

Property Convergence in Takings Law

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Abstract

Although one of the key questions in a federal system is how authority should be allocated between the state and national governments, property law has rarely generated serious controversy on this front. Instead, property entitlements and the rules governing resource use have typically been the province of state and local actors. The Supreme Court has repeatedly emphasized that property rights are created at the state level. And while federal regulations—for example, environmental regulations—certainly limit property rights, state and local land-use laws and state nuisance and trespass rules serve as major constraints on property's use and enjoyment. This feature of property law means there is potential for interstate variation in property rules.

In the private law of property—the body of law that governs disputes and relationships among private parties—there remains some variation among the states in both the forms of property recognized and in the different rules that limit ownership and use. However, in this Essay prepared for a symposium on federalism at the Pepperdine School of Law, I marshal evidence that one portion of the public law of property is on a different trajectory.

This Essay identifies two areas of convergence across states in constitutional takings law. First, though the federal Constitution could theoretically protect varied property interests and could measure the constitutionality of regulations affecting property against different background state legal re-

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gimes, developments in takings doctrine have enabled some courts to make cross-state comparisons both to create or cap the interests protected and to determine which limitations on title an owner should have expected. Second, despite the potential for variation offered by state constitutional takings provisions, state courts often interpret their constitutional protections for property in similar ways even when presented with different text or other relevant considerations. This Essay identifies how lower courts are applying takings doctrine in ways that may curb the significance of interstate differences in property rules and speculates on the features of takings law that minimize variation in the scope of constitutional takings protection where the potential exists for it. In surfacing the phenomenon of convergence, this Essay builds a foundation for considering the virtues, vices, and normative desirability of uniformity and variation in both takings law and in property law more generally.

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I. INTRODUCTION

Although one of the key questions in a federal system is how authority should be allocated between the state and national governments,¹ property law has rarely generated serious controversy on this front. Instead, property entitlements and the rules governing resource use have typically been the province of state and local actors.² The Supreme Court has repeatedly emphasized that property rights are created at the state level.³ And while federal regulations—for example, environmental regulations—certainly limit property rights, state and local land-use laws and state nuisance and trespass rules serve as major constraints on property’s use and enjoyment.⁴

This feature of property law means there is significant potential for interstate variation in property rules. Scholars have suggested that the fact that property law is left to the states allows for doctrinal and regulatory innovations and permits residents to agitate at a more local level for rules reflecting their preferences.⁵ There is some truth to these assertions. It does not seem coincidental that the state of California offers artists and celebrities stronger

1. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 665 (1990) (noting that the federal system divides “responsibilities among national, state, and local governments”).

2. See Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 n.1 (2005) (noting that states are the traditional source of property law, while federal property law is generally “limited to the regulation of properties owned by the United States and intellectual property law . . .”); Stewart E. Sterk, *Federal Land Use Regulation as Market Restoration*, B.U. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238139 (discussing issues related to federal limitations on local land-use regulations). There are periodically calls for limiting state or local authority over property, particularly in the field of land use regulation, where the potential for spillovers is particularly high. See generally Sterk, *supra* (manuscript at 4–6); Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1406–07 (2012) (describing two different federal attempts “to coordinate land-use planning on a national scale”).

3. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 482 (2005); *Drye v. United States*, 528 U.S. 49, 58 (1999); *Preseault v. I.C.C.*, 494 U.S. 1, 20 (1990) (O’Connor, J., concurring); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

4. Cf. Robert C. Ellickson, *Panel I: Liberty, Property, and Environmental Ethics*, 21 ECOLOGY L.Q. 397, 397 (1994) (bemoaning as “Beltway Syndrome” the way legal scholars focus on federal land controls at the expense of local controls).

5. E.g., Bell & Parchomovsky, *supra* note 2, at 99–100; Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 954 (2000); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 54 (2011). For criticism of the notion that competitive decentralization will necessarily lead to more preference satisfaction, innovation, or economic growth, see RICHARD C. SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 46–56 (2016); Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1860 (2010); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1831–34 (2003).

property (or property-like) rights in their likenesses and works than other states do.⁶ Some states are well-known for their strong environmental regulations limiting property use, while other states are far more “lax.”⁷

To be sure, in the private law of property—the body of law that governs disputes and relationships among private parties⁸—there remains some meaningful variation among the states in both particular forms of property recognized and in the different rules that limit ownership and use.⁹ However, in this Essay, I marshal evidence that one portion of the public law of property is on a different trajectory.¹⁰ Property conflicts between private citizens and the state are often channeled through the takings clauses, the constitutional provisions that set limitations on the government’s ability to acquire or regulate private property.¹¹ This Essay describes how state-specific property law has become less salient when courts are resolving owner disputes against governments, as opposed to other private parties. It speculates on the features of takings law that cause convergence in the protections af-

6. See Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1608 (2008); see generally Paul Cirino, Note, Advertisers, Celebrities, and Publicity Rights in New York and California, 39 N.Y. L. SCH. L. REV. 763 (1994).

7. See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 583 (2001) (stating that “many states are implementing innovative [environmental] protective measures” while other “states may prefer more lax environmental regulation.”). These economists “have generally found no strong association between environmental compliance costs and business location.” Mary Graham, *Environmental Protection & the States: “Race to the Bottom” or “Race to the Bottom Line”?*, BROOKINGS (Dec. 1, 1998), <https://www.brookings.edu/articles/environmental-protection-the-states-race-to-the-bottom-or-race-to-the-bottom-line/>. In other words, different environmental restrictions on property uses in different states may reflect the preferences of residents and local interest groups rather than attempts to lure either environmentally friendly or unfriendly firms. See *id.*

8. *Private Law*, BLACK’S LAW DICTIONARY 1390 (10th ed. 2014).

9. See *infra* Part II.

10. See *infra* Part III. In using the term public law here, I mean only to separate contexts in which the state is a party to the conflict involving the property owner from contexts in which disputants are solely private parties. See *Public Law*, BLACK’S LAW DICTIONARY 1425 (10th ed. 2014) (defining “public law” as “[t]he body of law dealing with the relations between private individuals and the government”). Of course, even when the government is involved in property disputes, private law plays a role. Cf. Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect between Public and Private Law*, 30 TOURO L. REV. 265, 265–66 (2014) (arguing that classification of takings law as “public law,” unmoored from private common law, has led to doctrinal confusion).

11. The federal and most state constitutions have “takings clauses.” U.S. CONST. amend. V; e.g., ARIZ. CONST. art. 2, § 17; CAL. CONST. art. I, § 19; MD. CONST. art. III, § 40; MASS. CONST. pt. I, art. X; MICH. CONST. art. 10, § 2; MINN. CONST. art. I, § 13; N.J. CONST. art. I, § 20; N.Y. CONST. art. I, § 7, cl. a; PA. CONST. art. I, § 10.

folded to property, minimizing interstate variation in the scope of constitutional protection where the potential exists for it.

This Essay proceeds as follows. In Part II, I describe the persistence of property variation in private law,¹² and in Part III, two aspects of convergence in constitutional takings law.¹³ First, though the federal Constitution could theoretically protect varied property interests and could measure the constitutionality of regulations affecting property against different background state legal regimes, developments in takings doctrine have enabled courts to make cross-state comparisons both to define the interests protected and to determine which limitations on title an owner should have expected. This means that courts are using a sort of national common law of property to determine the fate of claims for compensation.¹⁴ Second, despite the potential for variation offered by state constitutional takings provisions, state courts often interpret their constitutional protections for property in similar ways even in the face of different text or other relevant considerations.¹⁵ The aim of this Essay is largely descriptive: to identify how lower courts are applying takings doctrine in ways that may limit the significance of interstate differences in property rules. In discussing these phenomena of convergence, this Essay builds a firmer foundation for considering the virtues, vices, and normative desirability of uniformity and variation in both takings law and in property law more generally.

II. PROPERTY VARIATION IN PRIVATE LAW

All first-year law students in a Property course quickly learn that there can be a bewildering number of state-law variations on core property interests and doctrines. Historically, there have been variations in the sorts of interests recognized as property in different states. Take conservation easements, which benefit easement holders by preventing landowners from developing or altering property in some way.¹⁶ Massachusetts recognized

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Section III.A.

15. See *infra* Section III.B; see also Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139, 155–82 (2018) (exploring this form of convergence, state courts interpreting their constitutions in lockstep with the federal constitution).

16. See Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1044 n.1 (2006) (defining “conservation easements” as a “voluntary private land protection scheme[.]”).

them a full fifty years before Wyoming passed a statute creating them.¹⁷ Similarly, other forms of easements have emerged unevenly in different states, including easements or rights of access entitling owners to prevent nearby modifications to their means of entry and egress,¹⁸ or easements of view preventing neighbors from blocking the visibility of owners' businesses from the street.¹⁹ Variation is not limited to easements like these,²⁰ and new variations continue to arise from time to time.²¹

On top of the fact that states sometimes recognize different property interests, state legislatures and courts have imposed different doctrinal limitations on those property interests. A few highlights may illustrate the point. Consider adverse possession, which famously entitles the possessor of property to obtain title over the true owner with the passage of time; in some states, good faith is required for a valid adverse possession claim against an owner;²² in other states, the adverse possessor's state of mind is irrelevant;²³ and for a time, at least in a few states, only a bad-faith adverse possessor could obtain title.²⁴ State property laws also differentially limit who can

17. *See id.* at 1085–86. Prior to passing the statute, some Wyoming residents were using more traditional property tools like covenants and equitable servitudes for conservation purposes. *Id.* at 1085 n.205.

18. Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1184–89 (2016).

19. Note, *Abutting Landowner's Easement of View*, 5 N.Y. L. REV. 43, 43–46 (1927).

20. For a few other examples outside the servitude context, see Bell & Parchomovsky, *supra* note 2, at 74–75; Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 60–61 (2017).

21. For example, in the last few years, New York has floated creating a property-like right to control one's likeness that actors could transfer to heirs to prevent their appearance on-screen as computer-generated characters after their deaths. Jennifer E. Rothman, *New York Once Again Floats Right of Publicity Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (June 7, 2017, 12:45 PM), <https://www.rightofpublicityroadmap.com/news-commentary/new-york-once-again-floats-right-publicity-law>. Anyone whose likeness is used in New York could enforce this right, not just New York residents, so it would not have the same effect of creating uneven property entitlements afforded to residents of different states, but it is nonetheless an example of state innovation. *See id.*

22. *See, e.g., Croell Redi-Mix, Inc. v. Baltus*, No. 08–0379, 2009 WL 778760, at *3 (Iowa Ct. App. Mar. 26, 2009) (stating that a valid adverse possession cause of action requires a good faith claim of right).

23. *See, e.g., French v. Pearce*, 8 Conn. 439, 443 (1831) (explaining that “it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor”).

24. *See Preble v. Maine Cent. R.R. Co.*, 27 A. 149, 150 (Me. 1893), *overruled by Dombkowski v. Ferland*, 893 A.2d 599, 605–06 (Me. 2006) (abandoning the “Maine rule” approach to adverse possession by statute); *see also Mannillo v. Gorski*, 255 A.2d 258, 262 (N.J. 1969) (describing the Maine rule and the New Jersey court's decision to disavow its previous adherence to that rule).

possess property interests. The grantor of a parcel can reserve an easement in favor of a third party in some states but not in others.²⁵ Laws governing access to natural resources also change depending on the state in which they are located;²⁶ Oregon recognizes customary rights entitling the public to access beaches,²⁷ while New Hampshire expressly rejects those rights.²⁸ And the tort of nuisance may partly owe its reputation as a “legal garbage can” to the plethora of nuisance rules that proliferate across state borders.²⁹ Right to farm laws immunize agricultural operations from nuisance liability to different extents in different states,³⁰ and the tests for determining whether an activity is a nuisance differ as well.³¹ The amount of variation in property law even decades ago led one law professor to criticize the American Law Institute’s effort to write a *Restatement of Property* as “impossible from its inception. There is no ‘American law of property,’ and there can be none so long as the present federal system of government persists.”³²

Why is there variation in state property law? As explained at the outset, courts and scholars often repeat the maxim that property is a creature of state law,³³ and whenever authority over a body of law is reserved to the states, it

25. Compare *Estate of Thomson v. Wade*, 509 N.E.2d 309, 310 (N.Y. 1987) (holding that a third party is a “stranger to the deed” and cannot be the beneficiary of an easement by reservation), and *Pitman v. Sweeney*, 661 P.2d 153, 154 (Wash. Ct. App. 1983) (using the same rule), with *Willard v. First Church of Christ, Scientist, Pacifica*, 498 P.2d 987, 991 (Cal. 1972) (in bank) (joining Kentucky and Oregon in abandoning the “stranger to the deed” rule).

26. See Maureen E. Brady, *Defining “Navigability”: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1420, 1424–27 (2015) (cataloging different common law definitions of “navigable” for the purposes of defining “the scope of the public trust”).

27. Bell & Parchomovsky, *supra* note 2, at 95 n.124.

28. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 223 (2004) (noting these different rules in Oregon and New Hampshire).

29. See Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 71 (2006) (“[N]uisance law . . . varies dramatically from state to state.”); William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (coining the term “legal garbage can”).

30. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998).

31. EMILY DOSKOW & LINA GUILLEN, *NEIGHBOR LAW: FENCES, TREES, BOUNDARIES & NOISE* 230–33 (9th ed. 2017).

32. William R. Vance, *The Restatement of the Law of Property*, 86 U. PA. L. REV. 173, 178 (1937).

33. See, e.g., D. Benjamin Barros, Note, *Defining “Property” in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1879–81 (1995); Bell & Parchomovsky, *supra* note 2, at 74 n.1; James Y. Stern, *Property’s Constitution*, 101 CALIF. L. REV. 277, 286 (2013).

creates the potential for differences.³⁴ But some have argued that states have special institutional expertise over the property within their borders.³⁵ In the heyday of “federal common law,” when federal courts sitting in diversity jurisdiction considered themselves free to ignore state common law rulings, federal tribunals nonetheless deferred to the state common law of property as a quintessentially “local” issue.³⁶ Federal courts today routinely list family law and property law as areas where they should abstain or defer to allow “expert” state courts to resolve ambiguities in the doctrine.³⁷ Furthermore, jurists and scholars often suggest that state actors need flexibility to tailor property rules to particularities within their jurisdictions.³⁸ Any court decision that threatens to have the collateral effect of freezing the state’s common law of property is criticized as preventing judges and legislators from adapting their state’s property law to future local circumstances.³⁹

Of course, no one suggests that variation is an unmitigated good. First, more rules or interests does not necessarily mean better rules or interests.⁴⁰ Indeed, property doctrines seem to spawn a handful of variations rather than fifty different approaches.⁴¹ In some instances, a rule arising in one jurisdic-

34. See *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (discussing how the states are laboratories of federalism as each state has the authority to define their own laws in novel ways).

35. See *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) (emphasizing that the federal government owed “great respect” to “state legislatures and state courts in discerning local public needs”); Somin, *supra* note 5, at 54 (noting that arguments for federalism in the property context invoke “superior knowledge and expertise of state and local governments in catering to the diverse needs of their communities”).

36. *Swift v. Tyson*, 41 U.S. 1, 18 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1528 (2004). But see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1413–14 (2001) (noting that federal courts still sometimes meddled in property law in the era of *Swift v. Tyson*).

37. See, e.g., *Kelo*, 545 U.S. at 482; *San Remo Hotel v. City and Cty. of San Francisco*, 545 U.S. 323, 347 (2005); *LoCurto v. LoCurto*, No. 07 Civ. 8238 (NRB), 2008 WL 4410091, at *8 (S.D.N.Y. Sept. 25, 2008); *W. Hartford Initiative to Save Historic Prop. v. Town of West Hartford*, No. 3:06-CV-739 (RNC), 2006 WL 2401441, at *7 (D. Conn. Aug. 18, 2006); *In re Sweet*, No. 6:12-bk-03271-KSJ, 2012 WL 5555004, at *2 (Bankr. M.D. Fla. Nov. 15, 2012); *In re Carter*, 156 B.R. 768, 771 (Bankr. E.D. Va. 1993); *In re Desmarais*, 33 B.R. 27, 29 (Bankr. D. Me. 1983).

38. See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1104 (1981).

39. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1068–69 (1992) (Stevens, J., dissenting); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 262 (2011); see also Brady, *supra* note 26, at 1450 (describing this as the “ossification problem”).

40. See, e.g., Michelman, *supra* note 38, at 1104.

41. See Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Rob-*

tion may have such desirable consequences that it should be adopted everywhere; other times, different rules more effectively address different conditions, expectations, or preferences in different places. Second, Thomas Merrill and Henry Smith have rightly pointed out that a sort of “numerus clausus” principle operates to limit variation in property: property rights tend to be structured in a limited number of standardized forms to reduce the information costs to all third parties needing to ascertain who holds which rights.⁴² This principle has undoubtedly reduced variation, certainly as a matter of judicial lawmaking, although legislatures have still been responsible for significant innovations in property rights in different states.⁴³ Finally, to recognize the existence of variation is not to say that all innovations or variations are good.⁴⁴ States have long created property interests that are economically inefficient or morally abhorrent⁴⁵—though one can argue that these interests should be relegated to the fringe or eliminated without arguing against variation itself.⁴⁶

On the whole, however, variation has rarely been criticized, except perhaps by the fiercest advocates of uniformity (or perhaps by first-year law students approaching final exams and frantically memorizing various state rules).⁴⁷ To the contrary, scholars and judges have often suggested that states have expertise on property, and innovation and experimentation are viewed as systemic benefits.⁴⁸ In lieu of proposals for standardization, “it is a commonplace of Our Federalism that [rules of property] are left for definition by bodies of state law that the States are free to shape as they severally

ins, 64 U. CHI. L. REV. 21, 41 (1997) (“[T]he level of agreement across states is far greater than is sometimes supposed, in part because of the unifying forces created by the Restatements and the standard treatises on the subject.”).

42. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3, 9–12 (2000). For example, there are a finite number and fairly uniform types of freehold and leasehold interests in each state. *See id.* at 11.

43. *Id.* at 9–12, 58–60.

44. *See* Michelman, *supra* note 38, at 1104.

45. *See, e.g., id.*

46. *Cf.* *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (the beauty of federalism is that if one state tries an inefficient or morally abhorrent “experiment,” the other states are free to reject it).

47. *See* Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 692–93 (2014) (noting that the *Restatement of Property* project veered toward advocating for reform in ways consonant with a move toward “uniform” legislation).

48. *See* Bell & Parchomovsky, *supra* note 2, at 78–79; Merrill, *supra* note 5, at 954.

choose.”⁴⁹

III. PROPERTY CONVERGENCE IN TAKINGS LAW

Despite the persistence of some variations in property doctrines as a matter of private law, a different phenomenon occurs in one of property’s public law applications: takings. In general terms, the takings clauses of the state and federal constitutions prevent private property from being taken for public use without just compensation.⁵⁰ This is the area of property law that most empowers property owners against both direct confiscation and confiscatory regulation—“regulatory takings”—by federal, state, and local governments. The Supreme Court has enabled interstate variation in the application of the federal Takings Clause by emphasizing the role of nonconstitutional state property law in defining both what counts as constitutional property and in measuring whether a taking has occurred.⁵¹ As a result, the differences among states in both the specific property interests protected and in regulatory and doctrinal limitations on those interests could lead to differences in the operation of the Takings Clause in different states. Similarly, as a matter of state takings law, differences in state constitutional text and history could lead to different levels of protection against confiscation.⁵² Nevertheless, takings law is often marked by convergence, rather than variation.

49. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310 (1993); see also Merrill, *supra* note 5, at 954 (noting that because the Constitution “does not require that constitutional property be created in any particular form,” it “permits substantial experimentation and evolution of property institutions over time”).

50. U.S. CONST. amend. V; e.g., ARIZ. CONST. art. 2, § 17; CAL. CONST. art. I, § 19; MD. CONST. art. III, § 40; MASS. CONST. pt. I, art. X; MICH. CONST. art. 10, § 2; MINN. CONST. art. I, § 13; N.J. CONST. art. I, § 20; N.Y. CONST. art. I, § 7, cl. a; PA. CONST. art. I, § 10.

51. The Supreme Court has not defined the constitutional terms “property” and “taken” in a way that would limit interstate variation—for example, by defining “property” as “land.” Instead, the definitions incorporate positive state law. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); Sterk, *supra* note 28, at 222–24.

52. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16–19 (2018) (noting how different provisions and other local considerations might change states’ approaches to constitutional interpretation).

A. *Federal Takings Law and Defining Reasonableness*

Though the same federal Takings Clause applies to the actions of the federal government, and state and local governments,⁵³ the Clause need not apply identically across state borders. First, because property interests can vary by state,⁵⁴ a type of interest recognized in one place may not exist, let alone be protected, by the Constitution in another.⁵⁵ Second, in the regulatory takings context, the Supreme Court has repeatedly affirmed the role of background state property law in analyzing whether a taking has occurred.⁵⁶ Several of the Court's tests examine whether a regulation "takes" by examining how the owner's title or expectations were limited by pre-existing circumstances, including background law.⁵⁷ Differences in background state law could make a regulation a taking in one jurisdiction, but not in another, because identically situated owners would be operating under different background constraints.⁵⁸ To borrow an example developed by Stewart Sterk, Oregon has long recognized customary rights for the public to use dry-sand beach areas, whereas New Hampshire has specifically rejected those rights.⁵⁹ If the same regulation were passed in both states forbidding owners from building structures in the dry-sand portion of the beach, the New Hampshire owner would seem to have a stronger claim that his or her property rights were interfered with than a similarly situated Oregon owner, because the Oregon owner even before the regulation could not have imped-

53. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233–34 (1897); Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 *ECOLOGY L.Q.* 57, 75 n.92 (1997).

54. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Bd. of Regents of State Colls.*, 408 U.S. at 577); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents of State Colls.*, 408 U.S. at 577); Brady, *supra* note 20, at 59–63.

55. See Merrill, *supra* note 5, at 952–54 (noting that although "property" is a federal constitutional term, state actors can create interests that meet that bar in any form, allowing "experimentation and evolution of property institutions over time.").

56. See Sterk, *supra* note 28, at 206 (stating that protection against unconstitutional takings heavily depends on background state law principles).

57. See *id.* at 226.

58. *Id.* at 233.

59. *Id.* at 223.

ed the public's customary rights by building structures in that location.⁶⁰

Although these tests leave open the prospect of some variation among states, courts have adopted interpretations of the federal Takings Clause that facilitate convergence. There are signs that courts are using interstate comparisons to affect the scope of takings protection for property in two ways: first, by using interstate comparisons to create the background state law against which an owner's expectations are judged, and second, by using interstate comparisons to create or limit the unit or type of property recognized as constitutionally salient for federal purposes.

A potential cause of this phenomenon is the use of "reasonableness" and similar terms in Takings Clause cases.⁶¹ This is not unique to takings; throughout constitutional law, "reasonableness" has moved from its common law roots into all sorts of constitutional settings.⁶² An inherent problem with reasonableness is this: what counts as reasonable may vary depending on the chosen comparators.⁶³ If asking whether a person's conduct is reasonable, considerations relating to age, professional background, knowledge, and other experiences may change the calculus.⁶⁴ If asking whether a government's law or policy is reasonable, one may get different answers if comparing the action against a jurisdiction's own history and laws versus examining broader trends across states.⁶⁵ Reasonableness raises these problems in the takings context. As this Section identifies, the unclear parameters of reasonableness have permitted courts to measure property and takings by reference to the rules and interests protected in other states, which has altered the potential that otherwise exists for interstate variation.

The history of reasonableness relating to the takings law phrase "in-

60. *See id.*

61. *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (discussing whether a taking has occurred based on a factors test, including "its interference with reasonable investment backed expectations").

62. Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 61 (2017) ("The concept of reasonableness pervades constitutional doctrine.")

63. *Id.* at 61–62 ("[T]he underlying concept of reasonableness that courts adopt varies, with judges using competing objective, subjective, utility-based, or custom-based standards. . . . The use of the common term reasonableness to such different ends can blur distinctions between rights and remedies.")

64. *See id.* at 72–73.

65. *See generally* Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 103 CORNELL L. REV. (forthcoming) (manuscript at 6–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133213 (discussing the Supreme Court's reliance on state law when interpreting the Constitution in order to help form a general consensus).

vestment-backed expectations” is illustrative. This phrase comes from *Penn Central Transportation Co. v. City of New York*, which set forth three factors for courts to examine in determining whether a regulation is a taking: “the character of the governmental action,” “[t]he economic impact of the regulation on the claimant,” and “the extent to which the regulation has interfered with distinct investment-backed expectations.”⁶⁶ The notion of investment-backed expectations originated in Frank Michelman’s 1967 article “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law.”⁶⁷ In analyzing the Supreme Court’s few takings cases prior to that date, Michelman observed that it would oversimplify the Court’s takings analysis to focus primarily on the magnitude of the diminution in value suffered by the property owner.⁶⁸ Instead, Michelman asserted that, as a descriptive matter, the takings test primarily examined “whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.”⁶⁹ To give meaning to this language, Michelman asserted that courts would be more likely to find a taking had occurred when a regulation banned an established use as opposed to one not yet undertaken; courts would be unlikely to find a taking when a landowner had not “yet formed any specific plans for his vacant land.”⁷⁰

Eighteen months after the *Penn Central* opinion invoked “distinct investment-backed expectations,” the language changed almost imperceptibly in *Kaiser Aetna v. United States*.⁷¹ In a garden-variety physical takings case involving the conversion of a private pond to a public aquatic park, Justice Rehnquist briefly canvassed all of takings law, including the recently decided *Penn Central* case, noting that it had declared “interference with *reasonable* investment backed expectations” to be an important analytical factor in

66. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

67. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1213 (1967). For the observation that Michelman is the source of this factor, see Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 557 (2002); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 100–01 (1995).

68. Michelman, *supra* note 67, at 1233.

69. *Id.*

70. *Id.* at 1233–34.

71. 438 U.S. 104, 124 (1978). *Penn Central* was decided on June 26, 1978. *Id.* at 104. *Kaiser Aetna v. United States*, the case that slightly changed the test, was decided on December 4, 1979. 444 U.S. 164, 164, 175 (1979).

the regulatory takings context.⁷² This shift from “distinct” expectations to “reasonable” expectations was almost certainly not intended to change the analysis.⁷³ But some have suggested that distinctness and reasonableness carry different meanings, even if the Supreme Court and some lower courts use the terms interchangeably.⁷⁴ To determine the “distinctness” of an owner’s expectations, Michelman suggested courts would likely focus on the property owner’s plans and expenditures of capital in light of what the prior legal framework permitted.⁷⁵ To determine reasonableness, on the other hand, courts have used a much wider range of considerations to assess the property owner’s behavior.⁷⁶

The difference between distinctness and reasonableness may not be as significant as that view would suggest.⁷⁷ For instance, just as “reasonableness” implies limitations on constitutionally cognizable expectations about

72. *Kaiser Aetna*, 444 U.S. at 165–66, 175 (emphasis added).

73. J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 URB. LAW. 81, 85–86 (2006) (referring to this change as “seem[ingly] inadvertent”); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 56–66 (2004) (noting that “[t]he change was made without comment and seemingly without purpose”); Eagle, *supra* note 67, at 560–61 (“[I]t is not clear that *Kaiser Aetna* in fact intended to mandate governmental review of the plausibility of owners’ views.”). In addition, the authorship of the *Kaiser Aetna* opinion lends further support to the idea that a change in meaning was not intended, or at least not one that would harm property owners; Justice Rehnquist was “a strong proponent of robust Fifth Amendment private property protections.” Chipchase, *supra*, at 59; see Eagle, *supra* note 67, at 560–61.

74. See, e.g., *Presbytery of Seattle v. King County*, 787 P.2d 907, 915 n.29 (Wash. 1990); Chipchase, *supra* note 73, at 60 n.104 (collecting Supreme Court cases in which “reasonable” and “distinct” are used interchangeably in takings clause issues).

75. See Michelman, *supra* note 67, at 1233–34.

76. Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 765–67 (1988); see Breemer, *supra* note 73, at 85–86 (“[W]hatever its purpose in *Kaiser Aetna*, the use of the term ‘reasonable’ invited examination of the validity of a claimant’s expectations rather than examination of the effect of regulation in precluding distinctly planned, profitable uses of land.” (emphasis omitted)); Chipchase, *supra* note 73, at 57 (“The term ‘distinct’ thus directs a claimant to produce evidence showing that she intended to develop her property in the manner alleged and that she expended capital in furtherance of those plans. In contrast, the term ‘reasonable,’ or ‘reasonably prudent,’ implies that courts are to determine whether the claimant’s demonstrated expectations were appropriate or justified given the circumstances of the case.” (footnotes omitted)); Eagle, *supra* note 67, at 560 (“After all, ‘expectations’ are individualistic and possibly idiosyncratic views of the world. ‘Reasonableness,’ on the other hand, implies both the individual judgment and the societal determination that the judgment is at least plausible.”).

77. See Chipchase, *supra* note 73, at 60 n.104 (showing how different cases have used the words “reasonable” and “distinct” interchangeably or not at all).

property,⁷⁸ there are surely limits on the “distinct” expectations that might form the basis for a takings claim.⁷⁹ Compensation is a means of redressing a loss: the ability to control the “destinies” of one’s things and the psychological and economic harm resulting from that deprivation of control.⁸⁰ But control is always finite. Both distinct and reasonable investment-backed expectations have boundaries affected by preexisting state-specific regulations and common-law limitations.⁸¹ And preexisting law may not furnish the only limitation: as Carol Rose observed, takings law has long been a “muddle” because it requires mediating between owners’ expectations and the civic duties all members of a community share to not harm one another or the public at large.⁸² While there have been critics of the ad hoc reasoning involved in assessing owner expectations and evaluating whether compensa-

78. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–07 (1984) (noting that “[a] ‘reasonable investment-backed expectation’ must be more than a ‘unilateral expectation or an abstract need,’” for despite Monsanto’s unilateral interest in the secrecy of its data, existing EPA regulations concerning confidentiality put limits on Monsanto’s property interest (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980))); *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 76 (Fed. Cl. 1997) (“A regulatory scheme affecting the property at issue at the time of purchase can significantly discount an owner’s investment-backed expectations with respect to the property. In fact, numerous courts have found that a regulatory structure can thoroughly abrogate a property owner’s investment-backed expectations.”); *City of Dallas v. VRC LLC*, 260 S.W.3d 60, 66 (Tex. App. 2008) (“We consider existing law regulating the use of property in determining whether the regulation interferes with investment-backed expectations . . .”).

79. See Chipchase, *supra* note 73, at 65–66 (discussing limits on distinct expectations).

80. Cf. Michelman, *supra* note 67, at 1234 (noting that the need for compensation depends on the assumptions that individuals control the destinies of their “things” and that deprivation of that control is injurious in some way to the individual).

81. See *id.* at 1029–30 (noting that where “background principles of the State’s law of property and nuisance” place limits on land ownership, no taking has occurred); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 728 (2010) (plurality opinion) (suggesting that court decisions may trigger Takings Clause if “what had been private property under established law no longer is.”); *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring) (suggesting “the whole of our legal tradition,” beyond simply common law, should be used to determine the reasonableness of an owner’s expectations). Thus, members of the Court have often conceptualized existing legal limits on uses of property as a natural termination point for takings protection. *Lucas*, 505 U.S. at 1029–30 (majority opinion); *id.* at 1034–35 (Kennedy, J., concurring); *Stop the Beach Renourishment, Inc.*, 560 U.S. at 728. There are, of course, very close cases under either term, such as one identified by Michelman, where an individual purchases property in the midst of a public debate about some specific future restraint on its use. Michelman, *supra* note 67, at 1238.

82. See Carol M. Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. CAL. L. REV. 561, 594–97 (1984); see also Joseph William Singer, The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations, 30 HARV. ENVTL. L. REV. 309, 336 (2006) (“The question of justice and fairness does not relieve us of the burden of judgment, and that—perhaps more than any other reason—explains why it is the right question.”).

tion is required,⁸³ some balancing of the owner's subjective intentions against external limitations is probably inevitable in fairly accommodating the competing interests of the owner and society with respect to how property is held and used.⁸⁴

The operative question, then, is what considerations and comparisons should be involved in a holistic analysis of "distinctness" or "reasonableness." Courts have approached this question in different ways,⁸⁵ but some have begun treating other states' laws as considerations affecting the legitimacy or plausibility of an owner's investment-backed expectations.⁸⁶ In Wisconsin, for example, the state court of appeals treated the fact that

83. See Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 27–28 (2013).

84. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("[T]he Takings Clause is meant '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.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (internal quotation marks omitted)). There are some circumstances where per se rules derive from this fairness principle—for example, the uncontroversial takings case where land is condemned for a highway. Richard Kahn, *Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners*, 22 B.C. ENVTL. AFF. L. REV. 563, 564 (1995) ("[V]irtually all courts would allow compensation if even the tiniest fraction of private property was condemned for a right of way for highway construction."). In most cases about inverse condemnations through regulation, however, courts approach the fairness question by ad hoc balancing. *Lucas*, 505 U.S. at 1015 ("[W]e have generally eschewed any set formula for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'" (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (internal quotation marks omitted)); cf. *Brady*, *supra* note 26, at 1456–59 (advocating a balancing approach in the judicial takings context so that "courts will still have a fair degree of power to modify their law within reasonable parameters, but the Takings Clause will prevent the most egregious eliminations of property rights").

85. See *Berger*, *supra* note 76, at 765–67; Robert M. Washburn, "Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63, 63, 69–71 (1996). Preliminary research suggests there may be other factors besides those listed in these articles, and in several cases, courts suggested that it is unreasonable for owners to develop expectations if state actors have not affirmatively permitted or promised them the ability to do what they are now restrained from doing. See *State Dep't of Nat. Res. v. Arctic Slope Reg'l Corp.*, 834 P.2d 134, 140 (Alaska 1991); *Columbia Venture, LLC v. Richland County*, 776 S.E.2d 900, 914 (S.C. 2015). Other times, courts imply that if a property type or use is often regulated, future interferences with that property interest are more foreseeable and thus unlikely to give rise to claims for compensation. *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994); *Brace v. United States*, 72 Fed. Cl. 337, 354–55 (Fed. Cl. 2006); *Turntable Fishery & Moorage Corp. v. United States*, 52 Fed. Cl. 256, 261 (Fed. Cl. 2002); *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 550 (Iowa 2017); *Canal Ins. Co. v. Hopkins*, 238 S.W.3d 549, 570 (Tex. App. 2007).

86 See *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007); *Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State*, 903 N.W.2d 141, 151 (Wis. Ct. App. 2017).

“twenty-five other states” had enacted right-to-work laws as constraining unions’ expectations with respect to the property in their union treasuries.⁸⁷ The Eighth Circuit Court of Appeals held in another decision that a property owner’s experience with a video-poker ban in South Carolina should have led them to expect that their property—video-poker machines—might become regulated into valuelessness in Iowa.⁸⁸ Though other courts have reiterated the importance of using state-specific law in takings inquiries,⁸⁹ these examples illustrate that the unclear parameters of “reasonableness” in the *Penn Central* analysis⁹⁰ can permit different state regulations to limit property owners’ expectations regardless of jurisdictional boundaries. Property owners’ constitutional rights can be limited by a sort of multijurisdictional or national property law—an amalgam of state common law and statutory restrictions elevated to constitutional significance.⁹¹

Reasonableness has recently found its way into a second portion of the takings analysis: the definition of “property” and the so-called “denominator problem,” which refers to difficulties in ascertaining the relevant property interest on which a regulation operates.⁹² The problem arises whenever liti-

87. *Int’l Ass’n of Machinists Dist. 10*, 903 N.W.2d at 151.

88. *Hawkeye Commodity Promotions, Inc.*, 486 F.3d at 442.

89. See *Preseault v. United States*, 100 F.3d 1525, 1538–39 (Fed. Cir. 1996) (plurality opinion) (criticizing the government’s attempt to “use . . . federal law as well as state law in selecting the relevant ‘background principles’” for determining restrictions on owner’s expectations); *id.* at 1556, 1561 & n.6 (Clevenger, J., dissenting) (analyzing Vermont law closely to ascertain the scope of an easement property interest).

90. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137–38 (1978).

91. *Cf. Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 500, 506 (1987) (suggesting that claims based on the “unique support estate” recognized in Pennsylvania are “legalistic”). The *Keystone* Court rejected the plaintiff’s claim that a coal regulation constituted a taking, even though the challenged regulation was quite similar to the regulation held to be a taking in the earlier case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In deciding *Pennsylvania Coal*, the Court found it significant that Pennsylvania recognized a “support estate” separately transferable from either the surface land or the coal rights, essentially allowing surface and mineral rights to trade the right to cause or be free from subsidence. 260 U.S. at 415. Yet the *Keystone* Court seemed to minimize the importance of this unusual Pennsylvania property interest: “Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.” 480 U.S. at 500. Despite this language that could be read to minimize the importance of state-specific law, the Court still claimed to rely on “Pennsylvania law” in reaching its takings-related conclusions. *Id.*

92. See Brady, *supra* note 20, at 53–54; Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190–93 (2004).

gants dispute the proper unit for conducting the takings analysis: one parcel or multiple parcels possessed by the same owner, or a particular legal estate or property right versus a combination of them.⁹³ A regulation may drastically reduce the value of a small unit of property but work only a partial diminution of use and value on a larger unit.⁹⁴ In other words, deciding on a denominator may affect the subsequent resolution of a takings case.⁹⁵

The Supreme Court's most recent discussion of the denominator problem occurred in 2017, in *Murr v. Wisconsin*.⁹⁶ The case concerned a regulation that rendered a family unable to sell or develop one of their two small waterfront lots; when the lots came under common ownership, they were "merged" and could no longer be separately sold or built upon.⁹⁷ The question was whether the lower court should use the single undeveloped waterfront parcel as the unit for evaluating the family's takings claim or whether the court should use two neighboring parcels owned by the family, which would make the diminution in value far smaller.⁹⁸ In instructing courts how to resolve the denominator inquiry, the Court laid out three factors: (1) the treatment of the property under state law, including lot lines and reasonable restrictions affecting use and disposition of the property;⁹⁹ (2) the physical characteristics of the property, including its topography, the surrounding environment, and whether it is in an area "likely to become subject to, environmental or other regulation[;]"¹⁰⁰ and (3) any value effects of the regulation, such as whether the burden on one portion increases the value on another portion or the two portions taken together, suggesting multiple units are in a "special relationship" and should be considered a single unit.¹⁰¹ Overall, "[t]he endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his hold-

93. See Wright, *supra* note 92, at 190 (explaining that in the regulatory takings context, "the problem lies in identifying the bundle from which a particular property right has been taken").

94. *Id.* at 191 (explaining that if a landowner has ten acres that are fully developable except for one acre of undevelopable wetlands, then the landowner's loss from the regulatory taking depends on whether that one acre or the whole ten acres serve as the denominator).

95. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1054 (1992) (Blackmun, J., dissenting) ("[W]hether the owner has been deprived of all economic value of his property will depend on how 'property' is defined.").

96. 137 S. Ct. 1933, 1938 (2017).

97. *Id.* at 1941.

98. *Id.* at 1941–42.

99. *Id.* at 1945.

100. *Id.* at 1945–46.

101. *Id.* at 1946.

ings would be treated as one parcel, or, instead, as separate tracts.”¹⁰²

Several parts of this denominator test invite convergence.¹⁰³ The *Murr* majority opinion uses the word “reasonable” twenty-one times—and that does not include permutations like “reasonably” and “unreasonable.”¹⁰⁴ While, again, reasonableness or a balancing approach may be appropriate in the denominator inquiry,¹⁰⁵ the term reasonableness is open-ended enough to raise questions about the proper comparators without further specification.¹⁰⁶ Both reasonableness and likeliness are invoked in the *Murr* test in facially broad ways: courts are to consider the role of “reasonable restriction[s]” on the owner’s land and whether the property is “likely to become subject to[] environmental or other regulation.”¹⁰⁷ If experience with “reasonable investment-backed expectations” is any guide, courts may use the laws of other states to decide what it is reasonable for property owners to expect or what was likely to limit the property owner’s uses of land.¹⁰⁸ Indeed, in the *Murr* opinion itself, the Court suggested that the provision rendering one of the Murrs’ lots undevelopable was a reasonable restriction on their ownership because merger provisions had been around for “nearly a century,”¹⁰⁹ as compared to the Wisconsin law that merged their parcels, which was eighteen years old.¹¹⁰ The basis for this claim about the well-settled history of

102. *Id.* at 1945.

103. *See* Brady, *supra* note 20, at 66 (“*Murr* represents a new and different threat to property federalism than these previous rulings. . . . [because it] permits courts applying federal takings law to incorporate the property law of other jurisdictions to determine the scope of the interests protected.”).

104. *See Murr*, 137 S. Ct at 1939–50.

105. *See* *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (stating that the court takes a holistic, “flexible approach” to the denominator question, which is “designed to account for factual nuances” (quoting *Loveladies Harbor, Inc., v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (internal quotation marks omitted)); *see also* Brady, *supra* note 20, at 70 (noting that “[t]he *Murr* majority was not necessarily wrong to adopt a nuanced, flexible approach to the denominator problem” and that “courts need flexibility”).

106. *See* Brady, *supra* note 20, at 70 (stating the *Murr* factors are “perplexing and untried,” making the test “impossibly vague, unpredictable, and confused”).

107. *Murr*, 137 S. Ct. at 1945–46 (emphases added).

108. *See* Brady, *supra* note 20, at 67–68 (discussing how a new regulation on a property owner in one jurisdiction may be deemed reasonable by a court because that regulation already exists in another jurisdiction).

109. *Murr*, 137 S. Ct. at 1947.

110. *See id.* at 1940–41 (stating that the Wisconsin law was enacted in 1976 and the property was conveyed to the Murrs in 1994 and 1995). This is not to suggest that eighteen years is an inadequate duration; instead, it points out that the Court invoked a longer duration from a different place ostensibly because it would make the property owners look even less reasonable. *Id.* at 1947.

merger provisions was the fact that Great Neck Estates, New York, passed a merger provision in 1926¹¹¹—some 1,185 miles and numerous decades away from the site.¹¹² Though it is too early to tell whether lower courts will engage in similar cross-state comparisons to determine what an owner should have anticipated about property units,¹¹³ the centrality of reasonableness and likeliness in the new *Murr* test at least makes convergence more plausible.¹¹⁴

Murr raises the prospect that other states' property laws could be used to contract the scope of protection for property owners.¹¹⁵ However, courts have often used laws from other states in the opposite way: to expand or guarantee protection to owners when a state denies the existence of a right.¹¹⁶ A long line of Supreme Court precedent indicates that states may not roll back recognition of property to "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."¹¹⁷ Just as there are ambiguities in what factors determine "reasonableness," there is a latent ambiguity in this quotation: does the term "traditional" afford constitutional protection only to interests previously recognized within a particular state, interests reaching some federally recognized bar for what property is, or interests traditionally recognized in most states but denied in the site where the alleged taking has occurred? Some court decisions have suggested it may be the last of these options.¹¹⁸ In one takings case, a Ninth

111. Brief of Amici Curiae Nat'l Ass'n of Ctys. et al. in Support of Respondents at 9, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 3383223, at *9.

112. Driving Directions from Great Neck, N.Y. to St. Croix Cty., Wis., GOOGLE MAPS, <http://maps.google.com> (follow "Get Directions" hyperlink; then search "A" for "Great Neck, New York" and search for "B" for "St. Croix County, Wisconsin"; then follow "Get Directions" hyperlink).

113. See JESSE DUKEMINIER ET AL., PROPERTY 1101–02 (9th ed. 2017) (noting divergence in early scholarly reactions to the *Murr* decision).

114. See *Murr*, 137 S. Ct. at 1945–46 (discussing a number of factors that involve reasonableness and likeliness).

115. See Brady, *supra* note 20, at 56 ("*Murr* invites courts and litigants to define protected constitutional property by reference to the law and regulation of other states, undermining the security of interests that would otherwise appear stable under a single jurisdiction's rules").

116. *Id.* at 59–60.

117. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) (stating that "the government does not have unlimited power to redefine property rights").

118. *But see Vandever v. Lloyd*, 644 F.3d 957, 966–67 (9th Cir. 2011) (using only Alaska law in deciding whether fishing entry permits were property); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) (noting that "the state may not magically declare an interest to be 'Non property' after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular governmental bene-

Circuit panel recognized as property the interest accrued on principal belonging to prisoners, notwithstanding a state statute designating that interest as publicly owned, on the basis that the “interest follows principal” rule enjoys “near-universal endorsement by American courts—including California’s.”¹¹⁹ More recently, that same circuit found that Washington teachers have a protected property right in *daily* interest (denied to them by a state policy change) despite the state’s position that there was no law conferring such a property right, noting the “common law pedigree” of the “rule that interest accrues” daily and citing cases from Georgia, Maryland, New York, and Pennsylvania to support their finding that property had indeed been affected.¹²⁰

The use of multistate law here gives rise to the puzzle: the Takings Clause would be a nullity if constitutional protection only attached to what a state affirmatively recognizes as property because a state could simply get around the compensation requirement by claiming no property exists.¹²¹ If a state tries to extinguish a property right through that loophole, how should courts decide whether to recognize one? Scholars have generally endorsed the idea of the federal bar: state-specific law creates the relationships and rights that either rise or fail to become protected property as a matter of federal constitutional law.¹²² But some courts are evidently using the law of multiple states to define where that federal bar should be located.¹²³ This example neatly indicates some of the difficult questions associated with convergence. Perhaps multijurisdictional law should be used to compose the lower limit: a set of property rights that no state can eliminate without triggering the compensation requirement.¹²⁴ Takings protection would be ineffective without some baseline. But if multijurisdictional law sets a floor, should it be used to construct a ceiling?¹²⁵ The upper limit of constitutional

fit,” but evaluating only New York law to determine existence of that interest).

119. *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998).

120. *Fowler v. Guerin*, 899 F.3d 1112, 1118 (9th Cir. 2018).

121. *See Stern*, *supra* note 33, at 288 n.31.

122. *See Brady*, *supra* note 20, at 59–60; *Merrill*, *supra* note 5, at 927; *Stern*, *supra* note 33, at 287.

123. *See Brady*, *supra* note 20, at 60.

124. *Id.* at 59–60 (noting that the “Court has been skeptical about declining constitutional protection to an interest when some positive state law declares it is *not* property, even though other positive state law seems to treat it as such”).

125. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 64–67 (2002). Along with David Dana, Thomas Merrill suggested in several writings that there must be a ceiling to avoid

property protection in takings law has generally received less attention than the floor,¹²⁶ and the phenomenon of convergence directly raises the question of whether multijurisdictional law should furnish some upper boundary on the sorts of interests that will be protected.¹²⁷

It is worth noting here that the effects of convergence on property owners do not necessarily cut in a single direction. When it comes to defining what counts as constitutional property, convergence might help property owners in a state that is declining to recognize an interest by inviting courts to fashion one in the absence of specific state law.¹²⁸ Conversely, convergence might hurt owners in states that have unusual forms of property or outlier rules affecting the appropriate unit for the takings analysis because it might be unreasonable to rely on those fragile interests in light of the rules in other jurisdictions.¹²⁹ Likewise, when it comes to examining the reasonableness of an owner's expectations, courts could limit takings protection by counting a range of regulations from different states as constraints rendering an owner's expectations implausible or else enhance takings protection by discounting an unusual preexisting regulation due to the absence of that rule in other states.¹³⁰ Whether courts use other states' laws as swords or shields for property owners, when property interests or background laws are set by some sort of majority rule, it threatens to blunt one of the supposed benefits of allocating authority over property rules to the states.¹³¹ One of the virtues

the "too much property" problem which would result from states expanding the coverage of property to make more actions takings in undesirable and manipulative ways. *See id.*; Merrill *supra* note 5, at 935 (proposing a federal constitutional definition of Takings Clause property that does not derive from the rules of multiple states).

126. *See Brady, supra* note 18, at 1227 (noting paucity of work on whether doctrinal or other constraints "reduce the costs of constitutional property innovation by courts in takings law").

127. *See Brady, supra* note 20, at 65 (explaining that there is some precedent that suggests federal constitutional property law acts as a ceiling).

128. *See id.* (explaining that Supreme Court takings cases could be read "to establish that federal constitutional property is a floor: the Constitution will recognize as property certain interests, even when the state would try to wriggle out from them through invoking dubious positive law").

129. *See id.* at 68–69 ("[I]f a state is an outlier in recognizing a new form of property, . . . any good government lawyer litigating a regulatory takings claim [can] marshal evidence from across time and space to make a new regulation seem reasonable and to make owner expectations look unreasonable.").

130. *See id.* at 67.

131. *See id.* at 69 ("The benefits of constitutional property federalism—the democracy-enhancing, welfare-enhancing, and efficiency-enhancing effects of competition and innovation among the states—are blunted by the threat that the Constitution will protect only a uniform set of interests with the weight of multistate law and regulation behind them.").

of property federalism is supposed to be experimentation and innovation, but convergence raises the prospect that new interests or innovative regulations might be squelched as “unreasonable” or given limited effect because of the very fact that they are outliers.¹³²

In short, the Court has often suggested that the relevant background law for defining constitutionally protected property interests and for measuring whether a regulation interferes with owner expectations is jurisdiction-specific.¹³³ But various features of federal takings law discussed in this Section allow the laws of one state or the likelihood of regulation to shape protections for property interests in others. The structure of federal takings law leaves open the possibility for variation: different property interests might be recognized in different states, and different regulatory and common law regimes might make an identical regulation a taking in one state but not in another. However, the Supreme Court has developed tests that permit the validity of property interests to be determined by cross-state comparisons and that measure an owner’s expectations by reference to the law of multiple jurisdictions. This ultimately points toward convergence: the property interests protected and the sorts of actions that will constitute takings may be similar across state boundaries if the background law used in the analysis is multijurisdictional or national, rather than limited to a single state.

B. Converging State Constitutional Standards

Another opportunity for variation in takings law occurs at a different site: state constitutional law. Nearly all the state constitutions offer protections against uncompensated takings that parallel the federal Constitution.¹³⁴ Some of these provisions are textually different from the federal Takings Clause,¹³⁵ meaning different levels of takings protection are possible under the state constitution versus the federal Constitution.¹³⁶ Moreover, different

132. *See id.*; Sterk, *supra* note 28, at 205 (defending the lack of uniformity in state law takings rules).

133. *See Brady, supra* note 20, at 67 (“Years of court opinions have encouraged property owners to form expectations based on the law of the jurisdiction in which the property is located.”).

134. *See Maureen E. Brady, The Damagings Clauses*, 104 VA. L. REV. 341, 349, & n.30 (2018) (“Every state except North Carolina and Kansas has at least one state constitutional provision prohibiting property from being ‘taken’ without compensation.”).

135. *See generally id.* at 355–60 (describing the history of constitutional provisions that say “taken or damaged” or “injured”).

136. *Id.* at 344 & n.6 (“More than half of the state constitutions contain a takings clause that is

histories, constitutional debates, and attitudes within a state might lead state tribunals to arrive at different interpretations even of similar constitutional takings language.¹³⁷

Again, however, state takings law has tended to converge on federal interpretations of the Takings Clause. Nearly all state courts have opted to borrow federal takings tests like the *Penn Central* test wholesale, rather than developing alternative approaches to evaluating the constitutionality of regulations under their own constitutions.¹³⁸ Only a small handful of states gesture at different or novel takings tests.¹³⁹

materially different from the federal one, in that it prohibits property from being both ‘taken’ and ‘damaged’ or ‘injured’ for public use without just compensation.”)

137. See *People v. Caballes*, 851 N.E.2d 26, 43 (Ill. 2006) (citing “textual language (whether there is any significant difference between the phrasing of the state and federal provisions), the legislative history of the state constitutional provision, preexisting state law, state traditions, and public attitudes” as reasons why interpretations of state constitutions might diverge from interpretations of the federal Constitution).

138. *Phillips v. Montgomery County*, 442 S.W.3d 233, 240–42 & n.10 (Tenn. 2014) (citing a substantial number of state courts that have borrowed the federal takings test). See *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm’rs*, 38 P.3d 59, 64 (Colo. 2001) (en banc); *Haw. Hous. Auth. v. Lyman*, 704 P.2d 888, 896 (Haw. 1985); *Hampton v. Metro. Water Reclamation Dist. of Greater Chicago*, 57 N.E.3d 1229, 1240 (Ill. 2016); *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 210 (Ind. 2009); *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005); *Buhmann v. State*, 201 P.3d 70, 85 (Mont. 2008) (“[A] takings analysis based on federal law under *Penn Central* or *Lucas* is to be applied to takings claims whether brought under the U.S. or Montana Constitutions.”); *Mansoldo v. State*, 898 A.2d 1018, 1023 (N.J. 2006); *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 856 (N.D. 2005); *Cereghino v. State ex rel. State Highway Comm’n*, 370 P.2d 694, 697 (Or. 1962); *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 616 (Pa. 1993); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531–32 (Wis. 1996); Josephine L. Ennis, Comment, *Making Room: Why Inclusionary Zoning Is Permissible under Washington’s Tax Preemption Statute and Takings Framework*, 88 WASH. L. REV. 591, 617 (2013) (noting that Washington courts have oscillated between reading its constitution more broadly and in lockstep with the federal Constitution); see also *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1308 (11th Cir. 1992); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1131 (Nev. 2006) (Becker, J., dissenting in part and concurring in part); Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners’ Property in the Course of Law Enforcement: The View from Five State Supreme Courts*, 34 MCGEORGE L. REV. 1, 1, 22 (2002) (noting the use of federal precedents in takings law in California, Texas, Minnesota, Oklahoma, and Iowa).

139. See *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305–06 (Minn. 2011) (noting court’s history of sometimes relying on federal constitutional tests and other times relying on test developed solely for evaluating takings under state constitution); *Coast Range Conifers, L.L.C. v. State ex rel. Or. State Bd. of Forestry*, 117 P.3d 990, 997 (Or. 2005) (en banc) (noting Oregon rule that taking occurs only where the “regulation leaves the owner with [no] economically viable use of the property”); *Utah Dep’t of Transp. v. Admiral Beverage Corp.*, 275 P.3d 208, 215 (Utah 2011) (describing the test as “any substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed” (quoting *Stockdale v. Rio Grande W. Ry. Co.*, 77 P. 849, 852

The adoption of federal tests may make sense when the constitutional text is identical,¹⁴⁰ but it is harder to explain convergence when there are major textual differences between the state and federal takings clauses.¹⁴¹ In a context I have explored in previous work—when the state takings clauses provide compensation not just for property “taken,” but also for property “damaged” or “injured”—state courts have borrowed from one another in interpreting their constitutional provisions, meaning a single test for whether a “damaging” has occurred is the dominant approach in most states.¹⁴² This is the case even when there are different enactment histories and other textual variations.¹⁴³ Furthermore, state courts have found that the addition of this “or damaged” language adds little to federal protections in all but the most extreme outlying cases.¹⁴⁴ In short, in lieu of fifty (or even just two or three) different approaches to state takings law, federal precedents are very likely to be controlling as a matter of state constitutional interpretation.

There are exceptions. Following the backlash to the Supreme Court’s decision in *Kelo v. City of New London*, in which the taking of Suzette Kelo’s house for a proposed private development was upheld as a valid “public

(Utah 1904)); *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 187–88 (Wash. 2000) (en banc) (describing a mix of state and federal tests). It is somewhat unclear whether these tests result in material differences in state and federal protection. *See, e.g., Ennis, supra* note 138, at 617 (noting that after the *Manufactured Housing* case in Washington, at least one court continued to follow federal precedents).

140. *See, e.g., Buhmann*, 201 P.3d at 85 (stating that Montana courts take guidance from federal case law when applying a takings claim, “a practice that is consistent with that of other states with similar or identical language in their state constitutions”).

141. *See, e.g., DeCook*, 796 N.W.2d at 305 (stating that while the takings language of the Minnesota Constitution is broader than the Fifth Amendment Takings Clause language, Minnesota courts often still apply the federal standard).

142. *See Brady, supra* note 134, at 382–88 (noting that the approach of the Illinois courts to interpreting the words “or damaged” was used in nearly every state with a takings clause involving the words “damaged” or “injured”). James Krier and Stewart Sterk have observed that state takings doctrine is least harmonious (and the Supreme Court is least frequently cited) in cases involving flooding and government enterprises, cases for which the damagings clauses are ideally suited and for which there is no pertinent Supreme Court precedent. James E. Krier & Stewart E. Sterk, *Am Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 73–74 (2016).

143. *Brady, supra* note 134, at 388 (“[A] multitude of state supreme courts interpreting damagings clauses from Virginia to California noted that the United States Supreme Court had ‘approved’ or ‘concurred in’ the Illinois holding.”).

144. *Id.* at 388 (noting that interpretations of “or damaged” language in takings clauses rendered language “nearly inapplicable to anything except the sorts of physical invasions that would ordinarily qualify as a taking”). *But see Dickinson, supra* note 15, at 164 n.145 (listing cases where state courts have pointed out the “or damaged” textual difference, although my own research suggests this is more rhetorical than substantive).

use” within the meaning of the Takings Clause,¹⁴⁵ many state courts and constitutional drafters responded by interpreting or amending their constitutions to make clear that economic development was not a valid “public use” under the state constitution for the exercise of the eminent domain power.¹⁴⁶ Other state courts declined to expand protections for property owners, following the Supreme Court in interpreting the “public use” or “public purpose” provisions of their own constitutions broadly.¹⁴⁷ This has led to some variation in property protection across jurisdictions.¹⁴⁸ For this reason, some have hailed the post-*Kelo* response by state actors as a triumph of interstate variation: residents can agitate politically for the property protections they desire.¹⁴⁹ Others have argued that these state responses suffer from a variety of infirmities and loopholes that render the responses less successful than they appear, demanding a national response.¹⁵⁰ Tellingly, many of these infirmities are convergent: most post-*Kelo* statutes or constitutional amendments permit takings when the property is blighted, as that term is broadly and similarly defined.¹⁵¹ Nevertheless, the post-*Kelo* movement is an unusual example of some variation across states and between the state and federal doctrine in one aspect of takings law, even if the long-term effectiveness of that movement is not yet clear or certain.¹⁵²

In addition to post-*Kelo* laws yielding variation in property protection, some states have statutes that endeavor to strengthen protection against confiscation above and beyond what the federal Constitution requires.¹⁵³ Arizona, Florida, Louisiana, Mississippi, Oregon, and Texas have statutes on the books resulting either from voter initiatives or legislation that could be read

145. 545 U.S. 469, 475, 489–90 (2005).

146. See, e.g., *Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006); *Board of Cty. Comm’rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 650–51 (Okla. 2006); ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 135–64, 182–83 (2015) (cataloging legislative and judicial changes).

147. See, e.g., *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170–71 (N.Y. 2009).

148. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114, 2115–16 tabs.3 & 4 (2009); see also Dickinson, *supra* note 15, at 182–97, 212–19 (describing different post-*Kelo* innovations and offering explanations for these examples of divergence despite convergence elsewhere in constitutional takings law).

149. See Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762–63 (2009).

150. SOMIN, *supra* note 146, at 136, 141–64, 173–78; Somin, *supra* note 5, at 87–88.

151. SOMIN, *supra* note 146, at 145–53.

152. See Somin, *supra* note 148, at 2114.

153. See Krier & Sterk, *supra* note 142, at 78.

to require compensation for a greater range of government interferences with property than federal doctrine does.¹⁵⁴ But as an empirical matter, except for Oregon, these statutes have had extremely limited effect.¹⁵⁵ Courts have construed the statutes narrowly, the statutes have generated no significant doctrinal innovations, and litigants do not often win additional protection.¹⁵⁶ The prospect of greater degrees of protection in some states rather than others by virtue of different legislative protection against confiscation may be a matter of appearance rather than reality.¹⁵⁷

To put it simply, apart from different interpretations of the “public use” limitation and modest statutory innovations, states often decline to break new doctrinal ground as a matter of state takings law or to develop different ways of analyzing whether a taking has occurred.¹⁵⁸ Instead, interpretations of the state takings clauses tend to follow federal law in lockstep.¹⁵⁹ In the last Section, I suggested convergence within federal takings law may be attributable to the unclear parameters of reasonableness, likelihood, and foreseeability in federal takings tests. The root causes of lockstep interpretation in state constitutional law are much harder to determine: judges might be persuaded by federal opinions or simply mistaken about the force of federal precedents.¹⁶⁰ Lockstep interpretation is not at all unique to the takings clauses, and state court judges rarely explain why they are adopting federal

154. *Id.* at 78–79.

155. *Id.* at 78; *see also* Dickinson, *supra* note 15, at 176–82 (finding that “conformity with [federal] regulatory takings doctrine is the norm” even when it comes to state legislation). Oregon stands in contrast: after the enactment of voter-approved initiatives that required compensation whenever the market value of property was simply reduced, rather than reduced past some threshold, over 6850 claims for “government payment or waiver” were filed within three years. Krier & Sterk, *supra* note 142, at 80.

156. Krier & Sterk, *supra* note 142, at 78–80.

157. *See also* Somin, *supra* note 148, at 2105 (stating that twenty-two of the thirty-six state legislatures that have enacted reform laws in response to *Kelo* are mostly symbolic because they provide “little or no protection for property owners”).

158. *See, e.g.*, Ennis, *supra* note 138, at 617 (demonstrating Washington courts’ willingness to apply the federal standard to state takings clause determinations in spite of the distinction in language between the Washington and federal takings clauses).

159. *See* Phillips v. Montgomery County, 442 S.W.3d 233, 240–42 (Tenn. 2014) (providing a list of examples of states applying federal standards for a takings claim analysis).

160. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 338–39 (2011) (noting that state supreme courts may have tended to continue interpreting state constitutions in lockstep even after calls for more robust state constitutionalism “either from force of habit, mistaken belief that they were bound by the federal rules, lack of expertise, or simply because they agreed with [Supreme Court] reasoning”).

precedents, principles, and tests as their own.¹⁶¹ Yet this discussion by the Tennessee Supreme Court in 2014 may provide at least some clues: according to that court, having a different set of takings rules “would needlessly complicate an already complex area of law, increase uncertainty for litigants attempting to bring claims under both the federal and state constitutions, and place Tennessee at odds with the vast majority of states, nearly all of which have already adopted federal takings jurisprudence.”¹⁶² Whether these benefits of avoiding complexity outweigh the loss of potentially fruitful experimentation is an open question. Still, without passing on the normative desirability of any given modification to state takings law, the most important observation is that state takings law coheres around the Supreme Court’s pronouncements as those have been set out in the federal context.¹⁶³

IV. CONCLUSION

Because states are given primary control over property in our federal system,¹⁶⁴ there is potential for corresponding variation in state law.¹⁶⁵ Yet this Essay has demonstrated that there are differences in how that potential has borne out. In the private law context, states still sometimes tailor property rights to the things and people in their jurisdiction, recognizing different types of interests and placing different sorts of limitations on property rights. In the public-law takings context—when individual property owners are not squabbling among themselves, but rather defending property interests against some government—one can observe a different trajectory.

Descriptively, the sorts of property interests protected and the background legal rules used to measure whether a regulation is a taking show signs of convergence, both as a matter of federal and of state takings law. In the context of federal takings law, this may be due to the indeterminate factors affecting the interpretation of terms like “reasonable,” “foreseeable,” and “likely” when they are used in federal takings tests. Because the Consti-

161. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 792 (1992); see Dickinson, *supra* note 15, at 198–211 (arguing that simplicity, avoidance, textual similarity, and other factors all likely contribute to convergence in takings law).

162. *Phillips*, 442 S.W.3d at 244.

163. *Id.* at 240–42 (listing “an overwhelming majority of states whose constitutions or statutes contain provisions similar to the Takings Clause . . . [and that] have used the analytical framework developed by the United States Supreme Court when adjudicating regulatory takings claims”).

164. See Bell & Parchomovsky, *supra* note 2, at 74 n.1.

165. *Id.* at 99–100.

tution protects interests created by the state, the federal Takings Clause could protect different interests in different states. Likewise, the federal Clause might require compensation for regulations differently because different states' background laws and circumstances might render a single regulation unexpected and draconian in one jurisdiction but totally expected and predictable in another. But as a practical matter, some courts have interpreted "reasonableness" to be shaped by laws from multiple states, yielding a more uniform or national set of background principles from which protected property interests and inherent limitations on title are drawn. This makes it more likely that federal takings law will protect similar interests and will find similar regulations constitutionally permissible or infirm, even in states with somewhat different underlying rules.

Likewise, state takings law is also marked by convergence. The phenomenon of lockstep interpretation, well known in other constitutional contexts, is also present in takings law. Many states adopt federal takings precedents wholesale as a matter of state constitutional interpretation. Even when there are differences between the state and the federal constitutional text governing confiscation and devaluation of property, states tend to interpret their constitutions both in ways similar to one another and in ways that provide limited variations on protection.

These emerging trends in property law tee up questions about the merits of variation directly. There may well be plausible reasons for takings law to yield more homogenous results across state lines than, say, the law of adverse possession or some unique easement might. On the other hand, variation itself may be especially in need of protection when a state has extended an outlier right by its own actions and tries to use another state's rules to prevent that right from being asserted against it. This Essay noted how variation persists in underlying state property rules in private law, whereas developments in takings law may be eroding it. The task of justifying these different trajectories remains for another day.