

STATE CONSTITUTIONAL GENERAL WELFARE DOCTRINE

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It is black-letter law that the U.S. Supreme Court's takings doctrine presupposes exercises of eminent domain are in pursuit of valid public uses that require just compensation. But, neither federal doctrine nor the text of the Takings Clause offers any additional constraints. The story of the Supreme Court's takings jurisprudence is, in other words, incomplete and deserves reexamination. However, the usual protagonists, such as the Supreme Court or federal courts, are not central to this Article's reexamination. Instead, this Article's narrative is federalism, its characters are state courts, and its script is state constitutions.

In the post-Kelo v. New London era, state legislatures and courts diverged from federal takings doctrine to expand property protections beyond the constitutional floor set by the Supreme Court. Property scholars, however, have paid less attention to a doctrinal lacuna left behind after the nationwide state legislative backlash: state courts' failure to recognize an implicit obligation of local municipalities to satisfy "general welfare" principles when taking private property for economic development purposes as a matter of state constitutional law. The proposition of this Article is simple: state public use clauses should be understood to equate with state police power general welfare principles. This is what I call "state constitutional general welfare doctrine."

This cross-pollination of police power and takings doctrine also reveals that takings doctrine is highly fluid and malleable, capable of incorporating a variety of

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constitutional doctrines, such as substantially advances tests, exactions doctrine, and equal protection doctrine, to provide greater alternative conceptions of protections to private property. The commingling of state police power principles, such as general welfare, as equating with “public use” is just another example of takings doctrine’s ability to mold in a manner to provide enhanced protections to private property beyond the Supreme Court’s constitutional bottom.

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INTRODUCTION

Takings law is flexible and fluid. The Supreme Court's takings jurisprudence is no stranger to creative commingling of constitutional standards by state and federal courts in search of the right mix of standards and tests to advance the doctrine. This rich doctrinal history of intermingled constitutional standards is apparent in the substantially advances, exactions, and equal protection doctrines.¹ For example, the Court's previous debates over due process inquiries and takings in *Agin v. City of Tiburon*² and *Lingle v. Chevron*³ support the proposition that mixing constitutional doctrines may be necessary to impose additional constraints on the Court's public use test. In *Agin*, the Court found that government regulation of private property would give rise to a taking if the regulation "does not substantially advance legitimate state interests."⁴ The "substantially advances" test requires an analysis into whether regulations substantially advance legitimate state interests or deny a property owner economically viable use of his land.⁵ Of course, this requires weighing competing private and public interests. And prior to the Court's ruling in *Lingle*, which foreclosed due process inquiries in takings,⁶ a substantial number of state courts engaged in this cross-pollination of constitutional doctrines.

The Court in *Lingle* noted that the "apparent commingling of due process and takings inquiries" was improper,⁷ because due process is not "tethered . . . to the text of the Takings Clause."⁸ While this was arguably the right doctrinal move by the Court, the commingling of due process and takings doctrine by state courts for decades prior to *Lingle* arguably supports the proposition that state courts could normatively

¹ See *infra* Part III.

² 447 U.S. 255 (1980).

³ 544 U.S. 528 (2005).

⁴ 447 U.S. at 260.

⁵ *Id.*

⁶ 544 U.S. at 540.

⁷ *Id.* at 541.

⁸ *Id.* at 542.

“tether” general welfare principles to public use inquiries as a matter of state constitutional law.

The Court’s exactions doctrine has also been cross-pollinated by state courts who have “put the government to its proof—requiring a demonstrated connection between the challenged taking and the particular purpose used to justify it,”⁹ similar to the *Nollan* and *Dolan* tests.¹⁰ The Illinois Supreme Court, in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,¹¹ for example, intermingled the heightened standard of review employed in the Supreme Court’s *Nollan* and *Dolan* exaction jurisprudence to find an economic development taking unjustifiable where the property was transferred from one private entity for the benefit and use of another private entity.¹²

The Court’s “class of one” equal protection jurisprudence has combined with takings doctrine to create a unique mix of equal protection and takings protections to private property. The Court’s ruling in *Village of Willowbrook v. Olech*,¹³ holding that a homeowner could assert equal protections claims “as class of one” in the zoning context, has been employed by litigants in state court in the eminent domain context.¹⁴ The mixing of these doctrines creates an intriguing argument that “if [private] property is singled out for eminent domain” and other properties are not, then the homeowner can bring suit to “challenge the arbitrariness of the decision to take the property” as a violation of equal protection.¹⁵ A few state courts, particularly in New York, have entertained this claim by plaintiff property owners seeking to invalidate exercises of eminent domain on the theory that properties

⁹ Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936 (2003).

¹⁰ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (finding that government condition on development permit must have essential nexus to public harm); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (same).

¹¹ Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002).

¹² *Id.*

¹³ 528 U.S. 562, 564 (2000).

¹⁴ *Id.*; see also Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech’s Class of One*, 55 LOY. L. REV. 697 (2009).

¹⁵ Blackman, *supra* note 14, at 700.

located within a redevelopment project had been intentionally treated differently than other similarly situated properties.¹⁶

Absent from this account of cross-pollination is tethering state constitutional general welfare principles with state constitutional public use tests. Federal takings doctrine and the text of the Fifth Amendment Takings Clause offer limited constraints on the public use vein of the Takings Clause. As a result, this Article explores federalist dimensions of takings law to argue for an additional mode of takings protections that relies upon state courts and state constitutions as its foundation, not to supplant, but to supplement, current takings doctrine. The proposition of this Article is simple: State public use clauses should be understood to equate with state general welfare principles as a matter of state constitutional law. This is what I call “state constitutional general welfare doctrine.”

Underlying this federalist narrative are familiar legalists. Justice Louis Brandeis once wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁷ Indeed, his words were followed up years later by Justice William Brennan, who urged state courts to play a greater role in protecting constitutional rights by relying on state constitutions as more effective guarantors of individual rights than the United States Constitution.¹⁸ In the context of takings law, the notion of federalism is ever-present, but property scholars spend a pittance of time reflecting on federalist dimensions in takings doctrine.¹⁹ The Court’s recent decision in *Murr v. Wisconsin*, however, brought federalism to the forefront of the Court’s most recent permutation of its takings doctrine. In the Chief Justice John Roberts’s dissent, he noted, “[o]ur decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”²⁰

¹⁶ See *infra* Part III.

¹⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁹ See, e.g., Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139 (2018).

²⁰ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

Indeed, property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”²¹

On the other hand, the last time the Court’s public use doctrine was explicitly linked to federalism concerns in eminent domain takings was its *Kelo v. New London* ruling.²² There, the Court upheld economic development takings as a justifiable public use. Justice Stevens explained that “nothing in [the] opinion precludes [state courts and state legislatures] from placing further restrictions” on “public use” than the federal minimum “as a matter of state constitutional law.”²³ Those remarks generated substantial eminent domain reform at the state-level.²⁴ Most state legislatures amended or enacted new eminent domain statutes to bar or restrict takings for economic development.²⁵ State courts handed down rulings prohibiting takings with a private motive.²⁶ However, a slew of blight removal exceptions remained intact.²⁷ As Ilya Somin suggests, “the political backlash to *Kelo* has provided the same level of protection for property owners as would a judicial ban on economic development takings.”²⁸

After the *Kelo* decision, less than a quarter of the states amended their takings clauses to provide further protections from economic development takings.²⁹ Most of these amendments paralleled the language state legislatures had inserted into eminent domain statutes to bar or restrict economic development takings.³⁰ Few state courts have outright banned economic development takings as a matter of state constitutional law.³¹ Indeed, state canons played a limited role in the

²¹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal citations omitted).

²² *Kelo v. City of New London*, 545 U.S. 469 (2005).

²³ *Id.* at 489.

²⁴ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2178 (2009).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2103.

²⁹ *Id.* at 2117.

³⁰ See *infra* Part II.

³¹ See Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 3, 7–10 (2001).

Kelo revival of federalism in takings, even though state legislatures were aggressive in their pursuit of the electorate's preferences for stronger protections from government expropriation. Local municipalities, all the while, can still skirt the economic development bans and limitations by condemning land under the veil of "blight removal."³²

In a post-*Kelo* era, scholars have paid less attention to another implication of state court divergence and federalism: state courts' failure to recognize an implicit obligation for local municipalities to satisfy "general welfare" principles as part of the public use test when taking private property for economic development purposes.³³ In other words, scholars and jurists, along with state legislatures, neglected to focus attention to an area of state constitutional law that would likely have offered greater protections to economic development takings beyond legislative amendments.

This doctrinal lacuna, left in the wake of the post-*Kelo* backlash, deserves exploration. The Court's language on the relationship between "public use" and the "police power" in *Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Kelo* is instructive for establishing the framework for this Article's doctrinal pivot to cross-pollinate state police power and general welfare principles with the public use test.

In *Berman*, by upholding the District of Columbia's eminent domain power for the purpose of urban redevelopment, the Court noted that the

[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive.³⁴

The Court's opinion in *Midkiff*, decades later, expressly tied the two concepts together, stating that the "public use" requirement

³² See Gerald S. Dickinson, *Inclusionary Takings Legislation*, 62 VILL. L. REV. 135 (2017).

³³ See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 59–60 (2006) (arguing that general welfare should be a consideration in urban redevelopment projects likened to those in *Berman v. Parker*).

³⁴ *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

is . . . coterminous with the scope of a sovereign's police powers."³⁵ Justice O'Connor went further in *Midkiff*, stating that there is, nonetheless, "a [limited] role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power."³⁶ Likewise, Justice Stevens channeled Justice O'Connor's sentiments on the role of courts in takings review in his *Kelo* opinion. There, he invoked a "strong theme of federalism" by "emphasizing the 'great respect' that [the Supreme Court] owe[s] to state legislatures and state courts in discerning local public needs" in eminent domain determinations.³⁷ Justice Stevens then stated that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. . . . as a matter of state constitutional law."³⁸

There is, in other words, a place for state courts to constrain exercises of police power, including eminent domain takings. Justice Stevens's invocation of state constitutional law as a vehicle for placing stronger restrictions on public use is where this Article sets out to propose a "state constitutional general welfare doctrine."

State courts do have "a role . . . to play in reviewing a [state] legislature's judgment of what constitutes a public use"³⁹ and nothing precludes state courts from interpreting state "public use" to equate with the "catch-all" "general welfare" requirements under state constitutional law.⁴⁰ It is telling that Justice O'Connor had to walk back her broad and sweeping language in *Midkiff* twenty years later in *Kelo*, tying together the police power and public use in unison, when she noted that the majority opinion in *Kelo* "demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated."⁴¹ Justice O'Connor proceeded to explain that "[t]he trouble with economic development takings is that private benefit and

³⁵ Haw. Hous. Auth. v. *Midkiff*, 467 U.S. 229, 240 (1984).

³⁶ *Id.*

³⁷ *Kelo* v. City of New London, 545 U.S. 469, 482 (2005).

³⁸ *Id.* at 489.

³⁹ *Midkiff*, 467 U.S. at 240.

⁴⁰ Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 900 n.355 (2006).

⁴¹ *Kelo*, U.S. 545 at 501–02.

incidental public benefit are, by definition, merged and mutually reinforcing” and that any benefits to a private corporation or developer would be difficult to disaggregate from the promised public gains in taxes and jobs.⁴²

In other words, what Justice O’Connor seems to have done in her majority opinion in *Midkiff* and dissent in *Kelo* is to broaden “public use” to equate with police powers, except where there is an identifiable incidental public benefit to a developer who promised additional taxes and jobs. The problem with this reasoning is that there are few, if any, constitutional constraints on takings like economic development that fall outside the scope of O’Connor’s envisioned “police power” takings at issue in *Berman* and *Midkiff*.

The post-*Kelo* statewide backlash is evidence to suggest that the role of state constitutions is to constrain the exercise of the police power and the public use requirement for eminent domain by treating the public use question as nothing more than an inquiry into the “general welfare” principles under state constitutional law. There is precedent for state courts applying general welfare principles as a constraint on exercises of police power in the zoning context that supports this Article’s proposition.

The *South Burlington County NAACP v. Township of Mount Laurel* saga in New Jersey resulted in a judicial doctrine that required municipalities to take affirmative steps to provide a reasonable and fair share obligation of affordable housing under its zoning laws. There, the New Jersey Supreme Court stated “[i]t is required that, affirmatively, a zoning regulation, like any police power enactment, must promote . . . the general welfare [and] a zoning enactment which is contrary to the general welfare is invalid.”⁴³ The court noted that “general welfare” is broad enough to encompass public health, safety, and morals. But the court went further, noting that “police power enactments” must conform to “basic state constitutional requirements of substantive due process . . . which may be more demanding than those of the federal constitution.”⁴⁴ Moreover, the court stated that even

⁴² *Id.*

⁴³ *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975).

⁴⁴ *Id.*

in the absence of “general welfare” principles under the state’s zoning enabling statute, those same principles would still be required to be followed under the state constitution, and if they were not, then a zoning law is “theoretically” invalid as a matter of state constitutional law.⁴⁵ Indeed, the “basic importance of housing . . . fall[s] within” general welfare principles broadly conceived as including public health, safety, and morals.⁴⁶ If state general welfare principles, even if absent from state statutes authorizing the police power, are imposed as constraints on municipal exercises of police powers such as zoning, then it is equally appropriate for state courts, as a matter of state constitutional law, to equate “public use” with “general welfare” as an additional shield for private property owners in eminent domain challenges.

State constitutional general welfare doctrine is not the first scholarly effort to propose an additional constraint on eminent domain, as scholars have raised similar sentiments about a lack of concern for general welfare in urban redevelopment projects like that in *Berman v. Parker*.⁴⁷ An explicit state constitutional general welfare doctrine

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See McFarlane, *supra* note 33, at 58–60 (arguing that exercises of eminent domain power “must . . . [include considerations] of race and class”). McFarlane’s proposal is a good example of the insular and discrete group protection that additional constraints on eminent domain might result in. She states:

I argue that in light of these disparate needs and interests, there are limits, by virtue of constitutional obligations of the police power, to local government’s ability to facilitate redevelopment projects that deliberately aim to accomplish class transformation and exclusively reconfigure the inner city for the affluent. . . . For the city to aid the winners, and to craft the affluent paradise that today’s wealthy professional seeks, is an improper use of police power as well as an offense to inclusivity and egalitarian principles that reject race and class discrimination.

Id. at 7, 39; see also Michèle Alexandre, “Love Don’t Live Here Anymore”: *Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 5 (2008) (arguing that “public purpose” inquiries should require nondisplacement of poor residents); Robert C. Bird, *Reviving Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL’Y 239, 266 (2010) (arguing for a heightened standard of review in takings for the purpose of blight removal); Ronald K. Chen, *Gallenthin v. Kaur: A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for*

originates from *Kelo*, not *Berman*. But there are key differences. Prior scholarship sought to provide protections directly for discrete and arguably insular groups,⁴⁸ and none have explicitly invoked broader “general welfare” principles as equivalent to “public use” more narrowly. Further, few, if any, of these scholars propose additional constraints on eminent domain as a matter of federalism concerns in takings.

This Article is unpacked in four Parts. Part I explores how state constitutional general welfare doctrine has strong precedential support for amalgamating constitutional doctrines into one, including the Court’s *Agins* substantially advances doctrine, the Court’s *Nollan* and *Dolan* exactions standards, and the Court’s *Olech* equal protection class of one jurisprudence. Indeed, takings doctrine has exhibited a certain level of fluidity in its coalescence with other constitutional provisions, and some state courts have reciprocated by commingling those standards to find the right balance to protect private property rights. State constitutional general welfare doctrine is simply yet another example of multiple doctrines bleeding into takings doctrine.

Part II pivots this Article’s narrative to a discussion of federalism and state constitutionalism to understand the lacuna in takings doctrine that should be filled with a new cross-pollinated jurisprudence. After the *Kelo* decision, state actors resisted public use doctrine nationwide by amending or barring takings for economic development under state law or amendments to state constitutions. However, state constitutional law played a far more limited role than state legislation after *Kelo*. This Part explains that state courts post-*Kelo* diverted from federal takings

Redevelopment, 38 FORDHAM URB. L.J. 987, 1020 (2011) (arguing low-income families should be treated “fairly” in eminent domain decisions).

⁴⁸ United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 10 (2009) (proposing an “exclusionary eminent domain doctrine [that] would not absolutely bar” economic development takings or “condemnation of low-income housing . . . but . . . would result in the application of heightened review”); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 136 (2009) (arguing for definition of blight to mean threats to health and safety); Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1169 (2011) (arguing for new definitions of blight); Matthew J. Kokot, *Balancing Blight: Using the Rules Versus Standards Debate to Construct a Workable Definition of Blight*, 45 COLUM. J.L. & SOC. PROBS. 45, 47–48 (2011) (arguing that “blight” should be “defined in the framework of a ‘complex rule’”).

doctrine and showed a willingness to resist the Court's public use jurisprudence. But state courts failed to go further to recognize an implicit obligation for local municipalities to satisfy "general welfare" principles as part of the public use test when taking private property for economic development purposes. It is here that we find a through-line for which to explore this Article's proposed doctrine.

Part III proposes "state constitutional general welfare doctrine" as a missing doctrinal link post-*Kelo* and, more importantly, an additional constraint on takings. The origins of this doctrinal pivot come from the Court's struggle to conceptualize the "police power" and "public use" in *Berman*, *Midkiff*, and *Kelo*. However, a closer look at the language of the opinions suggests that state courts have an important institutional role to play in constraining broad conceptions of the police power and public use, and that state constitutional law should perhaps play an outsized role in implying a general welfare obligation.

Part IV offers a doctrinal cash-out. Intermingling general welfare principles as part of the public use inquiry raises the prospect that state public use clauses may be narrowed in application to constrain traditional justifications for eminent domain, such as urban redevelopment, blight removal, and economic development.

I. CROSS-POLLINATION IN TAKINGS DOCTRINE

This Part explores instances of cross-pollination where constitutional doctrines and tests were commingled with takings doctrine in different contexts. Doing so will not only substantiate this Article's proposal to blend general welfare principles with public use doctrine, but also will reveal the relative fluidity of takings doctrine.⁴⁹ Indeed, takings doctrine is highly variable. This adaptability has become ever-important in a post-*Kelo* era where state courts are continuously called upon to grant greater protections to private property beyond the constitutional bottom. But state courts, not the Supreme Court or federal courts, are better equipped to depart from—rather than build upon—the traditional constraints on public use.

⁴⁹ See *infra* Part III.

Nothing under contemporary takings jurisprudence would preclude “general welfare” concepts ordinarily reserved for state police power exercises from bleeding into state public use tests. But we need to look elsewhere to find evidence of cross-pollination working in other constitutional spheres. The following examples of doctrinal integration across constitutional provisions provide a conceptual framework for understanding how transferable takings law functions for litigants seeking to protect private property from government expropriation and, more importantly, why a state constitutional general welfare doctrine is an appropriate addition to the existing rich history of fluidity in takings doctrine.

A. *The Substantially Advances Test*

The *Kelo* decision that set off a nationwide divergence from federal takings doctrine was decided the same year as *Lingle*. But, as commentators have noted, *Lingle* received far less attention.⁵⁰ Yet, *Lingle*’s doctrinal implications are important for understanding the utility of a state constitutional general welfare doctrine proposed in Part III. The Court’s doctrine prior to *Lingle* tended to set forth dicta that caused due process concepts “to bleed into takings law.”⁵¹ While this “cross-pollination”⁵² may cause some confusion in understanding contemporary takings doctrine, the coalescence of due process concepts and regulatory takings doctrine substantiates this Article’s conceptual foundation, even though the Court’s ultimate determination in *Lingle* was to reject such blended doctrine. The Court’s decisions in *Agins*, *Nectow v. Cambridge*,⁵³ *Village of Euclid v. Ambler Realty Co.*,⁵⁴ and

⁵⁰ See Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 613–14 (2007); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 343–44 (2006).

⁵¹ Barros, *supra* note 50, at 344–45.

⁵² *Id.*

⁵³ *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928).

⁵⁴ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

finally ending with *Lingle* instruct the potential for coalescing general welfare principles in the public use inquiry.⁵⁵

In *Agins*, the Court found that government regulation of private property will give rise to a taking if the regulation “does not substantially advance legitimate state interests.”⁵⁶ In formulating this “substantially advances” test, the *Agins* Court relied upon due process precedent in *Nectow* and *Village of Euclid* in the zoning context. In *Nectow*, a city ordinance deprived a landowner of his property without due process,⁵⁷ while in *Village of Euclid*, the quintessential zoning case, the Court found that a zoning ordinance only survives substantive due process challenges if the ordinance is not “clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*.”⁵⁸ In light of *Agins*, it seemed obvious that the natural progression would be to review government exercises of the police power, specifically regulations that affect a Fifth Amendment taking, under the same substantial advances test, because the test prescribes an inquiry into the nature of due process and suggests a means-ends test to determine whether regulating private property achieves some legitimate public purpose.

The substantially advances inquiry of due process in land use regulations seeks to evaluate the magnitude and character of the burden that a regulation imposes upon private property rights.⁵⁹ In other words, the inquiry seeks to review the underlying validity of the regulation.⁶⁰ As the *Lingle* Court explained, the inquiry “suggests a means-end test” and asks whether the “regulation of private property is effective in achieving some legitimate public purpose.”⁶¹

But, the Court said that the “substantially advances” test does not reveal much about “the *magnitude or character of the burden* a particular regulation imposes upon private property rights.”⁶² Further,

⁵⁵ See Barros, *supra* note 50, at 343–45.

⁵⁶ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

⁵⁷ *Nectow*, 277 U.S. at 185–89.

⁵⁸ *Euclid*, 272 U.S. at 395 (emphasis added).

⁵⁹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539–40 (2005).

⁶⁰ *Id.* at 543.

⁶¹ *Id.* at 542.

⁶² *Id.* (alteration in original).

the inquiry does not, according to the Court, provide “any information about how any regulatory burden is *distributed* among property owners.”⁶³ Indeed, the Court concluded that “such a test is not a valid method of discerning whether private property has been ‘taken’” for a public use.⁶⁴ As a result, the Court found the “apparent commingling of due process and takings inquiries” to be improper,⁶⁵ because it is “tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.”⁶⁶

But the *Lingle* opinion also states that “if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement . . . that is the end of the inquiry.”⁶⁷ The Court leaves a gaping analytical hole as to how the public use inquiry ends when the government fails the public use requirement, particular if the Takings Clause “presupposes that the government has acted in pursuit of a valid public purpose.”⁶⁸

As for state courts, a significant number followed the amalgamated nature of “substantially advances” tests in the takings doctrine. In California, for example, a significant number of state appellate courts cited or relied upon the test in takings inquiries.⁶⁹ Other state supreme courts analyzed takings challenges under the cross-pollinated doctrine.⁷⁰

⁶³ *Id.* (alteration in original).

⁶⁴ *Id.*

⁶⁵ *Id.* at 541.

⁶⁶ *Id.* at 542.

⁶⁷ *Id.* at 543.

⁶⁸ *Id.*

⁶⁹ See *San Remo Hotel LP v. City & Cty. of San Francisco*, 41 P.3d 87, 108–09 (Cal. 2002); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1007 (Cal. 1999); *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1196 (Cal. 1998); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 859 (Cal. 1997); *Ehrlich v. City of Culver*, 911 P.2d 429, 443 (Cal. 1996).

⁷⁰ *R&Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289 (Ala. 2001); *Burrows v. City of Keene*, 432 A.2d 15, 19–20 (N.H. 1981); *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1217–18 (N.Y. 2004); *State ex rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345, 350 (Ohio 2002); *Goldberg Cos., Inc. v. Council of the City of Richmond Heights*, 690 N.E.2d 510, 512, 514 (Ohio 1998); *April v. City of Broken Arrow*, 775 P.2d 1347, 1348 (Okla. 1989); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998); *Manufactured Hous. Cmty. of Wash. v. Washington*, 13 P.3d 183, 193 (Wash. 2000); *Grady v. City of St. Albans*, 297 S.E.2d 424, 428 (W. Va. 1982).

The Idaho Supreme Court, although deeming *Agins* slightly murky, reviewed a takings challenge to a zoning ordinance under the cross-pollinated test.⁷¹ The Oregon Supreme Court found that a zoning ordinance did “substantially advance[] legitimate governmental interests, and [that the zoning ordinance did] not deny property owners economically viable use”⁷² It, therefore, was not a taking. The Texas Supreme Court, likewise, found that a municipal regulation substantially advanced a legitimate governmental interest, but that it was not a regulatory taking nonetheless.⁷³ The Supreme Court of Indiana, in *Ragucci v. Metropolitan Development Commission of Marion County*, analyzed a zoning determination under the *Agins* test, finding that it substantially advanced the municipal agency’s interest in rezoning neighborhoods to create multi-family buildings.⁷⁴ Indeed, state courts have welcomed attempts by litigants to blend “substantially advances” tests in takings doctrine. Of course, while the Court in *Lingle* found such mixing inappropriate, it is still well-established that, for years prior to *Lingle*, state courts were looking to this multifaceted approach to review local regulations and municipal action.

B. Exactions Means-End Inquiry

Public use inquiries have been blended with other areas of takings law, such as heightened standards of review in exaction cases. For example, a state court in Illinois has “put the government to its proof—requiring a demonstrated connection between the challenged taking and the particular purpose used to justify it.”⁷⁵ This is an example of the Court’s *Nollan* and *Dolan*⁷⁶ tests that determine whether economic development takings are justified public uses. The tests emphasize a

⁷¹ *Cty. of Ada v. Henry*, 668 P.2d 994 (Idaho 1983).

⁷² *Cope v. City of Cannon Beach*, 855 P.2d 1083, 1087 (Or. 1993).

⁷³ *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

⁷⁴ *Ragucci v. Metro. Dev. Comm’n of Marion Cty.*, 702 N.E.2d 677 (Ind. 1998).

⁷⁵ See Garnett, *supra* note 9, at 936.

⁷⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (finding that government condition on development permit must have essential nexus to public harm); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (same).

means-end approach to government imposition of conditions in exchange for development permits, requiring the state to show an essential nexus or rough proportionality between the condition imposed on the developer to mitigate a public harm caused by the developer's construction project. If the state cannot meet that heightened burden, then courts will find the condition unconstitutional in violation of the Takings Clause.

In *National City Environmental*,⁷⁷ the Supreme Court of Illinois cross-pollinated the heightened standard of review employed in the Supreme Court's exaction jurisprudence to find an economic development taking unjustifiable where the property was transferred from one private entity for the benefit and use of another private entity.⁷⁸ The issue before the court in *National City Environmental* was whether a development authority could condemn property owned by a private company and then convey the property to a motorsports corporation for economic development purposes.⁷⁹ The court noted that "the exercise of [the power of eminent domain] is not entirely beyond judicial scrutiny . . . and it is incumbent upon the judiciary to ensure that the power [] is used in a manner contemplated" by the particular constitution.⁸⁰ However, the state supreme court rejected the economic development justifications as inconsistent with the "public use" clause of the state constitution. It did so based on a finding that the "government failed to demonstrate that the condemnation-on-demand scheme was justified by legitimate policy goals."⁸¹ In effect, the court noted that the government's "true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use" and failed to provide evidence of a "thorough study" or "formulate any economic plan."⁸² The taking was simply to assist the developer in expanding his development goals as a "default broker" when negotiations failed with the landowners, instead of taking the property

⁷⁷ Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002).

⁷⁸ *Id.* at 7.

⁷⁹ *Id.*

⁸⁰ *Id.* at 8.

⁸¹ See Garnett, *supra* note 9, at 978.

⁸² *Nat'l City Envtl.*, 768 N.E.2d at 10.

in a manner “rooted” in sound economic and planning processes.⁸³ In other words, the court reasoned that the means (advertising eminent domain for a fee at request of private developer) to advance the goal of economic development exceeded the public use limitations of the state takings clause.⁸⁴ The court rejected the notion that the means of executing projects are “beyond judicial scrutiny” once the public purpose has been established.⁸⁵

As Nicole Garnett explains, the court “put the government to its proof—requiring a demonstrated connection between the challenged taking and the *particular* purpose used to justify it.”⁸⁶ In other words, the Illinois Supreme Court engaged in a modified rational basis review, rejecting the government’s argument that it could take private property for any “conceivable” public use,⁸⁷ and instead employed what Garnett finds to be the exactions heightened standard of review, because that standard requires the government to show a connection between the means of placing a condition on a development permit and the ends for which the condition would be used.⁸⁸ Ultimately, the Illinois Supreme Court in *National City Environmental* required “the government to establish a means-ends connection similar to that demanded in *Nollan* and *Dolan*.”⁸⁹

Other commentators, such as Richard Epstein, have raised the question of whether the *Nollan* and *Dolan* heightened standard of review could conceivably bleed into traditional public use inquiries in eminent domain cases, noting that it is unclear whether exactions analysis “will carry over to other portions of the takings clause” and whether *Midkiff* “can survive *Dolan*.”⁹⁰ Indeed, it is possible, as Garnett explains, that a test could be formulated that “abandons rational-basis

⁸³ *Id.*

⁸⁴ *Id.* at 10; see Garnett, *supra* note 9, at 978.

⁸⁵ *Nat’l City Env’tl.*, 768 N.E.2d at 1, 8.

⁸⁶ See Garnett, *supra* note 9, at 936.

⁸⁷ See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (noting that a legislature may take private property for any conceivable public use as part of the public use inquiry).

⁸⁸ See Garnett, *supra* note 9, at 937.

⁸⁹ *Id.*

⁹⁰ *Id.* at n.16 (citing Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479, 491–92 (1995)).

review and requires the government to link the means by which it acquires land to the particular purpose.”⁹¹ The test would likely require a local government to show, similar to exactions, that condemnation is “reasonably necessary” to advance the public purpose used to justify the taking.⁹² Thomas Merrill has also argued for a similar coalescence of means and ends inquiries in eminent domain challenges.⁹³ He posits that “where and how government should get property, not what it may do with it . . . demands a more narrowly focused and judicially manageable inquiry than the ends approach” of traditional public use.⁹⁴ This may be exactly what the Supreme Court may have meant to do in *Nollan* and *Dolan*.⁹⁵ It does not seem that the exactions tests have been “formalized” in any way in other states to extend to public use takings inquiries.⁹⁶ However, *National City Environmental* is a prime example of the exaction test coalescing with the public use inquiry and is, nonetheless, another illustration of the fluidity of the Takings Clause at the state level.

C. *Class of One Equal Protection Doctrine*

In the Supreme Court’s ruling in *Olech*, a homeowner sued a municipality, arguing that the Village’s demand for a thirty-three-foot easement violated equal protection.⁹⁷ The Court, in a brief opinion, stated that the homeowner could assert an equal protection claim as a “class of one.”⁹⁸ While challengers to zoning ordinances have utilized the *Olech* decision, it could conceivably be applied to “challenge an eminent domain taking for private development.”⁹⁹ In other words, *Olech* raised the prospect that a homeowner could be a class of one, as

⁹¹ *Id.* at 938.

⁹² *Id.*

⁹³ Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 66 (1986).

⁹⁴ See Garnett, *supra* note 9, at 941 (citing Merrill, *supra* note 93, at 66).

⁹⁵ *Id.*

⁹⁶ *Id.* at 937.

⁹⁷ 528 U.S. 562, 564 (2000).

⁹⁸ *Id.*

⁹⁹ Blackman, *supra* note 14, at 700.

opposed to those with inherent characteristics traditionally reserved for equal protection claims, such as race or religion, to argue that “if their property is singled out for eminent domain” and other properties are not, then the homeowner can bring suit to “challenge the arbitrariness of the decision to take the property.”¹⁰⁰

As Nestor Davidson explains, the Takings Clause protects against changes in existing background state property rights, and does not serve to find for discriminatory intent behind government action, and therefore the Takings Clause “is not the place to remedy that problem.”¹⁰¹ There is arguably a place for takings law to bleed into *Olech*’s class of one equal protection doctrine, specifically takings for economic development purposes that threaten homeowners.¹⁰² Such claims could arise by property owners under Section 1983, alleging the government agency commencing condemnation proceedings “intentionally” treated the landowner differently than other similarly situated landowners and that the difference in treatment lacked a rational basis.¹⁰³ However, an eminent domain proceeding is “less likely to be influenced by a particular legislator’s malice.”¹⁰⁴ Indeed, the “class of one” would be satisfied by a showing that a particular homeowner or group of homeowners has been treated differently, or it might entail an entire community.¹⁰⁵ The doctrine could be applied to protect communities or groups of property owners historically powerless in condemnation challenges, who have been “targeted for eminent domain.”¹⁰⁶ For example, as David Dana has explained, condemnation that affects low-income families in middle-class neighborhoods could potentially rise to the level of defining a class by income or race,¹⁰⁷ particularly “if all homeowners in a group targeted for eminent domain were black,” while other property owners unaffected by eminent domain

¹⁰⁰ *Id.*

¹⁰¹ See Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 51–52 (2008); see also Blackman, *supra* note 14, at 727.

¹⁰² See Blackman, *supra* note 14, at 727.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 730.

¹⁰⁷ Dana, *supra* note 48.

were white.¹⁰⁸ This, of course, would entail heightened scrutiny, since race falls within that purview under the Supreme Court's equal protection doctrine. However, if the class of one doctrine was applied based on low-income or poverty-stricken homeowners or property owners, then a rational basis standard of review would apply.¹⁰⁹ Indeed, a class of one doctrine applied to eminent domain challenges does not ask whether the taking is "necessary to achieve a certain public purpose, but rather scrutinizes the decision to take the *particular plot of property*."¹¹⁰

Thus, the coalescence of equal protection's class of one and takings doctrine does not necessarily seek to ascertain whether a municipality "needed" a person's home or property for economic development purposes, or some other justifiable public use, but "[r]ather, the inquiry would be to question the choice to take" that property instead of other similarly situated properties.¹¹¹ The blending of equal protection's class of one and takings doctrine offers a fine example of additional constraints on economic development takings. Beyond the application of the blended doctrine in takings, it is also possible, as Justice Kennedy alluded, that heightened standards of review in condemnation challenges should apply beyond the broad conceptions espoused by *Berman* and *Midkiff*.¹¹² Indeed, while the *Olech* decision helps to mitigate the problems associated with arbitrary zoning legislation, the decision also offers a cross-pollination of equal protection's class of one and takings doctrine that may provide greater protections to private property beyond the traditional public use and just compensation constraints and, likewise, "diminish the ability of the government to use eminent domain for private development."¹¹³ However, like the exactions-public use doctrinal tandem in *National City Environmental*, class of one equal protection in takings has limited utility across the states.

¹⁰⁸ See Blackman, *supra* note 14, at 730.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 734 (emphasis added).

¹¹¹ *Id.*

¹¹² *Id.* at 746.

¹¹³ *Id.* at 748.

Few plaintiffs have “proposed using the *Olech* rule to challenge an eminent domain taking for private development.”¹¹⁴ In the years since *Olech*, there have been some states courts that have reviewed challenges on the commingled theory that a property owner had “been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”¹¹⁵ In *Hargrove v. New York City School Construction Authority*, for example, a landowner sought review of a state agency’s decision to condemn her property.¹¹⁶ The New York Supreme Court, Appellate Division, Second Department held that the landowner was not denied equal protection and the state agency’s determination was rationally related to a public purpose.¹¹⁷ There, the agency sought to condemn property for purposes of building a public school.¹¹⁸ The property owner raised the class of one doctrine, arguing there was evidence to suggest the state agency had “intentionally treated” the owner differently from other similarly situated landowners, and the taking had no rational basis.¹¹⁹ The court declined to accept the class of one doctrine, noting that nothing in the record suggests that building a public school is not rationally related to a public purpose.¹²⁰

Another example is *Goldstein v. New York State Urban Development Corp.*¹²¹ There, the Atlantic Yards economic development project was challenged by a group of landowners in Brooklyn. The properties included both homes and businesses slated for condemnation for purposes of redevelopment. The court was faced with, among other claims, an allegation that a taking for economic development purposes where homeowners and businesses were subject to condemnation to advance a redevelopment project, was in violation of equal protection.¹²² The basis for the equal protection claim was that the homeowners and

¹¹⁴ *Id.* at 700.

¹¹⁵ See *Village of Willowbrook v. Olech*, 528 U.S. 562, 562, 564 (2000).

¹¹⁶ 944 N.Y.S.2d 315 (N.Y. App. Div. 2d Dep’t 2012).

¹¹⁷ *Id.* at 316.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 879 N.Y.S.2d 524 (N.Y. App. Div. 2d Dep’t 2009).

¹²² *Id.*

businesses located within the projected redevelopment area had been intentionally treated differently from other similarly situated.¹²³ The court made short shrift of the argument, noting that the determination by the agency to condemn the homeowner's property was for a rational basis, conformed with the state constitution's public use clause, and thus was not constitutionally infirm.¹²⁴

Nonetheless, the foregoing is evidence that takings law is flexible and fluid. These unique doctrinal precedents intermingling with constitutional standards offer scholars an opportunity to explore similar combinations of doctrines to impose greater protections for private property. Because the federal takings doctrine and the text of the Fifth Amendment's Takings Clause offer limited constraints on the public-use vein of the Takings Clause, we ought to look to federalist dimensions in takings jurisprudence¹²⁵ to fully appreciate both the usefulness and the limitations of a new cross-pollinated takings doctrine like the "state constitutional general welfare doctrine."¹²⁶

II. FEDERALISM, STATE CONSTITUTIONS, AND TAKINGS

A. *New Federalism and State Constitutionalism*

Justice Louis Brandeis once wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹²⁷ Not long after his plea for states to exercise their independence, federal courts, indeed, loosened their stranglehold on state autonomy to innovate doctrinally.¹²⁸ The prevailing wisdom for a state-law preference to

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 271 (2004).

¹²⁶ See *infra* Part III.

¹²⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹²⁸ See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 704–05 (2016).

innovation is based largely on a concern for expansive federal power over the states, which some argue may inhibit growth and progress.¹²⁹ This story is as old as the federal Constitution itself: states are sovereign entities and thus are independent and autonomous “within their proper sphere of authority.”¹³⁰ Justice William Brennan urged state courts to play a greater role in protecting constitutional rights by relying on state constitutions as more effective guarantors of individual rights than the U.S. Constitution.¹³¹ He called for state supreme courts to interpret their respective constitutions in ways that did not necessarily conform to, or perhaps were independent of, the federal document.¹³²

New Federalism envisions a democracy where state courts play a greater role in constitutional law doctrine by providing stronger protections to individual liberties at the state level, beyond what the federal document provides.¹³³ This is, in other words, a highly federalist vision of democracy, with states playing an outsized role.¹³⁴ Indeed, Justice Brennan, likewise, called upon states to experiment.¹³⁵ While there are many advocates for New Federalism and robust state constitutionalism,¹³⁶ it was Justice Brennan who saw an opportunity for state courts to depart explicitly from the federal constitutional baseline¹³⁷ and promote an agenda that believed individual liberties were better protected under state, rather than federal, constitutional law.¹³⁸ In *Michigan v. Mosley*, for example, Justice Brennan, referring to the Court’s previous *Miranda* decision, explained in his dissent that the majority’s decision eroded *Miranda*’s standards as a matter of federal

¹²⁹ See, e.g., Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1369–70 (2014).

¹³⁰ *Printz v. United States*, 521 U.S. 898, 928 (1997); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996).

¹³¹ Brennan, *supra* note 18.

¹³² *Id.*

¹³³ See Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1191–94 (1977).

¹³⁴ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 (1992).

¹³⁵ See Brennan, *supra* note 18, at 490–91.

¹³⁶ See *id.* at 500.

¹³⁷ See, e.g., *State v. Kaluna*, 520 P.2d 51, 58 n.6 (Haw. 1974).

¹³⁸ See Brennan, *supra* note 18, at 502.

constitutional law, and that “it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law . . . than is required by the Federal Constitution.”¹³⁹ *Miranda* would not be the last time Justice Brennan expressly advocated for New Federalism from the bench.¹⁴⁰ His point was that where the Supreme Court either sets forth new or preserves existing baseline protections of civil liberties and individual rights, state courts may depart or deviate from the constitutional bottom, so long as the issue is not field preempted.

In reality, however, it is arguably the case that Justice Brennan’s New Federalism and Justice Brandeis’s laboratories of democracy have not necessarily come to fruition the way they were envisioned. State actors are somewhat hesitant to divert from federal constitutional doctrine and interpretive modes of analysis. State courts often simply follow federal doctrine, even when they have the luxury of the same, or substantially the same, constitutional language before them.¹⁴¹ However, the post-*Kelo* divergence from federal takings doctrine is an exception to the relative dearth of independent state constitutionalism.

B. *State Constitutionalism and Takings*

1. Background State Law

Constitutional protections to property are derived from the Takings Clause. But, of course, like many areas of constitutional law, the protections are actually derived from extracanonial sources of state background property law. The Supreme Court’s recent decision in *Murr* offered a lesson of how the background of state property law is of paramount importance to inquiries into property disputes. Specifically, Chief Justice Roberts’s dissent walked through the importance of state

¹³⁹ *Michigan v. Mosley*, 423 U.S. 96 (1975).

¹⁴⁰ See, e.g., *United States v. Miller*, 425 U.S. 435, 454–55 & n.4 (1976) (Brennan, J., dissenting); *Baxter v. Palmigiano*, 425 U.S. 308, 338–39 (1976) (Brennan, J., concurring in part and dissenting in part); *Paul v. Davis*, 424 U.S. 693, 715, 735 n.18 (1976) (Brennan, J., dissenting).

¹⁴¹ See Dodson, *supra* note 128, at 703.

law as a backdrop to understanding private property protections. He noted, “Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”¹⁴² Indeed, “property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”¹⁴³

It is state legislatures and state common law that dictate and create property rights, while the Constitution provides the baseline protections to those property rights.¹⁴⁴ Likewise, state courts have relatively broad discretion to depart from federal doctrine and room to interpret state constitutional provisions in divergent ways.¹⁴⁵ However, an express requirement to conform to the Court’s takings doctrine is not evident.¹⁴⁶ State actors are also subject to state constitutional restrictions under the state’s takings clause, which raises questions as to whether they ought to depart from the constitutional bottom of takings doctrine or maintain looser strictures.¹⁴⁷

For many landowners, protections from regulatory takings are determined by background principles of state legislation and common law.¹⁴⁸ While Supreme Court doctrine establishes “a floor below which state courts cannot go to protect individual rights,” states have wide latitude to afford greater protections under state constitutions.¹⁴⁹ Landowners threatened by eminent domain takings also enjoy similar background state law protections. There is no constitutional constraint on the government negotiating and purchasing private property from an owner. The primary constitutional constraints of public use and just compensation are triggered when the government seeks to seize private property involuntarily from its owner. Clearly, the government can compel the conveyance of title. However, to successfully compel, the

¹⁴² *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

¹⁴³ *Id.* at 1951 (alteration in original) (internal quotation marks omitted) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984)).

¹⁴⁴ *See Sterk*, *supra* note 125, at 272.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See State v. Sieyes*, 225 P.3d 995, 1003 (Wash. 2010).

government must satisfy the public use and just compensation tests. If both, or even just one, strand is not satisfied, then the taking is unconstitutional. That is, the government cannot successfully pay just compensation at fair market value and take the property for purposes other than public use, such as for purely private purposes. But this Article is unconcerned with the just compensation vein, although it deserves (and has received) quite a bit of scholarly attention. Instead, we are concerned with the lack of constraints on public use.

When a property owner is compelled to transfer his property to the government involuntarily, the particular state eminent domain legislation sets forth the appropriate public uses for a taking. These public uses are measured against the federal Public Use Clause and the Supreme Court's doctrine. Indeed, the Takings Clause and the Supreme Court's public use doctrine protect against changes in states' eminent domain legislation. State legislation that permits a purely private-to-private transfer of property would likely be unconstitutional, as the Takings Clause would constrain such an action by requiring a showing of some public benefit or public purpose.

Debates over the public use doctrine today revolve around the narrow or broad conception of what public use means, with the latter meaning "public interest," "public benefit," or a "public purpose." The Court's ruling in *Berman* spurred the broader modern-day takings conception. Justice Douglas stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."¹⁵⁰ There, the Court held that takings for the underlying purpose of clearing slums and blighted neighborhoods were valid public uses under the Takings Clause.

Berman not only opened the door for urban renewal projects to flourish, but also invited just about any conceivable public use as justification for condemning private property. The Court's *Midkiff* ruling struck down a Hawaii statute that allowed fee title to be taken from landlords and transferred to tenants in an effort to reduce the concentration of land ownership. This statute was found as a valid public use, even though the statute authorized private-to-private

¹⁵⁰ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

conveyance.¹⁵¹ Then, in the Court's *Kelo* decision, something strange happened at the state level that upended decades of state conformity with public use doctrine.¹⁵² It is this abrupt rupture in federal doctrine at the state level that opens a pathway for rethinking how state courts should interpret their respective public use texts to imply "general welfare" principles proposed in Part III of this Article.

2. Federalism and Public Use Resistance after *Kelo*

In *Kelo*, the Court upheld economic development takings as a justifiable public use.¹⁵³ Delivering the opinion of the Court, Justice Stevens stated that a long-standing history of preference for "deference to legislative judgments in this field" colored the Court's decision to remain above the fray, and where such condemnation determinations arise, the Court would defer to the legislature.¹⁵⁴ The majority took the safe route, noting that the Court should not second-guess local governments' judgments regarding the efficacy of proposed economic development plans.¹⁵⁵ Justice Stevens noted that the "needs of society have varied between different parts of the Nation" and that courts should exercise "great respect" to state legislatures and state courts in discerning local public needs.¹⁵⁶ Nothing about the decision was a surprise and it was arguably expected that state courts would continue to gravitate towards federal public use doctrine the same way they had done for decades prior to *Kelo*.

That is not what happened. State legislatures resisted, arguing that economic development was not a justifiable public use.¹⁵⁷ But Justice Stevens's opinion reminded states that they were not tied to the decision. He noted that if dissatisfied with the decision, states could amend their eminent domain laws to offer greater protections. In doing

¹⁵¹ Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

¹⁵² *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 480.

¹⁵⁵ *Id.* at 489.

¹⁵⁶ *Id.* at 482.

¹⁵⁷ See Somin, *supra* note 31, at 37.

so, Justice Stevens cited the Michigan Supreme Court's decision in *County of Wayne v. Hathcock* as a prime example of a state court reading its public use clause narrower than the federal clause to invalidate economic development takings.¹⁵⁸ Justice Stevens explained that "nothing" in the opinion "precludes [state courts or state legislatures] from placing further restrictions on . . . 'public use' requirements that that are stricter than the federal baseline" or establishing new requirements as a "matter of state constitutional law."¹⁵⁹

There is some history of states utilizing their state constitutions as the first and primary mode of interpretation of the law, as opposed to first leaning on federal law to drive the analytical process. These states engage in what we call primacy.¹⁶⁰ Oregon, Washington, New Jersey, and New Hampshire, in particular, are a few states that have followed a form of state constitutionalism, adopting independent interpretations of their constitutions, although arguably doing so inconsistently.¹⁶¹ State courts in these jurisdictions claim to adhere to a strong sense of state constitutionalism.¹⁶²

Primacy is when a state court addresses a state constitutional issue before considering any federal constitutional issues if both are raised.¹⁶³

¹⁵⁸ *Kelo*, 545 U.S. at 489 n.22.

¹⁵⁹ *Kelo*, 545 U.S. at 489.

¹⁶⁰ See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 48 (2006).

¹⁶¹ See *State v. Ball*, 471 A.2d 347, 351 (N.H. 1983) (establishing the primacy doctrine as New Hampshire law); *State v. Hunt*, 450 A.2d 952, 955–56 (N.J. 1982) (following interstitial/supplemental doctrine to reach a result founded on the state constitution as more protective than the federal Constitution); *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981) (en banc) (establishing the primacy doctrine as Oregon law); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (establishing, in line with the dualism doctrine, "neutral criteria" to guide courts and litigants in deciding when to construe the state constitution differently from analogous federal clauses); see also Long, *supra* note 160, at 51.

¹⁶² See sources cited *supra* note 161; see generally Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983–86 (1985) (describing various state courts' approaches to independent state constitutionalism).

¹⁶³ John W. Shaw, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1025 (1993); see, e.g., *State v. Randant*, 136 P.3d 1113, 1117 (Or. 2006) (following the proper sequence in Oregon, which is to decide state constitutional questions before reaching federal questions).

As Robert Ellickson noted after the *Kelo* decision, judicial precedent and the constitutional and statutory texts “are assumed to be sufficiently open-textured to permit a judicial interpretation that would give primacy to the federalist values expressed elsewhere in the federal constitution. That the Justices who heard *Kelo* ended up writing four quite different opinions supports the notion that there indeed is room for varying interpretations.”¹⁶⁴ Indeed, Ellickson is not alone in his desire for “state courts, not federal courts” to be responsible for limiting and constraining public use in the eminent domain analysis.¹⁶⁵

Following the *Kelo* decision, an unprecedented wave of eminent domain reform swept the nation that either barred or restricted economic development takings. Forty state legislatures amended their eminent domain statutes to restrict or bar the exercise of eminent domain in some capacity.¹⁶⁶ “Public use” and “public purpose” was distinguished from economic development justifications in more than thirty states.¹⁶⁷ State supreme courts provided greater protections against takings for private use by narrowing the limits of the state public use clause.

The Supreme Court of New Jersey ruled to only permit redevelopment takings if the area has serious blight conditions.¹⁶⁸ The Oklahoma high court interpreted its takings clause to prohibit economic development takings altogether.¹⁶⁹ The Missouri Supreme Court found economic development takings impermissible.¹⁷⁰ The Ohio Supreme Court in *City of Norwood v. Horney* expressly ignored the *Kelo* decision, noting it was not “bound to follow the U.S. Supreme Court’s determinations of the scope of the Public Use Clause in the federal Constitution” and interpreted its public use clause as constitutionally

¹⁶⁴ Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 n.59 (2009).

¹⁶⁵ *Id.*

¹⁶⁶ See Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. 82, 84 (2015).

¹⁶⁷ *Id.*

¹⁶⁸ See *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 461–62 (N.J. 2007).

¹⁶⁹ See *Bd. of Cty. Comm’rs v. Lowery*, 136 P.3d 639, 650–52 (Okla. 2006).

¹⁷⁰ See *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472 (Mo. 2013).

limiting economic development.¹⁷¹ The South Dakota Supreme Court found “public use” to be narrowed to actual use by the government or public.¹⁷² The Pennsylvania Supreme Court refused to make its determination based on the federal Public Use Clause.¹⁷³

One observation of this backlash is that the post-*Kelo* state court rulings may have been a response to subconstitutionalism: the idea that state constitutions are notorious for failing to constrain state and local government exercises of police power.

3. Post-*Kelo* Constitutional Constraints

As a result of the high level of interchangeable relations between state constitutions and state governments, some commentators have dismissed state constitutions as more statutory than constitutional, thus giving rise to fewer constraints on local and state governments.¹⁷⁴ Eric Posner and Tom Ginsburg have coined this inferior status of state canons as “subconstitutionalism.”¹⁷⁵ They argue that greater majoritarianism, weaker rights, and constant amendments and revisions make the state canons less constitutional in nature.¹⁷⁶ The malleability of the documents, Posner and Ginsburg argue, is evidence that state constitutions impose fewer constraints on state governments.¹⁷⁷ State constitutions, in other words, operate in a way that focuses on lower-stakes, second-order policy issues within a state rather than focusing on constraining local and state governments.¹⁷⁸ This is a crucial difference between a state and the Constitution because, as noted, the federal document does place constraints on state governments, mainly through the Supremacy Clause and the Fourteenth Amendment. Since there are

¹⁷¹ See *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136 (Ohio 2006).

¹⁷² See *Benson v. State*, 710 N.W.2d 131 (S.D. 2006).

¹⁷³ See *Reading Area Water Auth. v. Schuylkill River Greenway Ass’n*, 100 A.3d 572, 582 (Pa. 2014).

¹⁷⁴ See DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 107–08 (1988); Gardner, *supra* note 134, at 819–20.

¹⁷⁵ Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010).

¹⁷⁶ *Id.* at 1584, 1594.

¹⁷⁷ *Id.* at 1593.

¹⁷⁸ *Id.* at 1606–07.

low agency costs as a result of the federal constraints on state governments, state constitutions relax constraints on both state legislatures and local municipalities.¹⁷⁹ As Posner and Ginsburg point out, however, the disadvantage is that state government is, well, less constrained.¹⁸⁰ Thus, as subnational documents, state constitutions may not provide the kind of checks on their state governments the way the federal document does.¹⁸¹

There are plenty of examples where a lack of state constitutional constraints leads to arguably problematic policy decisions by state governments. Take public education, for example. It is usually a policy matter dealt with exclusively by local governments through local property tax regimes.¹⁸² These regimes play a significant role in funding and operating public education at the local level.¹⁸³ Most states operate a public school system where local governments are, for the most part, unconstrained by state constitutions.¹⁸⁴ However, some state governments have attempted to impose constraints on this localist rule when a fundamental right, such as public education, is threatened by localism.¹⁸⁵ In other words, public education has been found by some state governments to be a “sufficiently important statewide matter to justify an exception to the normal rules of play” where local municipalities allocate school resources through local taxation.¹⁸⁶ Subconstitutionalism may help explain, or perhaps better understand, the post-*Kelo* state constitutional amendments to takings clauses and state court rulings seeking to rein in local governments’ takings powers.

For example, eleven states amended their state constitutions to be more restrictive on municipal takings than the Constitution and the Supreme Court.¹⁸⁷ In Texas, the state constitution was amended to

¹⁷⁹ *Id.* at 1607.

¹⁸⁰ *Id.* at 1585.

¹⁸¹ *Id.* at 1596.

¹⁸² See David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 381–401 (2001).

¹⁸³ See *id.* at 394–98.

¹⁸⁴ See *id.* at 390–98.

¹⁸⁵ *Id.* at 395.

¹⁸⁶ *Id.*

¹⁸⁷ See Somin, *supra* note 31, at 39.

preclude takings to transfer “to a private entity for the primary purpose of economic development or enhancement of tax revenue.”¹⁸⁸ In Virginia, amendments prohibited takings where the “primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development,” which is arguably more restrictive than in Texas.¹⁸⁹ Florida passed a constitutional amendment with far less teeth than other states, revising the document to simply state that property taken by eminent domain “may not be conveyed to a . . . private entity.”¹⁹⁰ The Louisiana Constitution was amended to mandate that condemnation of blighted property be justified by the fact that blight causes health and safety problems, and is prohibited for “predominantly” private uses or solely economic development.¹⁹¹ Michigan’s amended constitution raised the standard of proof to condemn blighted property to “clear and convincing evidence,” while also narrowing the definition of blight, and removing economic development and “tax revenue” enhancing justifications from the definition of public use.¹⁹² South Carolina revised its document to require that properties designated as blighted must be a danger to the public health and safety and added an outright restriction on economic development takings.¹⁹³ In North Dakota, the constitutional amendments post-*Kelo* peered directly into the state public use clause, completely striking economic development from consideration as a public use.¹⁹⁴

If state legislatures and state populaces were willing to amend state constitutions to constrain the public use clause in response to rampant economic development takings by local governments, but statutory loopholes left the possibility of private enterprise takings intact,¹⁹⁵ then it would seem that other sources of state constitutional law would aptly provide a conceptual engine to explore new constraints imposed on

¹⁸⁸ TEX. CONST. art I, § 17(b).

¹⁸⁹ VA. CONST. art. I, § 11.

¹⁹⁰ FLA. CONST. art. X, § 6(c).

¹⁹¹ LA. CONST. art. I, §§ 4(B)(1)(a), (B)(2)(c), (B)(3).

¹⁹² MICH. CONST. art. X, § 2.

¹⁹³ S.C. CONST. art. I, § 13(B).

¹⁹⁴ N.D. CONST. art. I, § 16.

¹⁹⁵ See Somin, *supra* note 31, at 42.

municipalities. As Posner and Ginsburg suggest, while subconstitutionalism arguably encourages fewer constraints on local governments,¹⁹⁶ it may explain why state actors post-*Kelo* have imposed greater restrictions on local government eminent domain powers under the state constitution.

But in imposing those restrictions, state jurists and scholars neglected another implication of the post-*Kelo* backlash; that is, state courts failed to recognize an underlying obligation for local municipalities to satisfy “general welfare” principles as part of the public use test when taking private property for economic development purposes.¹⁹⁷ As Audrey McFarlane has explained, the “exercise of the police power by local government comes with certain implicit obligations.”¹⁹⁸ If the *Kelo* decision taught us anything, it is that state courts, as a matter of constitutional law, may fill the gaps or raise the floor on protections to private property beyond the federal minima. As Jane Baron explains, “*Kelo* clearly establishe[d] that, for *federal constitutional purposes*, ‘public use’ will be defined in broadly deferential terms”¹⁹⁹ But, *Kelo* also taught us that nothing, in other words, precludes state courts from “tethering” general welfare principles—just like courts prior to *Lingle* tethered due process concepts to takings—to the text of state public use clauses in an attempt to constrain the rather broad and inclusive conception of public use set forth by the federal takings doctrine.

III. EQUATING PUBLIC USE WITH GENERAL WELFARE PRINCIPLES

The proposition of this Article is that state public use clauses should, in limited circumstances, be understood to equate with state

¹⁹⁶ See generally Ginsburg & Posner, *supra* note 175.

¹⁹⁷ Only two scholars, to the best of my knowledge, have raised the potential for direct constitutional constraints on eminent domain. See McFarlane, *supra* note 33, at 42–60 (arguing that general welfare should be a consideration in urban redevelopment projects likened to those in *Berman v. Parker*); Dana, *supra* note 48, at 8 (proposing an “exclusionary eminent domain doctrine” that would not absolutely bar economic development takings or condemnation of low-income housing but “would result in the application of heightened review . . .”).

¹⁹⁸ McFarlane, *supra* note 33, at 50.

¹⁹⁹ Baron, *supra* note 50, at 652 (emphasis added).

general welfare principles as a matter of state constitutional law—what I call “state constitutional general welfare doctrine.” Like the unique mix of class of one equal protection and takings doctrine or the tethering of substantially advances tests and takings, state general welfare principles under state constitutions could arguably be commingled with, if not bound to, state public use clauses, as an additional “source of constitutional meaning.”²⁰⁰ To understand this doctrinal proposal post-*Kelo*, we need to untangle the ubiquitous and arguably ambiguous meanings of “public use” and “police power.”

A. *The Police Power and Public Use*

As Thomas Cooley has noted, the police power is “to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights”²⁰¹ That states have a general “police power” to protect health, safety and “general welfare” of the state’s citizens is the essence of the federalist regime.²⁰² Indeed, the Framers wanted the states to maintain “residual sovereignty” regarding state and local matters.²⁰³ But, while the police power is well-known, its application and definition is “uninstructive.”²⁰⁴ It is arguably one of the “most misunderstood ideas in constitutional law” because the “meaning and implications of the term are far from clear.”²⁰⁵ As Stephen Miller notes, “There is arguably no other aspect of law so ubiquitous and so incapable of definition; moreover, there may be no other area of law where courts and

²⁰⁰ See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 990 (2019).

²⁰¹ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 671 (Little, Brown, and Co. 3d ed. 1874).

²⁰² JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 139 (8th ed. 2010).

²⁰³ Hon. Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373, 389 (2004).

²⁰⁴ Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747 (2007).

²⁰⁵ *Id.*

commentators have come to consider this as an acceptable status quo.”²⁰⁶ The concept’s relationship to the public use doctrine is equivocal, but little has been written on the exercise of eminent domain and the police power.²⁰⁷

The Supreme Court’s rhetoric in its three most important public use cases is instructive on the relationship between “public use” and “police power.” In *Berman*, the Court, reviewing whether an urban renewal project to clear urban slums in the District of Columbia satisfied a public use, stated “[w]e deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.”²⁰⁸ Justice Douglas equated the public use test with the broad police powers of the state, conflating substandard housing and blighted areas as “injurious to the public health, safety, morals, and welfare,” with the government action of taking private property in slum areas as a necessary “public use.”²⁰⁹ The Court, seemingly acknowledging and accepting the vastness of the term, pivoted to the legislature as the final determinative institution, noting that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation”²¹⁰ Then, the Court seemed to mix the police power with the public use test, noting that the “[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power to municipal affairs [and] illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive.”²¹¹

²⁰⁶ Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 680 (2015).

²⁰⁷ D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

²⁰⁸ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁰⁹ *Id.* at 31.

²¹⁰ *Id.* at 32.

²¹¹ *Id.* at 32–33.

Then, in *Midkiff*, Justice O'Connor proclaimed that, "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."²¹² Justice O'Connor went on to state that there is "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power."²¹³ Both passages from O'Connor and Douglas were odd and confusing commingling of public use and the police power, essentially broadening the scope of public use by acknowledging that, like the police power, it is expansive and mostly a legislative determination. As Bradley Karkkainen explains, the New Deal-era Court completely muddled the term "general welfare" as a result of the Court's insistence on deference to legislative determinations.²¹⁴ The term "swelled" to include a broad range of legislative "public interests" regardless of whether the public benefit or public use was reserved for a particular class.²¹⁵ Finally, in *Kelo*, Justice Stevens channeled Justice O'Connor's sentiments on the role of courts in takings review, stating that "nothing" in the opinion "precludes [state courts and state legislatures] from placing" stronger restrictions on "public use" than the federal minima as a "matter of state constitutional law."²¹⁶

Some scholars argue that "in the Court's eyes, the problematic exercise of governmental power being challenged by the property owner was the scope and purpose of the redevelopment plan, not the exercise of the eminent domain power. . . ." and that the case is better understood as a ruling on the scope of the state and local government's exercise of the police power.²¹⁷ Others have argued that the Court's *Berman* decision gave rise to a "de facto" authority to justify local government exercises of the police power.²¹⁸ But the extent and operational basis of the police power was still not really made clear by the Supreme Court, and it seems that where private property rights are

²¹² *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

²¹³ *Id.*

²¹⁴ See Karkkainen, *supra* note 40, at 899.

²¹⁵ *Id.*

²¹⁶ *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

²¹⁷ McFarlane, *supra* note 33, at 46.

²¹⁸ See Miller, *supra* note 206, at 696.

at issue, the Court is reluctant to make a conclusive determination of what is public use and what are the limitations on police power.²¹⁹ Instead, the Supreme Court has preferred to defer to legislative determinations as its fallback.

As some commentators have argued, *Berman* was not a case about the police power, nor should it have been.²²⁰ Indeed, the question was whether a federal urban renewal program that would clear slums in the District of Columbia was a justifiable “public use” under the Takings Clause. But Justices Douglas and Justice O’Connor in *Midkiff* instead equated the public use test with the broad police powers of the state. This was a departure from the separate and distinct modes of analysis between the police power and eminent domain; that is, the traditional notion that the police power regulation was noncompensable, while the exercise of eminent domain did not require a police power justification, only that the taking be for the public use upon just compensation.²²¹ As Thomas Merrill explains, “if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a ‘public use.’”²²² But, as James Krier and Christopher Serkin argue, if public use was truly coterminous with the police power, then the Takings Clause would be interpreted to mean “nor shall private property be taken pursuant to the police power, without just compensation.”²²³ Instead, they argue, equating police power with public use “seems to have done away with serious judicial scrutiny of the public-use question.”²²⁴

Part of the problem was created by Congress justifying the urban renewal project on the basis of its police power because the project would remove substandard housing and blighted areas that were, according to Congress, “injurious to the public health, safety, morals, and welfare,” thus making the taking of the property in those areas

²¹⁹ *Id.*

²²⁰ See Karkkainen, *supra* note 40, at 899.

²²¹ *Id.*

²²² Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986).

²²³ James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 862–63; see also JESSE DUKEMINIER ET AL., PROPERTY 1010, 1014 (9th ed. 2017).

²²⁴ Krier & Serkin, *supra* note 223, at 862–63.

necessary as a “public use.”²²⁵ If the police power is whatever the legislature deems it to be, then “general welfare” has no “judicially apparent enforceable limit[s].”²²⁶ Indeed, it is arguably the case that the Court’s *Berman* decision, conflating “public use” and “police power,” unraveled the “project of judicial policing of the bounds of the police power” that long served the Court’s substantive due process jurisprudence.²²⁷ One might ask, is it really the case that the Court meant to broaden the police power and general welfare to operate “without meaningful limits”?²²⁸ The problem seems to be that “a catch-all category of ‘general welfare’ was added to ‘public health, safety, and morals’ in the standard list of legitimate police power purposes, and courts and commentators came to regard the police power as exceeding the narrow bounds of nuisance prevention.”²²⁹ The expansion of general welfare into the police power constraints was not always so broad though. General welfare was both narrowly construed and defined to mean “for the mutual benefit of property owners generally” or “for the benefit of the entire public.”²³⁰

The term “general welfare” is oft-repeated by state courts in local disputes. It is an accepted truism at the state level that the police power is constrained by principles of “health, safety and general welfare.” But the term is still ill-defined. As McFarland notes, in light of *Berman*, “what is the general welfare? This is an important question without an immediately self-evident answer because of the context of social relations within which the police power is exercised.”²³¹ General welfare is universally understood to place a limit on police power actions, such as the enactment of zoning and land use ordinances to ensure such actions promote the health, safety, morals, and general welfare of the community.²³² As most state courts in New York, New Jersey, and Pennsylvania hold, “the *general welfare* is not fostered or promoted by a

²²⁵ See Karkkainen, *supra* note 40, at 900.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 896.

²³⁰ *Id.* at 896–97.

²³¹ See McFarlane, *supra* note 33, at 52.

²³² See *Cleaver v. Bd. of Adjustment*, 200 A.2d 408, 412 (Pa. 1964).

zoning ordinance designed to be exclusive and exclusionary.”²³³ And in these jurisdictions, the police power is constitutionally constrained by general welfare principles in the zoning context.

But read in the context of federalism concerns in takings, the Court’s high-profile eminent domain opinions in *Berman*, *Midkiff*, and *Kelo* offer state courts an opportunity to explore state constitutional provisions to find constraints on public use that may serve as a source of additional protections to private property beyond the post-*Kelo* legislation. There is a place for state courts to constrain exercises of police power, including eminent domain takings, and Justice Stevens’s invocation of state constitutional law as a vehicle for “placing stronger restrictions”²³⁴ on public use is where this Article sets out to propose a state constitutional general welfare doctrine. The question is what is the precise course of additional constraints. The answer lies in the inherent powers delegated to local governments by state legislatures. It is that inherent power, derived from state authority, that implicitly constrains local governments from exercising police powers, even if in the name of parochial localism, that disadvantages certain populations or has an impact on the broader region or state beyond the lines of the locality.

If “public use” and the “police power,” taken together, mean that private property may be taken so long as it is exercised to accomplish the protection of the health, safety, and morals of the community, then nothing precludes state courts from interpreting state public use clauses to provide additional (if not alternative) protections to private property than the federal baseline as a “matter of state constitutional law” by tethering general welfare to public use. State courts normatively should consider the implicit obligation of local governments to exercise their takings power to satisfy general welfare principles within or as part of the “public use” inquiry. The *Mount Laurel* saga in New Jersey provides an apt example of how general welfare principles, as a matter of state constitutional law, have been imposed to constrain local government exercises of its police power.

²³³ Nat’l Land & Inv. Co. v. Kohn, 215 A.2d 597, 612 (Pa. 1965); see also S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 448 (N.J. 1983).

²³⁴ *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

B. *General Welfare Constraints on Police Power*

There are examples where state courts, as a result of state constitutional law, have imposed constraints on police power actions based precisely on a narrowed approach to what state actions or regulations satisfy “general welfare.” A Michigan appellate court noted that the “term ‘general welfare’ . . . is not a mere catchword to permit the translation of narrow desired into ordinances which discriminate against or operate to exclude certain residential uses deemed beneficial.”²³⁵ The Pennsylvania Supreme Court, likewise, has noted that the “general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary.”²³⁶ The Court went further, noting that “of course, minimum lot areas may not be ordained so large as to be exclusionary in effect and, thereby, serve a private rather than the public interest.”²³⁷ A minority of state courts in California and New York have been explicit in their attempt to carve out a doctrine that imposes a constitutional requirement that local municipalities further the general welfare.²³⁸ Indeed, these doctrines imposing state constitutional requirements on municipalities to further the general welfare derive from several discrete areas of the law.

First, state constitutions may include an existing clause that explicitly sets forth the constitutional requirement.²³⁹ Second, state courts may implicitly read the requirement as part of the police power, and find that such power can only be exercised to further the general welfare.²⁴⁰ Third, the general welfare requirement on municipalities is frequently imposed by statute, such as standard zoning enabling laws.

²³⁵ *Green v. Lima Twp.*, 199 N.W.2d 243, 246 (Mich. Ct. App. 1972).

²³⁶ *Kohn*, 215 A.2d at 612.

²³⁷ *Id.* at 612 n.30 (quoting *Bilbar Constr. Co. v. Bd. of Adjustment of Easttown Twp.*, 141 A.2d 851, 858 (Pa. 1958)).

²³⁸ Henry A. Span, *How the Court Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001).

²³⁹ *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 415 (N.J. 1983) (“The constitutional basis for the Mount Laurel doctrine remains the same. The constitutional power to zone . . . is but one portion of the police power and, as such, must be exercised for the general welfare.”).

²⁴⁰ *Id.*

As the New Jersey Supreme Court explained in *Mount Laurel*, “the constitutional basis . . . remains the same . . . the constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare.”²⁴¹ The court went further, explaining that “any police power enactment . . . must promote public health, safety, morals or the general welfare” and that “general welfare” is indeed broad in such a manner to encompass health, safety, and morals.²⁴²

Under the New Jersey Constitution’s general welfare clause, for example, local governments are required to act in a manner that advances the health, safety, morals, and general welfare of residents by mandating that developing municipalities zone to make reasonable availability and opportunity for low-income housing developers to build affordable housing.²⁴³ This affirmative duty imposes an additional constraint on state police power.²⁴⁴ The state supreme court, thus, stated that “a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare.”²⁴⁵ The *Mount Laurel* ruling established that governments have an obligation, under their police power, to make affordable housing available and integrate communities.²⁴⁶ As the infamous *Mount Laurel* saga in New Jersey determined, “[i]t is required that, affirmatively, a zoning regulation, like any police power enactment, must promote . . . the general welfare . . . [and] a zoning enactment which is contrary to the general welfare is invalid.”²⁴⁷

Indeed, in New Jersey, “police power enactments” must conform to “basic constitutional requirements of substantive due process and equal protection [and] which may be more demanding than those of the federal constitution.”²⁴⁸ There, “general welfare” principles must be followed under the state constitution, and if they were not, then zoning

²⁴¹ *Id.*

²⁴² *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975).

²⁴³ *Id.* at 717, 723–24.

²⁴⁴ *Id.* at 724–25.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

laws are “theoretically” invalid as a matter of state constitutional law.²⁴⁹ Of course, part of the general welfare inquiry, at least in the zoning context, is whose “general welfare must be served.”²⁵⁰ For example, “when regulation does have a substantial external [statewide] impact, the welfare of the state’s citizens beyond the border of the particular municipality cannot be disregarded and must be recognized and served.”²⁵¹ As Nestor Davidson explains, “The court thus brought to the surface both the regional (spatial) and normative dimensions of Mount Laurel’s exclusion, and *Mount Laurel*’s constitutional theory relied on the intersection of those considerations.”²⁵²

It is important to note that New Jersey is an outlier state where state courts imply constitutional constraints on local police powers through general welfare principles. Further, another obstacle worth mentioning is that “general welfare” is vague and traditionally inherently a creature of political institutions.²⁵³ Like state courts in New Jersey imposing a general welfare requirement, if state courts were to evaluate eminent domain based on whether it meets general welfare requirements, instead of simply determining if it accrues a public benefit or has a public purpose, then the courts will have “only the vague notion of the ‘general welfare’ to guide” them, which makes such determinations potentially “standardless.”²⁵⁴ Nonetheless, such an outlier still provides a thoughtful foundation for thinking of ways for which state public use clauses should be tethered to general welfare principles.

C. *Equating Public Use with General Welfare*

As the Tennessee Supreme Court has noted, “state governments may enact any laws reasonably related to the health, safety, welfare, and morals of the people, subject only to the constraints imposed by . . . state

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 725–26.

²⁵¹ *Id.*

²⁵² See Davidson, *supra* note 200, at 995.

²⁵³ See Span, *supra* note 238, at 3.

²⁵⁴ *Id.*

constitutions.”²⁵⁵ Our traditional notion of public use and the police power is that any legislative act which purports to facilitate governmental efforts to reduce a hazard to public health, safety, morals, or general welfare is exempt from state constitutional constraints.²⁵⁶ But that notion, if not assumption, should be challenged. Once the state legislature has delegated the power of eminent domain to local municipalities (which it does), exercises of eminent domain become constitutional in nature and therefore could be subject to implied general welfare constraints under or within the public use clause of state constitutions. Even if local and state legislation is given a presumption of constitutionality, “a[n] [eminent domain] statute premised upon the police power” should be subject to constitutional protections under the Takings Clause and the broader principles of general welfare.²⁵⁷

The traditional approach to constraining “public use” was for state courts to “build on state public use precedents that have read ‘public use’ in state constitutional public use clauses as something narrower or more constrained than anything that might be classified as beneficial to the public or pertaining to a matter of a legitimate government concern.”²⁵⁸ While some state courts have done this post-*Kelo*, none, to the best of my knowledge, have made the doctrinal move to equate public use with general welfare principles. Some states, like Washington, offer some guidance, if not, a roadmap.

The Washington Supreme Court views the “police power” and the power of eminent domain as distinct, noting that the terms have been used “elastically and imprecisely.”²⁵⁹ That Court has interpreted its public use clause to require takings that promote “the general welfare.”²⁶⁰ As a result, one might argue that the Washington State takings clause implicitly equates public use with general welfare

²⁵⁵ *SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 472 (Tenn. 2012); *see also* *Motlow v. State*, 145 S.W. 177, 188–89 (Tenn. 1912).

²⁵⁶ *Bd. of Supervisors v. Carper*, 107 S.E.2d 390, 395 (Va. 1959).

²⁵⁷ *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 329 (Va. 1987); *see also* *Carper*, 107 S.E.2d at 395.

²⁵⁸ *Dana*, *supra* note 48, at 60.

²⁵⁹ *Eggleston v. Pierce Cty.*, 64 P.3d 618, 623 n.6 (Wash. 2003) (en banc).

²⁶⁰ *Id.* at 622.

principles.²⁶¹ The Connecticut Supreme Court has noted that “the promotion of the general welfare is made the foundation principle of eminent domain.”²⁶² In *City of Utica v. Damiano*, the court conflated eminent domain with general welfare, questioning whether there was “any reason to suppose that the power of eminent domain may not be extended under the general welfare power to encourage the development of private property to meet a compelling community economic need.”²⁶³ New York state appellate courts have consistently noted that their constitution’s “public use” definition is “broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community.”²⁶⁴

A California appellate court seemed to suggest that under its state constitution, takings for purposes of public health, safety, or morals that are not “essential to the general welfare” may not meet the public use test.²⁶⁵ These examples, however useful, can cut both ways in the takings context. On the one hand, economic development takings are arguably exercised for the very purpose of enhancing the general welfare by revitalizing blighted city neighborhoods. On the other hand, urban renewal takings arguably run afoul of general welfare principles by targeting minority neighborhoods and displacing poor residents from city neighborhoods. But the point here is that state courts, which enjoy wide-ranging latitude to offer additional (usually greater) protections beyond the constitutional baseline set by the Supreme Court, are not restricted from venturing outside the scope of the state takings clause to tether and impose a general welfare requirement in its public use test that would scrutinize local government exercises of eminent domain that run afoul of equity and inclusion.

Take, for example, *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, where the court explained that when “we

²⁶¹ *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 212 (Wash. 2000).

²⁶² *Conn. Coll. for Women v. Calvert*, 88 A.633, 646–47 (Conn. 1913).

²⁶³ See, e.g., *City of Utica v. Damiano*, 193 N.Y.S.2d 295, 300 (County Ct., Oneida Cty. 1959).

²⁶⁴ *Byrne v. N.Y. State Office of Parks, Recreation & Historic Pres.*, 476 N.Y.S.2d 42 (N.Y. App. Div. 4th Dep’t 1984); see also *225 Front St., Ltd. v. City of Binghamton*, 877 N.Y.S.2d 486, 488 (N.Y. App. Div. 3rd Dep’t 2009); *Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 848 N.Y.S.2d 214, 219 (N.Y. App. Div. 2d Dep’t 2007).

²⁶⁵ *Hunter v. Adams*, 4 Cal. Rptr. 776 (Cal. Dist. Ct. App. 1960).

inquire whether an ordinance reasonably relates to the public welfare [such] inquiry should begin by asking whose welfare must the ordinance serve . . . [b]ut . . . an ordinance . . . may be disclosed as unreasonable when viewed from a larger perspective.”²⁶⁶ Indeed, it is not the result on residents in a particular locality, but instead the entire region or state that should be considered under state constitutional general welfare doctrine. Or, as some scholars argue, general welfare principles provides “values such as equity and inclusion to bear in the doctrine.”²⁶⁷ Indeed, in theory state constitutional general welfare doctrine would “advance the actual, general welfare of the people of the state” as a result of the plenary power that the state wields over state and local matters, especially when state legislatures delegate the eminent domain power to local governments through its eminent domain codes.

IV. DOCTRINAL IMPLICATIONS

As discussed in Part I, a variety of examples exist that show how constitutional doctrines can mix to provide greater protections to private property. *Olech*’s class of one equal protection doctrine has been cross-pollinated with takings at the state level in an attempt to protect homeowners and other private property interests. Likewise, the substantially advances tests have been tethered to takings doctrine, while the Court’s exactions doctrine has been tested in eminent domain challenges to restrict local government economic development takings. And, finally, the Court’s exactions heightened standard of review has been tethered to public use inquiries. The addition of state constitutional general welfare doctrine to the mix raises questions of how the connection between general welfare and public use plays out doctrinally. Part IV provides some insight into how state courts would apply general welfare principles to the public use test in a variety of taking contexts. As explained, the source of “state constitutional general welfare doctrine” is an expansive view of local governments obligations to residents within and outside a particular locality, giving consideration

²⁶⁶ 557 P. 2d 473, 485–89 (Cal. 1976) (en banc).

²⁶⁷ See Davidson, *supra* note 200, at 987.

to the inherent delegation of state police powers, such as exercises of eminent domain, to local governments, and that such “a structural principle” should be understood to “bring values such as equity and inclusion to bear in the doctrine.”²⁶⁸

A. *Urban Redevelopment Takings*

Urban renewal is a longstanding traditional use that satisfies the public use requirement. As noted earlier, in *Berman*, a redevelopment agency sought to condemn an area of the District of Columbia to prevent, reduce, or eliminate slums. The area was decaying and blighted. But the community was not factored into the equation for redevelopment.²⁶⁹ The Court in *Berman* made no mention of “general welfare” principles as controlling its decision, and merely reiterated the concept of the police power as broad and inclusive, and that, likewise, the public use requirement was equal, if not broader, than the police power.²⁷⁰ The ruling, of course, took judicial review out of the public use equation. Yet, an implied “general welfare” inquiry within public use may narrow the public use test to restrict takings if applied in a manner similar to the *Mount Laurel* doctrine.

As McFarlane argues, the state police power should be interpreted “when the government exercises the power of eminent domain and also for proper exercises of the police power in connection with redevelopment, in general.”²⁷¹ In other words, McFarlane raises the prospect that the definition of public use should derive under a state’s police power.²⁷² She also notes that “public purpose relates to the scope of police power and the way in which local governments should exercise their power over development” as a result of *Mount Laurel*.²⁷³ She draws a link to the *Berman* decision, where the focus of the legal questions was

²⁶⁸ *Id.*

²⁶⁹ Keasha Broussard, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 105 (2000).

²⁷⁰ *Berman v. Parker*, 348 U.S. 26 (1954).

²⁷¹ See McFarlane, *supra* note 33, at 59.

²⁷² *Id.* at 59–60.

²⁷³ *Id.* at 58.

on whether the plaintiff's business was properly characterized as blighted, arguing that "there are limits, by virtue of constitutional obligations of police power" of local municipalities' exercise of urban redevelopment projects that have the effect of gentrifying or "exclusively" reconfiguring a city for the affluent.²⁷⁴

Under McFarlane's approach, exercises of the police power, including eminent domain, for purposes of redevelopment that give preference to the "wealthy" over the poor and minorities would be "improper."²⁷⁵ Indeed, major urban redevelopment projects, like the one justified in *Berman*, offer an additional source of scrutiny if general welfare principles raised in cases such as *Mount Laurel* were part of the public use inquiry under state constitutional law. In other words, a taking for the purpose of urban redevelopment that had the effect of facilitating high-end commercial and residential development would not pass muster under a state constitutional general welfare doctrine. Indeed, the question arises, "whose general welfare is served" and policy choices that ignore the needs of a diverse range of the local, regional, and state populace would be subject to further scrutiny. State constitutional general welfare doctrinal would require a municipality to show some evidence of integration and equity in an effort to avoid the displacement effects of new urban redevelopment projects. Where the government failed to show such efforts, the taking may be in violation of a state public use clause primarily because it runs afoul of general welfare principles.

B. *Prohibition on Economic Development Takings*

A similar concern regarding displacement is raised not only in urban redevelopment projects where federal monies help subsidize the costs of development, but also in economic development projects strictly driven by private investment. A general welfare inquiry as part of the public use test may offer an additional structural constraint on economic development takings that result in displacement or exclusion.

²⁷⁴ *Id.* at 7.

²⁷⁵ *Id.* at 39.

For example, “exclusionary eminent domain doctrine” is a narrow doctrinal test that specifically focuses on low-cost housing and displacement from middle-class neighborhoods in urban areas. The doctrine attacks “exclusionary eminent domain,” the phenomenon after economic development takings that leads to the loss of affordable housing and the displacement of residents from one neighborhood to another.²⁷⁶ In other words, “the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes . . . [and] are excluded not only from their homes but also from their home neighborhood or locality.”²⁷⁷ Even though exclusionary eminent domain doctrine does not expressly identify “general welfare” principles as the main source of the inquiry under public use, such a doctrine would likely fall comfortably under a general welfare inquiry in public use as part of state constitutional general welfare doctrine.

Exclusionary eminent domain doctrine’s judicial remedy requires a judge-made evaluation of a municipality’s condemnation efforts in light of the regional need for low-income housing, which is directly tied to the *Mount Laurel* doctrine in the zoning context.²⁷⁸ The proposal then requires judges to evaluate the impact of the condemnation on a fair share obligation of affordable housing with respect to those needs.²⁷⁹ This doctrine also employs a rebuttable presumption. If a local government exercises eminent domain in an urban area that results in a decrease of affordable housing below or further below its fair share obligation, then a state court may invalidate the taking.²⁸⁰ This requires the application of heightened review similar to the Court’s exactions test rather than a rational basis standard. The presumption, in other words, is that exclusionary condemnations are invalid.²⁸¹ A local government could overcome the presumption by showing a need for the economic

²⁷⁶ Dana, *supra* note 48, at 7–8.

²⁷⁷ *Id.* at 8.

²⁷⁸ *Id.* at 10.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

redevelopment project.²⁸² The doctrine, thus, shifts the burden to the municipality to show a compelling justification for the condemnation.²⁸³

The distinction with this Article's state constitutional general welfare doctrine is that exclusionary eminent domain doctrine fails to constrain the type of condemnations at issue in *Kelo* where economic development was the key driver of the taking in a middle-class neighborhood affecting middle-class homes.²⁸⁴ So, while Dana's doctrine is useful to a degree, it mostly "enable[s] state courts to constrain the use of eminent domain to exclude the poor [by focusing its inquiry on the loss of affordable housing] without undermining the use of condemnation for economic development purposes more generally."²⁸⁵ While the *Mount Laurel* doctrine is not an explicit recognition of social costs, it does include the amelioration of concentrated poverty.²⁸⁶ Mitigating poverty should be a goal in the general welfare principles set forth under state constitutional law.²⁸⁷ In other words, state constitutional general welfare doctrine would implicate exclusionary eminent domain doctrine, but provide a greater restraint on the economic development takings.

An egalitarian doctrinal vision of state constitutional general welfare doctrine imposes the principles of general welfare on any condemnation that incurs a private benefit through economic development. Many local governments use tax revenue generation as a primary reason for condemning land, even if the condemnation displaces poor or middle-class residents. The City of New London's purpose for the taking in *Kelo* was to create jobs and increase tax revenue.²⁸⁸ A general welfare constraint on the public use analysis generally would yield results that limit or completely bar economic development takings, which is a normative departure from the popular state legislative reform initiated post-*Kelo*. Where there is evidence of a

²⁸² See *id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 11–12.

²⁸⁵ Ilya Somin, *Introduction to Symposium on Post-Kelo Reform*, 17 SUP. CT. ECON. REV. 1, 4 (2009).

²⁸⁶ See Dana, *supra* note 48, at 51.

²⁸⁷ *Id.* at 62.

²⁸⁸ *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

detrimental impact on affordable housing or poor residents as a matter of general welfare under state constitutional law, the taking would be barred completely. The general welfare inquiry would also ascertain the extent to which a private benefit is incurred by the developer under an economic development taking.

C. *Constraining Blight Condemnations*

Blight removal is yet another purpose behind many municipalities' pursuit of taking private property. It is also used as an underlying motive or pretext for the primary reason for the taking; to achieve economic development. After *Kelo*, blight removal provisions under state eminent domain codes remained untouched by state legislatures, which gave rise to abuse of blight removal exemptions to achieve the broader goal of economic development.²⁸⁹ At the same time, some commentators have conceded that "judicial willingness" to rubber-stamp any determination of blight by local lawmakers" makes it all the more important for state legislatures to "tighten" the criteria for blight.²⁹⁰ The concern, of course, is that it will be used to "circumvent" restrictions on economic development takings.²⁹¹ But a state-level doctrine that equates general welfare with public use would temper concerns of municipalities circumventing the loose blight definitions under state eminent domain codes.

For example, James Ely, Jr. argues that legislatures should define blight to include property that threatens "health and safety" instead of defining blight on a neighborhood basis.²⁹² While legislatures could amend provisions to incorporate Ely's suggestion, it requires political will to do so. And given state legislatures' reluctance to unequivocally bar economic development takings, the loose and liberal definitions of blight will likely continue. Thus, it seems that the "health and safety" inquiry that Ely suggests under legislative definitions may be better served as part of the judicial inquiry under state constitutional general

²⁸⁹ Somin, *supra* note 31, at 13.

²⁹⁰ See Ely, *supra* note 48, at 136.

²⁹¹ *Id.*

²⁹² *Id.*

welfare doctrine. In other words, interpreting blight to threaten “health and safety” as part of a general welfare inquiry of public use clause may yield a constraint on takings for blight removal under state constitutional law, even in the absence of express statutory or constitutional language of “general welfare.”

Like *Mount Laurel*, the general welfare concerns derived from state exercises of zoning. Legislative action that invoked zoning laws was subject to constitutional scrutiny, even though statutes made no mention of general welfare. Likewise, most eminent domain codes do not utilize general welfare language; however, because state legislation authorizing eminent domain, like zoning, delegates the power to local municipalities, any exercise of that power at the local level subjects condemnation to constitutional scrutiny as a matter of general welfare. As Robert Bird has suggested, “[p]olitically vulnerable landowners might benefit from a closer judicial review given that imbalance of power between them and the government.”²⁹³ He argues that imposing a “modest” judicial check on blight by way of heightened scrutiny would better serve vulnerable property owners from abusive exercises of eminent domain by local governments.²⁹⁴

Perhaps state constitutional general welfare doctrine would require courts to peer into the underlying motive of a taking justified by blight removal by weighing the true intent of the taking and whether the condemnation truly sought to remove blighted, dilapidated, tax-delinquent property from a locality to preserve the integrity of a neighborhood, or to instead pursue private development and tax revenue generating goals. Any evidence of an underlying motive that runs afoul of taking private property to remove blight would be found violative of general welfare. This constraint on blight removal takings would not invoke strict scrutiny as a guiding test under general welfare, largely because such a doctrinal test would cause state courts to “determine whether or not the landowner is deserving of heightened protection.”²⁹⁵ At its most extreme, equating public use with general

²⁹³ Bird, *supra* note 47, at 266 (proposing heightened standard of review as part of blight removal justifications).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 265.

welfare principles may have the effect of forbidding blight removal takings altogether, “unless ‘blight’ is defined narrowly to include neighborhoods that impose extraordinary external costs on outsiders.”²⁹⁶ This would, as Michael Heller and Rick Hills suggest, leave exercises of eminent domain for traditional purposes to fall comfortably within the public use justifications envisioned,²⁹⁷ but demand more from the government when it seeks blight removal condemnations with the underlying motive of economic development. Such motive may be detrimental to the health and safety of low-income residents because the condemnations result in displacement and exclusion, thus running afoul of general welfare principles implied in state public use clauses. This approach to state constitutional general welfare doctrine fits neatly with the *Mount Laurel* approach to zoning. Much of the concern of exclusionary zoning by municipalities is that the exclusion results in shifting the poor to other municipalities, and that such a result is violative of general welfare principles, since municipalities must exercise zoning powers with all state residents, not just local residents, in mind. As Heller and Hills explain, blighted areas or properties that impose “extraordinary external costs on outsiders” means that only takings targeting extreme slum-like conditions that pose a threat to those living in a particular vicinity would satisfy general welfare.²⁹⁸

D. *Restricting Economic Discrimination Takings*

Finally, there is a legitimate concern that economic development takings have the effect of economic discrimination.²⁹⁹ As Ronald Chen explains, reading the concept of blight “together with appropriate general principles limiting the arbitrary use of police in a way that disproportionately affects low incomes communities” makes it

²⁹⁶ Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1470 (2008).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See Alexandre, *supra* note 47, at 5 (proposing public purpose to mean precluding displacement of the poor); see Chen, *supra* note 47, at 1020 (noting that the poor should enjoy fair treatment in condemnations).

acceptable.³⁰⁰ He draws a parallel to the *Mount Laurel* saga in New Jersey, noting that the application of equal protection used in zoning cases is applicable in the eminent domain context where “the powers of redevelopment, and the power of eminent domain in particular, are clearly among the police powers of the state” to exercise takings fairly as an obligation to the poor.³⁰¹ In other words, exclusionary exercises of police power.

Michèle Alexandre, likewise, defines “public purpose” in urban renewal projects as dealing primarily with nondisplacement of poor residents.³⁰² In other words, Alexandre proposes a redefinition of public purpose to include “a protection against displacement of economically marginalized individuals.”³⁰³ Two of Alexandre’s redefined inquiries under public purpose are familiar to this Article’s proposal. Specifically, Alexandre proposes that courts should consider whether a community had input in the planning process for urban renewal in a neighborhood.³⁰⁴ Further, she notes that courts should be weighing whether local governments and developers considered the effects of and worked towards preventing displacement of the poor.³⁰⁵ Indeed, by virtue of the fact that general welfare principles embedded in state constitutional law include considerations of “health and safety” along with “general welfare,” state constitutional general welfare doctrine would likely capture Alexandre’s concerns within a public use inquiry. In other words, community voice and city prevention of displacement are not concerns rendered strictly to a public use test, but are inherently considerations pursuant to general welfare principles as a matter of state constitutional law. Tethering general welfare to public use may provide state courts reviewing takings with the tools to inquire into governmental efforts to engage the community in the planning process or efforts to study, anticipate, prevent, and remedy the impact of displacement as a matter of state constitutional law.

³⁰⁰ See Chen, *supra* note 47, at 1020.

³⁰¹ *Id.*

³⁰² See Alexandre, *supra* note 47, at 5.

³⁰³ *Id.* at 24.

³⁰⁴ *Id.* at 25.

³⁰⁵ *Id.*

CONCLUSION

In a post-*Kelo* era, scholars neglected a lacuna left after the nationwide backlash: State courts' failure to recognize an implicit obligation of local municipalities to satisfy "general welfare" principles when taking private property for economic development purposes as a matter of state constitutional law. This Article showed that this gap can be filled by arguing that state public use clauses should be understood to equate with state police power general welfare principles—state constitutional general welfare doctrine. The doctrine offers similar protections to vulnerable property owners by requiring that exercises of eminent domain satisfy constitutional duties to take private property for the public use by relying upon general welfare principles. State constitutional general welfare doctrine would share a unique place among other examples of cross-pollination in takings jurisprudence, including the substantially advances tests, class of one equal protection doctrine, and exactions doctrine. This Article's proposal is yet another example of the fluidity and malleability of takings doctrine in providing greater protections to property owners beyond the traditional public use and just compensation dichotomy.