grassroots movements that, however promising, might have difficulty advancing at the state level. *Id.* at 260.

234. The Federalist No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961); see also, e.g., Carol Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 Nw. U. L. Rev. 74, 100 (1989) (“Everyone is . . . tediously aware of the Federalist argument that we need a large republic as a safeguard against faction.”); Michael J. Waggoner, *Log-Rolling and Judicial Review*, 52 U. Colo. L. Rev. 33, 35 (1980) (explaining the process of trading votes so that minorities can become a majority on an issue).

much of anything in return.<sup>235</sup> A tyrannical local majority also may have a propensity to generate external impacts, as the scale of local regulation creates parochial incentives for the local political system to impose externalities on other local governments.<sup>236</sup>

In one sense, these reasons for caution on local authority might seem especially pertinent in the context of land-use regulation. Land is immobile, and thus, real property ownership may be even more vulnerable to expropriation than other interests held by persons in the minority because owners cannot as readily exit the jurisdiction.<sup>237</sup> Moreover, the exercise of property interests in land—when compared to the exercise of most other interests—is especially likely to generate extra-local effects given land’s interconnectedness,<sup>238</sup> particularly as the traditionally sharp geographic separation among localities has given way to metropolitan areas in which such separations are often undetectable.<sup>239</sup>

While a locality’s ability to regulate land use seems critical to its ability to develop and police its character, such regulations present a magnified version of the same types of externality-generating impacts that the exercise of property rights in land can portend. As Professor Briffault has noted, “Local density controls, restrictions on lot size, restrictions on affordable housing, and exclusions of regionally necessary (albeit locally undesirable) facilities contribute to regional sprawl, traffic congestion, housing costs, infrastructure costs, loss of open space, and other environmental harms.”<sup>240</sup> All of these concerns, explicitly or implicitly, undergird support for state-level authority vis-à-vis local authority.

---

235. See generally Clint Bolick, *Leviathan: The Growth of Local Government and the Erosion of Liberty* (2004) (arguing that the exponential growth of local government threatens “grassroots tyranny”).

236. See Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 *Va. Env’t L.J.* 189, 223 (2002) (describing how local governments may have their own “parochial concerns, such as impacts on the local tax base, jobs, and economic development, as well as the local benefits of certain environmental amenities”).

237. See, e.g., Somin, *Federalism and Property Rights*, *supra* note 2, at 58–62 (“[T]he costs of eminent domain and regulatory takings mostly fall on immobile assets, and exit therefore cannot be used to avoid most of them.”); see also Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *Vand. L. Rev.* 831, 854–67 (1992) (noting how even “vigorous competition [among municipalities] provides virtually no protection against the municipal extraction of economic rents from landowners”). For a defense of exit in the land context, arguing that “the market for development suffers many frictions, but nevertheless may be sufficiently competitive to constrain local governments’ exactions practices, except in a few narrow circumstances,” see Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473, 478 (1991).

238. See Sax, *Private Property and Public Rights*, *supra* note 41, at 155 (noting that “the ecological facts of life demonstrate a powerful inextricability in the utilization of natural resources”).

239. See Briffault, *Home Rule*, *supra* note 223, at 262.

240. *Id.* at 261, 271; see also David A. Dana, *Exclusionary Eminent Domain*, 17 *Sup. Ct. Econ. Rev.* 7, 7–8 (2009) [hereinafter Dana, *Exclusionary Eminent Domain*] (exploring the

In another sense, however, traditional reasons for caution about local authority in property lose some force when seen in light of counterbalancing concerns with state governance evident in the new preemption. Barriers to democracy at the state level stemming from gerrymandering and interest-group capture raise concerns in the property rights context no less than in other areas of new preemption.<sup>241</sup> Moreover, there is a plausible argument that property-related interests at the local level are *least* likely to be in need of extraordinary state intervention to overcome local political-process failure. This is true whether they are overrepresented in Professor William Fischel's paradigmatically home-voting suburban communities<sup>242</sup> or because they represent the proverbial growth machines of denser urban political economies.<sup>243</sup> Whatever risks the tyranny of the local majority holds as a general matter, in other words, property holders seem more likely to be the subjects than the objects of political power in most local contexts.<sup>244</sup>

The adoption of local regulations that affect property interests should certainly reflect legitimate state concerns. States can play a meaningful

---

“phenomenon of ‘exclusionary eminent domain’—the exercise of eminent domain that has the effect of excluding low-income households from an otherwise predominantly or entirely middle-class or wealthy neighborhood or locality, whether or not exclusion itself was the purpose of the condemnation”). Professor Briffault asserts that state mandates on some subjects—such as policing business, promoting equality, or aiding the poor—“may at times be necessary” where local governments would adopt them but for interlocal competition. See Briffault, *Home Rule*, supra note 223, at 268. Professor Richard Schragger suggests that the prospect of exit to other jurisdictions is limited today in the face of the agglomeration economies that characterize many cities. See Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 Va. L. Rev. 1537, 1548–53 (2019).

241. See supra text accompanying notes 217–218.

242. See generally Fischel, *Homevoter Hypothesis*, supra note 15 (arguing that the political economy of suburban communities tends to be driven by interest groups focused on preserving the value of single-family housing).

243. See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 Am. J. Socio. 309, 309–10 (1976) (positing a theory that the desire for growth mobilizes and builds consensus among the urban elite); see also Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. Empirical Legal Stud. 227, 259–61 (2014) (empirically testing the urban-growth-machine and the homevoter models and finding “surprising support for the homevoter-based model”).

244. Cf. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 Nw. U. L. Rev. 1, 41–44 (2008) (explaining the political economy of takings protection that favors owners with relatively greater assets).



role guiding,<sup>245</sup> brokering,<sup>246</sup> monitoring,<sup>247</sup> and, where appropriate, intervening in local policies that have the greatest propensity to generate externalities or discriminatory impacts beyond a locality's boundaries.<sup>248</sup> It is difficult, however, to deny that state preemption in the property rights context is all too often rigid and acontextual, rather than reflecting how and in which situations the states might operate to *improve* the exercise of local power.

For example, categorical state statutory compensation mandates<sup>249</sup> bleach all local texture from an inquiry that in constitutional adjudication recognizes challenging contextual tradeoffs among the degree of the concentration of harm, the reasonableness of the expectation of an owner in a given regulatory arena, and the nature of the governmental action at issue. Similarly, bans on all economic-development eminent domain valorize the worst potential breakdown of the exercise of local authority, and, in the process, eliminate a potentially positive local policy option regardless of the equities involved in any given instance.<sup>250</sup>

It is conceivable that procedural requirements could improve local decisionmaking and protect vulnerable communities by clarifying the terms of policy decisions that often have implications—in terms of discriminatory impacts, environmental degradation, and the like—beyond the property at issue. But state procedural statutes in the takings context, such as takings impact assessment requirements<sup>251</sup> and state impact-fee

---

245. See Patricia E. Salkin & Amy Lavine, *Land Use Law and Active Living: Opportunities for States to Assume a Leadership Role in Promoting and Incentivizing Local Options*, 5 *Rutgers J.L. & Pub. Pol'y* 317, 358–59 (2008) (discussing ways in which state planning mandates can offer guidance to local governments).

246. See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *Wash. L. Rev.* 93, 97–98, 158 (2003) (discussing the state role in facilitating regionalism); see also Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. Rev.* 190, 221 (2001) (explaining state facilitation of interlocal bargaining).

247. See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 *SMU L. Rev.* 177, 263 (2006) (discussing state monitoring of, and data collection about, local policies).

248. See, e.g., Dana, *Exclusionary Eminent Domain*, *supra* note 240, at 28–31 (discussing the need for state doctrine to temper exclusionary local policies).

249. See *supra* section II.A.1.

250. Many other instances of state preemption in the takings context similarly seem designed to remove broad areas of local authority to respond to the perception of local policy failure in particularly salient—even if not necessarily truly representative—examples. The widespread adoption of rent-control preemption, for example, reflects not just the political power of landlord interests at the state level, but also a lack of understanding of the modern evolution of rent regulation as much more carefully crafted than early generations of rent control. See generally Vicki Been, Ingrid Gould Ellen & Sophia House, *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 *Fordham Urb. L.J.* 1041 (2019) (describing the numerous choices jurisdictions make in designing and implementing modern-day rent regulation programs).

251. See *supra* section II.B.

statutes,<sup>252</sup> generally serve not to enhance the quality of local decision-making but instead to override it, thereby privileging the interests of owners in contexts in which the local political economy seems unfavorable to that interest group.<sup>253</sup>

A more intersystemically nuanced approach could involve states helping local governments face the challenges of local governance—managing interest-group pressures, increasing the capacity to understand and weigh extra-local impacts, and the like, all of which are often compounded by significant local fiscal constraints inherent in local decisionmaking around property issues—without dismissing local advantages in terms of civic participation, responsiveness, and experimentalism.<sup>254</sup> The breadth of state efforts to limit local decisionmaking authority in land-use and related policy areas simply do not allow for this kind of contextualization, much like the bulk of recent new preemption measures that pointedly eliminate local power.<sup>255</sup> Local governments can hardly be accountable—let alone responsive to distinctive local conditions—if critical areas of authority are materially constrained or removed in their entirety without justification.

This is not to cede entirely the state role by any means. States must attend to particularly troubling local policies—for example, local exclusionary zoning that reinforces economic and racial segregation. But removing local authority wholesale through state preemption across a range of local land-use and related policy areas is rarely the most prudent course and may have unintended consequences.<sup>256</sup> More targeted and subject-specific state (and federal) intervention, whether through robust

---

252. See *supra* note 156 (noting, among many other examples, instances in which state impact-fee statutes clarify the relevant standards and procedures at issue).

253. See Richard C. Schragger, *Local Control of Land Use: A Partial Defense* 3–8 (Sept. 2020) (on file with the *Columbia Law Review*) [hereinafter Schragger, *Local Control of Land Use*] (unpublished working paper) (arguing that recent state-level market-favoring preemption of local land-use authority may harm lower-income and minority communities, while deregulating local housing markets can lead to higher costs and less control over development and displacement).

254. See Barron, *supra* note 198, at 2264 (advocating for home-rule reform that does not “strictly limit local powers to a narrow sphere” but rather “alter[s] the current mix of state law grants and limits that gives substance to local legal power”). See generally John R. Nolon, *Calming Troubled Waters: Local Solutions*, 44 *Vt. L. Rev.* 1 (2019) (describing examples of how states can provide critical information and support for local governments); Dave Owen, *Cooperative Subfederalism*, 9 *U.C. Irvine L. Rev.* 177 (2018) (illustrating the successes of cooperative “subfederalism” through Oregon, Florida, and California regulations).

255. See *supra* section III.A.

256. See Schragger, *Local Control of Land Use*, *supra* note 253, at 3–6 (discussing state deregulation of local land use as tending to favor market-oriented solutions to problems such as affordable housing that may undermine the nominal goals of such deregulation but arguing that state preemption of local authority is not a viable solution).

fair housing laws or related approaches, are generally preferable to unduly uniform state constraints.<sup>257</sup>

When seen in full, then, the contemporary landscape of broad, overly rigid state takings preemption undermines the positive role that local governance can play in constitutional property without many of the offsetting benefits of a cooperative state–local approach. Ultimately, then, a more localist-sensitive takings federalism—a takings localism—could productively rebalance the state–local relationship away from an anti-localism that has for too long unduly problematized property governance.

### C. *Localism and Takings Theory*

Rebalancing state intervention to protect space for local authority and input, with appropriate caution, lends normative strength to a jurisprudence of the Takings Clause that seeks to maintain property's character as a healthy democratic institution.<sup>258</sup> A more localist-sensitive equilibrium, however, also illuminates long-standing debates in academic discourse. Although the richness of the literature on takings theory does not allow for a full accounting here, it is sufficient to note critical ways in which a new takings localism would resonate both for takings theories that give primacy to efficiency and those more oriented toward fairness and distributional justice.

Many efficiency-based theories of takings rest on the implicit premise that human values and ends are generally subjective.<sup>259</sup> On this view, the legislative process serves to maximize the satisfaction of these subjective values and ends, acting like a market where votes and political advantage serve as currencies of exchange.<sup>260</sup> Regulatory choices are understood in turn as the product of bargains struck among diverse, individually derived preferences, with majoritarianism theoretically lowering the transaction costs of reaching that bargain.<sup>261</sup> Constitutionally mandated compensation, in this view, helps ensure that majorities take account of

---

257. Cf. Davidson, *Dilemma of Localism*, supra note 17, at 990–96 (exploring state general welfare constraints on exclusionary local authority).

258. See supra section I.A.

259. See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 152 (1977) [hereinafter Michelman, *Political Markets*] (describing a “strictly individualist and subjectivist conception of human experience” that “serves as a foundation for modern economic analysis”).

260. See generally Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* ch.3 (1991) (providing an overview of an economic theory of legislation).

261. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 100–03 (1962) (explaining how during bargaining under simple majority requirements, “the individual in the majority will have relatively little incentive to be overly stubborn . . . since [they] will realize that *alternative* members . . . can be drawn from the minority”).

the costs—not merely the perceived benefits—of regulation, or that regulation counteracts market or procedural failures.<sup>262</sup>

Understanding the intersection of localism and takings theory adds depth to this public-choice perspective by elevating distinctions among government entities of different sizes and strengths within the states.<sup>263</sup> To begin, there is a strong argument that, to the extent the incentive structure of the so-called “fiscal illusion” theory has any grounding in actual practice, it is at the local level.<sup>264</sup> Local governments tend paradigmatically to be more sensitive to compensation mandates given their scale and the fiscal constraints under which they operate, and, if anything, may be too cautious in exercising their regulatory authority in that light.<sup>265</sup> If states are making the relevant tradeoffs, and they are comparatively more indifferent to cost, they are more apt to miscalculate the balance between individual rights and community needs in any particular circumstance.<sup>266</sup> As with other individual rights, that may—depending on one’s perspective—be a feature, not a bug, but the point emphasized here is that it is important to recognize that broader scales of reference change the calculus.

Moreover, to the extent that efficiency-based theories of takings highlight the advantages of mobility—exit and entrance—to maximize the satisfaction of individual preferences, there is an argument that local authority can leverage individual market signals, given that much mobility takes place within, rather than among, the states.<sup>267</sup> It is true that the immobility of real property makes mobility-based arguments in takings

---

262. See Jack L. Knetsch & Thomas E. Borcharding, *Expropriation of Private Property and the Basis for Compensation*, 29 U. Toronto L.J. 237, 239–42 (1979) (discussing internalization by distinguishing between “value to the owner” and market value); Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 319–20 (1990) (explaining aspects of takings law as managing the interests of majorities and more or less politically protected minority factions). See generally Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) (surveying market and political failures).

263. Pioneers in this regard include Professors William Fischel and Christopher Serkin. See generally Fischel, *Homevoter Hypothesis*, *supra* note 15 (contending that homeowners have more influence on the efficiency of local governments than they do on state or federal governments); Serkin, *Local Property*, *supra* note 15 (advocating a local approach to the takings problem as opposed to a uniform statewide approach).

264. See Serkin, *Big Differences*, *supra* note 15, at 1634.

265. See *id.* at 1666–67.

266. To the extent that an efficiency-oriented perspective on takings would suggest a generally stronger compensation threat than current takings jurisprudence sets forth, that could plausibly lend support for the first category of state interventions described above that involve liability expansions. See *supra* section II.A. But a focus on incentives and internalization would still give reasons to be cautious about other categories of state constraints, such as procedural impositions, specific limitations on local authority, and property owner empowerments. See *supra* sections II.B–.D. All of these interventions more directly eliminate the ability of local political process to internalize the costs and benefits of regulation.

267. Cf. Serkin, *Local Property*, *supra* note 15, at 886–91 (arguing that takings law should be decided locally because of competition between local governments).

more vulnerable than in some areas of governance,<sup>268</sup> but that does not mean the feedback loop of local preference shaping and accountability fails entirely for property. The critical point is a marginal one. To the extent that local governments respond to mobility-related incentives in areas of policy most related to takings, centralizing through broad-scale state preemption undermines that avenue of preference satisfaction. This is not to endorse the perspective wholesale, but instead to highlight the interplay between devolutionary arguments in the discourse of localism and their potential implications for takings.

Questions of the balance of authority between states and local governments are no less relevant to evaluating fairness and distributional justice in takings. As noted, both the Supreme Court and commentators have highlighted the role of compensation in restoring parity to owners whose property has been undermined in a manner that would be unjust absent that payment.<sup>269</sup> This perspective foregrounds substantive outcomes rather than market or procedural failures. While fairness theories in takings diverge on their assessment of when owners should be considered sufficiently singled out by a regulation to warrant compensation, they tend to moderate compensation mandates through a recognition of the long-run reciprocity inherent in property.<sup>270</sup>

Fairness theories of takings are often justified by the proposition that because property law involves the resolution of competing claims to nonshareable resources, governmental decisions to allocate property interests will always require that someone's interest be sacrificed one way or another.<sup>271</sup> Even if a sacrifice is especially stark and unexpected for a

---

268. See Somin, *Federalism and Property Rights*, *supra* note 2, at 57–58 (“The main difficulty with such competitive federalism arguments is that they fail to take adequate account of the immobility of property rights in land.”).

269. See, e.g., Mulvaney, *Property-As-Society*, *supra* note 106, at 941 (“[T]akings adjudications should be concerned not with whether a state decision presses property into public service but rather the extent to which it applies that pressure in a way that unfairly and unjustly isolates and sacrifices an individual owner’s property interest.”); Sax, *Private Property and Public Rights*, *supra* note 41, at 163–64 (contending that compensation may be appropriate where an owner is prohibited from using land as long as the prohibited use would not generate “conflict-creating spillover effects”); Joseph William Singer, *Kormendy Lecture: Justifying Regulatory Takings*, 41 *Ohio N.U. L. Rev.* 601, 636 (2015) (“Regulatory laws are valid without compensation, even if only a few owners are affected, as long as those laws do not unfairly single out individual owners to bear ‘public’ burdens that individuals should not have to bear in the absence of compensation.” (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

270. See, e.g., Dagan, *supra* note 41, at 742–46 (reconceptualizing “reciprocity of advantage” and “diminution of value” to determine when compensation is required); Peterson, *supra* note 41, at 60 (arguing that compensation is not required when the government takes an owner’s property to prevent or punish action that the public would consider wrongful); Singer, *The Ownership Society*, *supra* note 41, at 325–38 (distinguishing the “castle,” “investment,” and “citizenship” models of property to examine “just obligations”).

271. See Timothy M. Mulvaney, *A World of Distrust*, 120 *Colum. L. Rev. Forum* 153, 156 (2020) (“Property law consists of state allocative choices made in the face of competing

given individual in a given instance, the thinking goes, that sacrifice is likely to be offset in the long run by living in a civilized society that subjects owners, over time, to an interconnected system of both sacrifices in service of other members of the community and advantages gained at those same persons' expense.<sup>272</sup> From this, it follows that legislators tasked with resolving competing property claims—allocating those sacrifices and advantages—deserve deference when guided by other-regarding principles in identifying, defining, persuading, and taking actions toward objectively defined human values and ends through joint, reasoned deliberation.<sup>273</sup>

Fairness-based accounts of takings law, as with efficiency, can be illuminated through the lens of the state and local allocation of decisional authority with respect to the sacrifices and advantages inherent in property.<sup>274</sup> Fairness-oriented theories of takings require contextualized decisionmaking, given that the normative evaluation of singling out involves a detailed look into whether and why parties should be considered similarly situated. In this light, there is much to be concerned about when a sole decisionmaker—the state government—is making those decisions through rigid dictates that sweep broadly rather than resting those decisions on contextualized justifications.

This is not to contend, of course, that fairness-based accounts should necessarily embrace localism in all elements. Rather, it is to suggest that attending to the character of the specific level of government that makes the allocative decision at the center of a takings case could deepen the analysis required to determine whether a specific regulation has isolated a particular individual in such a way that only compensation can avert manifest injustice. Adding localism to this analysis highlights the relative capacity to target and respond to on-the-ground impacts, offer impacted parties meaningful opportunities to participate, and confront fundamental ills such as exclusion and inequality. As with the blunt tool of preemption and similar state constraints in efficiency accounts, so too with fairness-based theories there can be much to commend an equilibrium that

---

claims to access or exclude others from finite resources . . ."); see also Underkuffler-Freund, *A Special Right*, *supra* note 189, at 1039 (asserting that protecting a property interest for one person "necessarily and inevitably" denies that same interest to someone else (emphasis omitted)).

272. See, e.g., *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 109 (Cal. 2002) (asserting that reciprocity of advantage lies "not in a precise balance of burdens and benefits . . . but in the interlocking system of benefits . . . that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice . . . for the common good").

273. See Michelman, *Political Markets*, *supra* note 259, at 149–51 (describing the legislature as a mechanism for organizing human action to achieve "public or objective values").

274. Cf. Rose, *What Federalism Tells Us*, *supra* note 15, at 1699 ("One does not need to give in to localism bashing to acknowledge that local governments are very likely to deal with property issues differently from the way that the federal government does . . .").

preserves space for the local in an intersystemic dialogue that fosters nuance and regard for the challenging tradeoffs inherent in constitutional property.

#### CONCLUSION

This Article began with the premise that the Takings Clause provides protection against changes to a legal right—property—that states have traditionally defined. This means that takings law is inherently federalist in structure, placing great weight on the democratic process within the states to resolve many of the most contentious constitutional property questions. But takings federalism does not stop devolving at the state level, given the centrality of local governments to property. Given that, it makes sense—echoing Professor Heather Gerken—to carry the democratic vision at the heart of takings jurisprudence all the way down.<sup>275</sup>

Takings jurisprudence provides space for democratic institutions, from the councils of the smallest rural villages to the legislatures of the most populous states. State legislatures, however, have unjustifiably arrogated and centralized authority over property issues in a marked way by preempting and otherwise constricting local powers to resolve issues that have served as key touchpoints in the development of takings law. The extent of this state interference when laid out in a cumulative way has been underappreciated in the literature and raises significant concerns.

Resolving takings conflicts through overly rigid, unmediated statewide standards echoes the arguments that scholars have made against the current state excesses of the new preemption. Strengthening local authority in the property arena certainly carries normative and practical concerns—albeit concerns that may be better resolved through narrowly targeted interventions rather than sweeping constraints on local authority. But rebalancing to preserve local authority over property is true to the democratic underpinnings of takings jurisprudence and is a more attractive way of instantiating the decentralizing instincts underlying the doctrine. States have a role to play, as do the courts, in setting the outer boundaries of constitutional property. But local governments should not lightly be discarded as a locus for contributing meaningfully to the democratic tradeoffs inherent in conflicts over property. The time has arrived, in short, for takings localism.

---

275. See Heather K. Gerken, *Forward: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 7–8 (2010) (“I use the term ‘federalism-all-the-way-down’ to describe the institutional arrangements that our constitutional account too often misses—where minorities rule without sovereignty.”).