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BOSTON UNIVERSITY

JUDICIAL TAKINGS AND COLLATERAL ATTACK ON STATE COURT PROPERTY DECISIONS

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In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[1] the U.S. Supreme Court divided over the question whether takings alleged to have occurred as a result of *judicial* action should be treated identically to takings by legislative or executive actors. In this essay, we accept the plurality's basic contention that it makes little sense to treat judicial takings of property categorically differently than takings by other branches of government. If a judge decided to condemn property for a highway project, for example, we agree with Justice Scalia that the Constitution would compel compensation, just as it does when the legislature or executive takes private property for the benefit of the public.

Beyond the prototypical example of condemnation, however, the notion of judicial takings raises a whole new set of complications. Given the incremental and case-specific nature of common-law development, property rules evolve and morph in ways that are continually shifting the rights and responsibilities of property owners, their neighbors, and the public. If every decision effecting such a shift triggered a takings claim by the losing party, it would not only clog the court system and burden the public fisc, but also undermine the system of common-law rulemaking that has long dominated property law development. Such fears might appear far-fetched under the historically narrow definition of takings. As the Supreme Court

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1. 130 S. Ct. 2592 (2010).

broadens the type of governmental action that can constitute a taking, however, it becomes more and more plausible to contend that run-of-the-mill common-law decisions by state courts could trigger federal court scrutiny under the Takings Clause. Any judicial decision addressing new facts could be characterized as a "change" in the law and thus a taking of property from the non-prevailing party.

Beyond its general threat to common-law evolution, moreover, the specter of judicial takings raises a related but distinct concern about the ability of state courts to interpret the meaning of state-law property doctrines. *Stop the Beach Renourishment* aptly illustrates this point. The Supreme Court of Florida declared that, under Florida law, sand dumped by the government to prevent erosion constituted an "avulsion" whereby ownership accrued to the state.[2] The property owners, displeased with the Florida court's interpretation of Florida law, asked the federal courts to intervene. They sought a declaration that the Florida Supreme Court had misinterpreted prior Florida law, such that its current ruling (treating the sand dump as an avulsion) changed the law and amounted to a judicial taking.[3]

This sort of claim raises difficult questions about what standard of review a federal court should apply in deciding whether a state court's decision on a question of state property law has effectively deprived a property holder of preexisting rights. This issue is particularly salient because judicial takings theories have the potential to transform mistakes of state law into federal constitutional violations. A similar dynamic occurs in a number of other areas. Under the Contracts Clause,[4] for example, a state court's interpretation of what counts as a binding contract under state law may amount to an "impairment" that violates the federal constitution if it departs from settled state principles of contract law.[5] In *Bush v. Gore*,[6] Chief Justice Rehnquist's concurring opinion argued that a state court's interpretation of state election law could, if it departed from preexisting state law principles, violate Article II's prescription that states conduct presidential

2. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1117–18 (Fla. 2008).

3. *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

4. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

5. *See, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) (finding that state law created a contractual right, notwithstanding the state supreme court's conclusion that the right was not contractual in nature, and that subsequent state legislation unconstitutionally impaired the contract).

6. Bush v. Gore, 531 U.S. 98 (2000).

elections in the "manner directed" by the state legislature.[7] And in international law, a "denial of justice" occurs when a domestic court misconstrues domestic law in a way that harms a foreign national; supranational tribunals may thus review domestic courts' construction of their own law in order to assess whether justice has been denied.[8] Experience in each of these areas suggests that federal courts considering judicial takings claims must proceed with caution and deference if we are to avoid enabling widespread collateral attacks on state judgments and preserve the supremacy of state courts in interpreting state law.

The *Stop the Beach Renourishment* plurality suggested at least some degree of deference to state courts' construction of state property law by saying that courts "take" property only if their decisions depart from "established" rights.[9] This language suggests a further set of analogies to qualified immunity and *habeas corpus* law, which also require courts to assess whether a principle of law is "clearly established" or "new."[10] The jurisprudence in these areas is hardly a model of clarity, but the problems it grapples with are inevitable once courts acknowledge—as they must—that judges sometimes make and change the law rather than merely apply it. At a minimum, any court prepared to recognize a judicial taking must come to grips with the difficult question of distinguishing between "new" and "established" constructions of state law; that question, we suggest, should be approached with a strong dose of deference to the state courts.

We would go further, however, and largely rule out recognition of judicial takings except in the relatively rare circumstance in which a state's highest court acknowledges that it has departed from preexisting law. Under the Supreme Court's landmark decision in *Murdock v. Memphis*,[11] state courts ordinarily have the last word on matters of state law; the Supreme Court lacks jurisdiction to review state-law questions on appeal from the state courts, even if the case is

7. *Id.* at 112–13 (Rehnquist, C.J., concurring).

8. *See generally* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1172, 1189 (2005) (discussing this phenomenon).

9. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010).

10. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (holding that new constitutional rules should not be applied retroactively on collateral review of state criminal convictions); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding that executive officials generally have qualified immunity barring liability unless their actions violate "clearly established" law).

11. 87 U.S. (20 Wall.) 590 (1875).

otherwise within the Court's jurisdiction because it also presents a federal question.[12] Although a limited exception to the *Murdock* rule exists for state-law questions antecedent to a question of federal right, the instances in which the Supreme Court reviews such questions are rare. The Court engages in such review, moreover, only when strong federal interests are present and the Court has particular reasons to doubt the competence or good faith of the state courts. These rationales do not justify federal review whenever a losing property claimant wishes to argue that a state court "changed" state property law by misconstruing it. There is simply no reason to think that a federal reviewing court is more likely to arrive at the "right answer" under state property law than was the state court in the first instance. Given the high costs of federalizing state property decisions, we would simply foreclose such review entirely.[13]

I. JUDICIAL TAKINGS AND THE NATURE OF THE COMMON LAW

At first glance, it seems logical to conclude that the Takings Clause applies to *any* government action that takes "private property . . . for public use, without just compensation."[14] The language of the Takings Clause gives no reason to distinguish between legislatures, executives, and courts, leaving the logical implication that any of these state actors can commit an unconstitutional taking by depriving individuals of private property rights, for public purposes, without adequate compensation. Although at least one commentator has suggested that this textual argument is "some sort of faux formalism,"[15] we think this premise makes good sense. If a state could avoid paying just compensation by transferring its condemnation authority to the courts, that would invite a fairly obvious end run around the Takings Clause. Indeed, constitutional doctrine has avoided similar end run problems by extending the First Amendment to *all* government actors,

12. *Id.* at 635–36.

13. As we discuss *infra* Part III, claims that a *federal* court decision has "taken" *federal* property rights—e.g., by altering preexisting patent, copyright, or trademark law—raise somewhat different issues. While this sort of takings claim avoids federalism concerns, it demonstrates the potential breadth (and danger) of a broad judicial takings doctrine that finds a taking any time a judicial decision defies the expectations of property owners.

14. U.S. CONST. amend. V. *See also* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the Takings Clause against the states).

15. J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, ECOLOGY L.Q., 2 (forthcoming 2011), *available at* http://ssrn.com/abstract=1823709; *see also id.* at 4 (declaring generously that "the plurality's textual argument is so much lipstick on a pig").

even though the text is explicitly limited to "Congress."[16]

We suspect that the difficult question is not so much whether *courts*, as opposed to legislatures or executive actors, are ever subject to the Takings Clause, but rather whether that clause applies to a particular form of judicial action—the traditional development of the common law of property. Even critics of the plurality's judicial takings doctrine would surely apply the Takings Clause to a court that had been expressly delegated the state's power of eminent domain. If that is right, then the focus should not be so much on which branch of government is acting, as a purely formal matter, but on what the government is actually doing. Two aspects of the judicial action at issue in *Stop the Beach Renourishment*—a state court's interpretation of state property law—make it a particularly troublesome judicial takings candidate. First, when a state court construes and limits the scope of property rights, that process will generally be more akin to the type of regulatory action that falls within the Supreme Court's regulatory takings jurisprudence than to classic exercises of eminent domain. Second, the inherently evolutionary nature of common-law decision-making makes it difficult to determine when a court has altered state property law sufficiently to trigger a takings analysis.

Some criticisms of judicial takings seem grounded ultimately in an objection to regulatory takings jurisprudence in general, regardless of the branch to which that jurisprudence is applied.[17] In part to keep the peace among co-authors, we do not go so far. Our point is simply that the expansion of the Court's takings jurisprudence beyond the confines of eminent domain raises the stakes for a debate about judicial takings. Takings now include minor physical invasions from things like cable wires,[18] regulatory restrictions on the appropriate use of the property,[19] and even economic regulations that a reviewing court deems insufficiently "just[]" and "fair[]" in light of the

16. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (invalidating a judicial injunction against publication of the "Pentagon Papers" under the First Amendment); *see also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1456 (1990) ("The Supreme Court has unhesitatingly extended most of the noneconomic restrictions of the Constitution to judicial actions, even in the face of express constitutional language to the contrary.").

17. *See*, *e.g.*, Byrne, *supra* note 15, at 15 (arguing that "the kind of rigid *per se* regulatory takings rule favored by the *Stop the Beach Renourishment* plurality should not apply to either legislative or judicial decisions").

18. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982).

19. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922).

investment-backed expectation of the aggrieved party.[20] Takings, in other words, can result from virtually any governmental action or rule change that unduly burdens a party's interest in real property, personal property, or money for the benefit of the public.[21] The immediate benefit, moreover, need not accrue to the public at large, but can go to a private party.[22] Of course, burden alone does not establish a taking; the burdened party must prove, to the court's satisfaction, that the burden was unjust and unfair.[23] As the Supreme Court has acknowledged, however, this is an "essentially ad hoc and fact intensive" inquiry that turns on a series of highly subjective factors: "'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action.'"[24]

The expansion of the type of property "losses" that can constitute a taking may not go directly to the question of whether to treat judges differently than other governmental actors, but it certainly affects the practical import of a decision that judges can take. The fact that even purely monetary transfers can constitute a taking has created a convergence between the constitutional notion of a "taking" and the everyday business of common-law courts. Courts routinely decide cases presenting new facts, and they sometimes decide them in surprising ways. Sometimes those decisions defy the expectations of

20. Eastern Enters. v. Apfel, 524 U.S. 498, 523–24 (1998); *cf. id.* at 553 (Stevens, J., dissenting) ("[I]t seems to me that the plurality and Justice Kennedy have substituted their judgment about what is fair for the better informed judgment of the members of the Coal Commission and Congress.").

21. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part) (contending that purely economic regulation should be evaluated under the Due Process Clause rather than the Takings Clause, which should apply only when "a specific property right or interest [is] at stake").

22. *Id.*; *cf.* Kelo v. City of New London, 545 U.S. 469, 485, 489–90 (2005) (holding that an economic redevelopment plan falls within the "public use" requirement of the Fifth Amendment, even when private parties receive much of the direct benefit from the plan).

23. *See Apfel*, 524 U.S. at 523–24 ("'[T]he determination whether justice and fairness require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons,' is essentially ad hoc and fact intensive. We have identified several factors, however, that have particular significance: '[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979))). Courts dispense with this requirement of proving an unfair and unjust burden when the taking involves a permanent physical occupation of the party's property, *see Loretto*, 458 U.S. at 441, or when a regulation denies the property owner all "economically viable uses of his land," *see Lucas*, 505 U.S. at 1019.

24. *Apfel*, 524 U.S. at 523–24 (quoting *Kaiser*, 444 U.S. at 175).

parties and result in one party having to bear an unanticipated cost. If each damage assessment or injunction in such cases were open to a Takings Clause challenge, it would not only burden the federal judiciary, but would chill the process of common-law decision-making.[25] Given the breadth of property interests that can trigger takings claims, there is no reason to believe that a broad judicial takings rule would limit itself to property law; any change in tort or other state laws that resulted in unanticipated burdens on one party could invite Takings Clause challenges as well.[26]

Advocates of the judicial takings doctrine dismiss these concerns, contending that common-law courts have no greater right than legislatures to change the rules in a way that appropriates or impermissibly burdens established private property rights.[27] Accepting the logic of that argument, however, brings us to our second and more difficult question: how should a federal court evaluate whether a court has *changed* the rules to an extent that could constitute a taking? Arguably, every case presenting new facts results in some minor "change" in the law, regardless of how slight the change in circumstances. The common law is simply the cumulative body of years of such experience. It grows and evolves organically, sometimes in unpredictable ways. A court may unwittingly adopt standards in one case that fit poorly with a different and unanticipated set of facts. When that new set of facts presents itself, the court may retreat from its broad ruling and revise its legal standards to better suit the new circumstances.

Take nuisance law. For years many states, including New York, granted automatic injunctions in nuisance suits, regardless of the economic consequences, if a neighboring property owner could show that it was suffering damages that were not "insubstantial."[28] In 1970, in *Boomer v. Atlantic Cement Company*,[29] the New York Court of Appeals abandoned this long-standing rule in favor of one that

25. *See* Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 248 (2011), http://yalelawjournal.org/2011/2/18/mulvaney.html (worrying that a broad judicial takings doctrine "could serve to chill the ordinary operation of the common law system as responsive to changing conditions").

26. *Cf.* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 283 (1988) (proposing that the Takings Clause applies to states' claims of sovereign immunity in tort suits, "insofar as they bar recovery when private parties would be liable for similar conduct").

27. Thompson, *supra* note 16, at 1509–10.

28. *E.g.*, Whalen v. Union Bag & Paper Co., 101 N.E. 805, 805–06 (N.Y. 1913).

29. Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

balanced costs and benefits, allowing nuisances to continue when the underlying activity brought dramatically more benefit than harm.[30] This shift reflected a significant change in the legal entitlements of property owners living near a nuisance. Given the increasing pressure on state courts to balance costs and benefits in crafting nuisance rules, such a shift may have been predictable. But it clearly represented a departure from prior rulings that reallocated benefits and burdens among neighboring landowners.[31] Should such a departure constitute a taking, which would entitle every property owner living near a nuisance to claim compensation from the state, in addition to actual damages for their injuries, because the court reordered the remedies available to them?

We are skeptical, based on prudential, historical, and federalism concerns. We have already suggested some of the practical concerns. After all, finding takings from decisions like *Boomer* would at best discourage, and at worst preclude, judicial innovation. If every change in the law threatened takings liability, courts would be deterred from adapting the law to meet new circumstances and learning from their mistakes.

From a historical perspective, it strikes us as odd to suddenly define as a taking the kind of common-law evolution that was occurring before, during, and after the adoption of the Fifth and Fourteenth Amendments, but was never thought to raise Takings Clause concerns. The U.S. Supreme Court has not traditionally viewed state decisions altering state law as constitutionally problematic. In 1930, for instance, the Court reasoned that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions."[32] And even Justice Scalia conceded in *Stop the Beach Renourishment* that the Framers "doubtless did not" expect the Takings Clause "would apply to judicial action."[33]

30. *Id.* at 875.

31. Before *Boomer*, the threat of an injunction gave those living near a nuisance a valuable economic tool in negotiations with the perpetrator of the nuisance; they could hold out and demand a share of the profits associated with the nuisance in exchange for allowing the nuisance to continue, even when such payment substantially exceeded the damages that they suffered from the nuisance. After *Boomer*, neighbors who lived near a nuisance whose overall benefits exceeded its harms were limited to receiving actual damages.

32. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 n.8 (1930).

33. 130 S. Ct. at 2606 (plurality opinion).

The historical debate raises a difficult problem of translation:[34] On the one hand, it is too simplistic to say, as Justice Scalia did, that "the Framers did not envision the Takings Clause would apply to judicial action" because "the Constitution was adopted in an era when courts had no power to 'change' the common law."[35] As Professor Peter Byrne points out, "English common law underwent dramatic modernization in the Eighteenth Century, and American courts after independence immediately adopted English common law to suit American circumstances."[36] On the other hand, it is also "nonsense as a matter of legal history"—to borrow Professor Byrne's phrase[37]—to suggest that nothing has changed in our conception of the lawmaking role of courts in the wake of Legal Realism (not to mention Law and Economics and Critical Legal Studies). The last century has put a great deal of pressure on categorical distinctions between law and politics or courts and legislatures. If it is to perform its historical function of protecting property holders against deprivations by government, the Takings Clause must reflect these changes. But at the same time, it should not be construed to foreclose the sort of common-law evolution that the Framers valued and that we still rely upon today.

Advocates of judicial takings have two responses to these concerns about disrupting the development of the common law. First, they say that the worry about deterring innovation is not unique to judges and that legislatures, too, must take the Takings Clause into account in considering new legal rules.[38] At least one of us views this as a reason for concern about the expansion of the takings doctrine generally, and we see little reason to compound these concerns by extending the takings doctrine to judges. Because they generally act incrementally and in the context of specific factual disputes, we think courts bring particular institutional advantages to the process of legal change.[39] These specific advantages both ease some of the more

34. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

35. *Stop the Beach Renourishment*, 130 S. Ct. at 2606.

36. Byrne, *supra* note 15, at 4.

37. *Id.*

38. *See, e.g.*, Thompson, *supra* note 16, at 1499–1509 (asserting that legislatures are very conscious of takings issues due to budgetary concerns).

39. *See, e.g.*, Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 678–81 (1994) (discussing the institutional virtues of judicial decision-making); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 32 (1962) (emphasizing the courts' concern for continuity in their approach to legal change).

persuasive concerns about takings and make us particularly unwilling to deter judicial innovation.

In theory, constitutional doctrine might preserve the virtues of evolutionary judicial innovation while still compensating property holders on the receiving end of more dramatic changes, even when those changes occur at the hands of courts. The second response of judicial takings advocates is thus to interpret judicial takings narrowly, to apply only to "substantial" departures from precedent.[40] It is not clear that this narrower form of judicial takings doctrine is what the *Stop the Beach Renourishment* plurality had in mind. When Justice Scalia said that "[o]ur precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment,"[41] he seemed to leave little room to acknowledge the institutional differences between legislatures and courts or the traditional evolutionary processes of the common law. In contrast, in response to Justice Kennedy, Justice Scalia allowed that "[i]f no 'settled principl[e]' has been abandoned, it is hard to see how property law could have been 'change[d],' rather than merely clarified."[42] We suspect that some such qualification will be essential if the judicial takings position is ever to move from a plurality opinion to a majority holding.

A final set of concerns, however, leaves us skeptical as to whether even a more limited judicial takings doctrine is worth the institutional costs that it might incur. Even a doctrine limited to "substantial departures from precedent" would invite messy federal-court line-drawing over exactly how much property a state court could take if a state court could take property.[43] *Any* form of federal judicial review of state-court property decisions will implicate serious federalism concerns, regardless of the standard under which such review is conducted.

The federalism-based objection to a judicial takings doctrine rests on a particular view of the source of property rights. In our view, state courts define state property law (at least when the state legislature

40. *See, e.g.*, *id*.

41. *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality opinion).

42. *Id.* at 2606–07. Likewise, we suspect that there is enough play in the joints of what counts as an "established" property right to resist other commentators' characterization of the plurality opinion as adopting a "per se rule." *See, e.g.*, Byrne, *supra* note 15.

43. *Cf. Stop the Beach Renourishment*, 130 S. Ct. at 2603 (plurality opinion) (comparing Justice Breyer's hypothetical analysis of the takings claim to "the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood").

does not intervene). Property rights thus do not come from the federal Constitution or some *a priori* conception of property—they are whatever the relevant state authorities, usually courts, say they are.[44] While we think this is the dominant view, in contemporary jurisprudence, it is not entirely uncontroversial.[45] But it grounds our view that allowing federal courts to review every allegation that a state court has changed state property law would undermine the state courts' control of state law.

Professor Barton Thompson describes this "positivist" view of state property law as inevitably indeterminate, leaving state courts free to avoid takings claims by simply declaring that property is whatever they say it is.[46] The alternative, however, requires the adoption of a normative federal vision of "property"—property, under this approach, is whatever *federal* courts say it is in interpreting the Constitution. That, as we have suggested, would run counter to traditional understandings of the relation between state and federal law in this important area; it would also amount to a significant extension of federal authority.[47]

Professor Thompson advocates an expectations-oriented approach, which would declare an interest to be property if prior statutes and judicial decisions gave the owner a reasonable basis for believing that her ownership was established and secure.[48] This approach cannot avoid embroiling federal courts in an inquiry into the reasonableness and certainty of expectations based on state property law. It also reflects a normative vision of a background set of federal rights and entitlements that go along with property

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44. *Cf.* Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .").

45. *Compare, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 487 (6th ed. 2009) (hereinafter "HART & WECHSLER") ("The cases take the view that, in general, the question whether a 'property' interest exists is governed by state law."), *with* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . .").

46. Thompson, *supra* note 16, at 1527.

47. *Cf.* Lucas A. Powe, Jr., *Rehearsal for Substantive Due Process: The Municipal Bond Cases*, 53 TEX. L. REV. 738 (1975) (recounting how the federal courts extended their powers vis-à-vis state courts by employing their own normative views of common-law rights to supplant state law).

48. Thompson, *supra* note 16, at 1538–41.

ownership.[49] In our view, federal courts should stay out of the business of assessing the certainty and predictability of state common law; we think it unwise to move toward such a normative federal notion of property.

There may well be circumstances in which a state court decides, because of changed circumstances or patently normative reasons, to abandon a clearly defined property rule to which it had adhered for many years. Even in such a situation, we see good reason for caution in invoking the Takings Clause because of our worry about deterring judicial innovation. It would make good sense, for example, to decide that takings law simply cannot apply to a judicial decision unless the decision appropriates private property for the benefit of the general public. When a judicial decision changes the law in a way that satisfies this classic notion of a taking, however, we agree with Justice Scalia that a judicial taking can occur. Otherwise, we think federal courts should take state courts at their word and find no taking when a court applies the law to new facts, regardless of the expectations of the parties.

II. JUDICIAL TAKINGS AND STATE COURTS' CONTROL OF STATE LAW

The positivist view of property that we advocated in the preceding part makes property rights entirely a creature of the common or statutory law that creates them. This law will generally (although not always[50]) be state law. A primary reason for rejecting a broad doctrine of judicial takings thus sounds in federalism: federal court review of state property decisions in order to identify and remedy uncompensated judicial takings would interfere with the state courts' control of their own law. This Part develops the principle that state courts are the boss of state law; although we discuss areas in which the law departs from that principle, we suggest that those departures should be kept to a minimum.

49. Professor Thompson acknowledges this point, but views it as inevitable if the Takings clause is to achieve its normative goals. *See id.* at 1541 ("An expectations approach . . . is not adequate by itself to delineate constitutional property. The Court must supplement it with some normative view of property . . . .").

50. We discuss judicial takings of federally-created property rights in Part III, *infra*.

A. The Murdock *Rule*

In *Murdock v. City of Memphis*,[51] the Supreme Court held that it lacked jurisdiction to review a state supreme court's construction of state law. *Murdock* involved a direct appeal from a state supreme court that raised issues of both state and federal law; although the U.S. Supreme Court had jurisdiction to decide the federal questions in the case, the Court rejected the notion that once it had jurisdiction over the case itself, it could decide *all* the issues—both federal and state—necessary to reach a final judgment.[52] The U.S. Supreme Court's jurisdiction over appeals from the state courts, *Murdock* said, "has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law."[53] Accordingly,

> [t]he State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.[54]

As one of us always tells his Federal Courts students, that's why they call them the state *supreme* courts.[55]

The *Murdock* Court purported to rest on a construction of the 1867 Judiciary Act, which amended the 1789 Judiciary Act's provision for Supreme Court review of state-court decisions;[56] the Court avoided deciding "whether, if Congress had conferred such authority [to review state courts' decision of state-law questions], the act would have been constitutional."[57] But the *Murdock* rule has assumed a quasi-constitutional status on account of the role that it plays in our federalism. Professor Martha Field has thus explained that if the federal Supreme Court were allowed to substitute its own view of state law for that of the highest state court, "it would not be possible to identify any body of law as 'state law.' It is thus because of *Murdock* that the whole concept of state law as distinct from federal

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51. 87 U.S. (20 Wall.) 590 (1875).
52. *Id.* at 621–22.
53. *Id.* at 630.
54. *Id.* at 626.
55. Except of course in New York, where the "supreme courts" are trial courts, subject to reversal by the Appellate Division and the Court of Appeals. Go figure.
56. The current provision is 28 U.S.C.A. § 1257 (West 2011).
57. *Murdock*, 87 U.S. (20 Wall.) at 633.

law is a meaningful one."[58]

The debate about judicial takings reflects a tension between *Murdock*'s principle that state courts are the boss of state law (at least vis-à-vis *federal* courts) and the structure of certain federal guarantees, which do not specify the content of state law but forbid certain kinds of *changes* to that law. The Contracts Clause, for example, relies on state law to define the scope of contract rights, but forbids state actors to "impair the obligation" of those rights.[59] The Takings Clause requires just compensation when property is taken for public use, but leaves the definition of the underlying property rights primarily to state law.[60] In effect, both clauses allow the states to define property and contract rights as they will, but forbid the states to *change* those rights in a way that abrogates vested rights. This arrangement has produced an uneasy situation in which the U.S. Supreme Court has asserted a limited right of review over state-court decisions on state-law issues in order to ensure that the related federal rights are respected.

The early case of *Fairfax's Devisee v. Hunter's Lessee*[61] provides an instructive example of this limited right of review. *Fairfax's Devisee* was a prequel to the Marshall Court's more famous decision in *Martin v. Hunter's Lessee*,[62] which affirmed the Supreme Court's power to review state-court decisions on *federal* issues. The State of Virginia had seized land belonging to Denny Martin Fairfax, a British subject, during the Revolutionary War. The State ultimately granted the land to Hunter. Under the treaties that ended the war, seizures that occurred before a certain date would be honored, but seizures *after* the effective date would not. Fairfax's right to the land—a federal right under the treaty—thus depended on the effective date of the seizure, a question of *state* law. The Virginia Court of Appeals determined that the seizure took place before the effective date, but the U.S. Supreme Court—worried that the state courts were hostile to British subjects in general and these sorts of treaty rights in

58. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 922 (1986). Professor Field points out that, despite *Murdock*'s avowed reliance on statutory construction, its rule has become "such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it." *Id.* at 920.

59. U.S. CONST. art. I, § 10, cl. 1.

60. Some property rights, such as patents, are created under federal law. But even here, those rights are not created by the Constitution itself.

61. 11 U.S. (7 Cranch) 603 (1813).

62. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

particular—reviewed that decision and reversed.[63] As the authors of the Hart and Wechsler casebook explain, *Fairfax's Devisee* stands for the proposition that "where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination."[64]

Federal review of state-law issues that are antecedent to a determination of federal rights thus stands as an important exception to the *Murdock* rule. In *Fairfax's Devisee*, federal review involved a narrow category of state law—the effective date of revolutionary land seizures—and a narrow set of federal rights that the Court had good reason to think were the subject of unique hostility in the relevant state.[65] Judicial takings, on the other hand, threaten to create a much broader exception. In principle, any state judicial decision that departs from prior law "changes" that law, and if that change works to the detriment of a property holder, it may be construed as a taking. That means that the correctness of *any* state-court ruling on property rights is antecedent to the property holder's federal right of just compensation. It is hard to see how any disappointed property holder would not have colorable grounds to bring *any* state property ruling within the jurisdiction of the U.S. Supreme Court—or possibly induce a lower federal court to hear a collateral attack on the state court's ruling—simply by relabeling a putative error of state law as a judicial taking.

We do not think this is a promising model for federal-state judicial relations. The next section discusses analogous situations in which federal courts or international tribunals have engaged in review of state-court decisions on state law. It also considers possible options for mitigating the effect of such review drawn from other areas of federal courts law. We conclude that federal courts should engage in such review as infrequently as possible.

B. Murdock*'s Exceptions: Federal and International Review of State-Court Decisions on State-Law Issues*

Notwithstanding *Murdock*, federal courts review state-court constructions of state law in a number of contexts in which they deem

63. *Fairfax*, 11 U.S. (7 Cranch) at 626–28.
64. HART & WECHSLER, *supra* note 45, at 458.
65. *Fairfax*, 11 U.S. (7 Cranch) at 608–10.

such review necessary to protect federal rights.[66] The examples most structurally similar to the Takings Clause occur under the Contracts Clause, which forbids state "Law[s] impairing the Obligation of Contracts."[67] Because federal law generally does not define contractual rights, the existence of the underlying contract in Contracts Clause cases is a matter of state law. Nonetheless, the Supreme Court has held that, "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, [and] what are its terms and conditions" as a predicate to determining "whether the State has, by later legislation, impaired its obligation."[68] This inquiry "involves an appraisal of the statutes of the State and the decisions of its courts."[69]

The Contracts Clause cases pay their respects to *Murdock*, however, by according considerable deference to the state courts' interpretation of state law. In *Indiana* ex rel. *Anderson v. Brand*, the Court said that "we accord respectful consideration and great weight to the views of the state's highest court."[70] Other cases have gone further—rhetorically at least—and insisted that

> "if there is no evasion of the constitutional issue . . . and the nonfederal ground of decision has fair support . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court."[71]

It is not altogether clear that the different formulations one encounters in the opinions make a great deal of difference in practice; we have very few cases on the issue, in part because when the Court decides to leave a state court's construction of state law undisturbed,

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66. *See generally* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1919 (2003) (proposing that "the Supreme Court has ancillary jurisdiction to review state-court determinations of state law in cases where the Constitution or federal law imposes a duty of fidelity to prior state law . . . and the claim is that the state court materially and impermissibly departed from that law at a later point in time"); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 89 (2002) (arguing that, in order to conduct such review, "the Court should have to rebut its own presumption that state courts can be trusted to self-enforce their supremacy clause obligations when applying state law").

67. U.S. CONST. art. I, § 10, cl. 1.

68. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938).

69. *Id.*; *see generally* HART & WECHSLER, *supra* note 45, at 485–86.

70. *Brand*, 303 U.S. at 100.

71. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (quoting Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930)).

it typically denies *certiorari* because it lacks jurisdiction under the adequate and independent state-grounds doctrine. Such an action will generally occur without comment by the Court—hence the dearth of decisions fleshing out the relevant standard of review.[72] But even the few cases we do have make clear that the Supreme Court owes an obligation of deference to state-court constructions of state law even when they are antecedent to a question of federal right.

Professor Henry Monaghan has argued that "the fair support rule should be viewed as a rule of practice only," and that "the Court possesses ancillary jurisdiction *independently* to determine the content of state law whenever the Federal Constitution directly constrains its operation or incorporates it."[73] But it is unclear where this "ancillary" jurisdiction comes from. *Murdock* interpreted the state-law questions arising in federal question cases as falling outside the Court's statutory jurisdiction,[74] and Congress has never enacted an ancillary or supplemental jurisdiction statute for the Supreme Court as it has for the federal district courts. Any attempt by the Supreme Court to overrule a state court on a question of state law would raise the constitutional difficulties that *Murdock* avoided. It is thus the Court's jurisdiction to review antecedent state-law questions *at all* that rests on a shaky foundation—not the "fair support" rule. That jurisdiction, if it can be justified at all, rests on the fear that state courts are not simply deciding their own law incorrectly, but rather are deliberately manipulating it in order to avoid federal rights. Something more than a mistaken construction on a close question is thus required in order to support federal intervention.

The Contracts Clause may be largely ancient history, but the problem of federal review of state-law issues antecedent to federal rights persists. A particularly dramatic instance is then-Chief Justice Rehnquist's concurrence in *Bush v. Gore*.[75] Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[76] The Chief Justice, joined by

72. These issues of case posture also mean that the Supreme Court typically will have occasion to issue an opinion only in the rare subset of cases in which it decides to override the state court's construction of state law. The opinions we have, in other words, may well be unrepresentative of the Court's general approach to state-court constructions of state law. The more important indicator is the infrequency with which the Court engages in such review at all.

73. Monaghan, *supra* note 66, at 1964 (emphasis added).

74. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1874).

75. Bush v. Gore, 531 U.S. 98 (2000).

76. U.S. CONST. art. II, § 1.

Justices Scalia and Thomas, read this language to impose a federal nondelegation principle of sorts on state election law: state legislatures must "direct" the process for appointing presidential electors, rather than abdicating that responsibility to other branches of state government.[77] Although the state courts might ordinarily enjoy broad authority to fill gaps in state law, the Chief Justice argued that this authority is circumscribed in the context of a presidential election.[78] The concurring justices thus had to review the Florida Supreme Court's construction of state election law to determine whether that court had departed so far from the statutory framework as to engage in forbidden judicial lawmaking.[79]

As in the Contract Clause cases, the *Bush v. Gore* concurrence accorded a degree of deference to the state court's construction of state law. The Chief Justice wrote that the Court should "undertake an independent, if still deferential, analysis of state law."[80] He warned, however, that too much deference would undermine "the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."[81]

If anything, *Bush v. Gore* helps make the case for considerably greater deference to state courts in the context of judicial takings. It is hard to think of any contexts in which the federal interest in a correct construction of state law is greater than with respect to a national presidential election. Equally important, the *Bush v. Gore* concurrence's actual analysis of state law poses something of a cautionary tale. Florida's law concerning recounts in contested elections was intricate and murky, and although one can make a case that Chief Justice Rehnquist's reading of it was more persuasive than the Florida Supreme Court's, that case is hardly beyond dispute.[82]

77. *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

78. *Id.* at 112–20.

79. *See generally* HART & WECHSLER, *supra* note 45, at 490–94 (discussing the federal review of state courts issue in *Bush v. Gore*).

80. *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

81. *Id.* at 115.

82. *Compare, e.g.*, Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 23–40 (concluding that the Florida Supreme Court's decision was indefensible), *with* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407–08 (2001) (criticizing the U.S. Supreme Court's reversal of the Florida Supreme Court).

When in doubt on such a question, one might sensibly prefer the reading of a state supreme court based simply on its greater familiarity with state law in general and state election rules in particular. The failure of the *Bush v. Gore* concurrence to attract a majority of the Court or to win acceptance in the broader legal community suggests that it is hardly a model for federal-state judicial relations.[83]

Federal courts are not the only tribunals that review state-court constructions of state law; in recent years, such review has increasingly been undertaken by supranational tribunals adjudicating "denial of justice" claims under international law. In such cases, an international tribunal effectively reviews a domestic court's decision to determine whether the domestic court has violated international law by treating a foreign party to a suit unfairly—and "unfair treatment" may include an erroneous determination of the foreign party's claims. Consider, for example, two leading cases under the North American Free Trade Agreement's Chapter 11,[84] which permits private entities to file claims against the signatory countries for treating the plaintiff's investments in ways that violate international standards[85]: *Mondev International Ltd. v. United States*[86] and *Loewen Group, Inc. v. United States*.[87]

In the *Mondev* case, a Canadian corporation contracted with the City of Boston and the Boston Redevelopment authority to build a shopping mall, parking garage, and hotel in Boston's infamous "Combat Zone."[88] When the deal fell through, Mondev sued the City and the Authority for breach of contract and tortious interference with contractual relations in state court.[89] Mondev prevailed before a jury, but the trial judge entered a JNOV on the ground that the defendants were immune from suit under Massachusetts law.[90] The

83. *See, e.g.*, Byrne, *supra* note 15, at 12 (citing *Bush v. Gore* as an example of the Supreme Court's disrespect for state courts).

84. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993).

85. *See generally* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1170 (2005) (discussing examples of arbitration proceedings under Chapter 11 of NAFTA).

86. Mondev Int'l Ltd. v. U.S. (Can. v. U.S.), ICSID Case No. ARB(AF)/99/2 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002).

87. Loewen Group, Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003).

88. Lafayette Place Assocs. V. Boston Redevelopment Auth., 649 N.E.2d 820, 822 (Mass. 1998).

89. *Id.* at 824–25.

90. *Id.* at 836–37.

Massachusetts Supreme Court affirmed the judgment, holding not only that the defendants were immune, but also that the trial court had erred in finding breach in the first place.[91]

Mondev then turned to Chapter 11 arbitration under the NAFTA.[92] As the NAFTA tribunal construed it, Mondev's claim was "that by the decisions of its courts, the United States effectively expropriated the value of the rights to redress arising from the failure of the project."[93] Mondev argued that the outcome of its lawsuit amounted to a "denial of justice" under international law, a principle that implicates both "improper procedures and unjust decisions."[94] As a leading treatise explains, the denial of justice principle "recognizes that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgment itself."[95] In effect, such claims rely upon "the substantive injustice as indirect evidence of partiality . . . in the tribunal."[96] The upshot is a principle that by misconstruing its own domestic law, a domestic court may violate international law as well.

The *Loewen* case presented a similar effort to collaterally attack a state-court construction of state law in an international tribunal.[97] *Loewen* involved a business tort dispute between a local funeral home chain in Mississippi and a larger Canadian mortuary conglomerate.[98] After a Mississippi state-court trial in which the plaintiffs repeatedly appealed to patriotism and antiforeign sentiment, a jury awarded the local plaintiffs $500 million, including $75 million for emotional distress and $400 million in punitive damages.[99] Because Mississippi law required appellants to post an appeal bond equal to 125 percent of the judgment, the Loewen Group eschewed an appeal on the

91. *Id.* For further background, see Dana Krueger, Note, *The Combat Zone:* Mondev Int'l, Ltd. v. United States *and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT'L L.J. 399 (2003) (suggesting that the American victory in *Mondev* was "a hollow victory primarily based on technical grounds").

92. Mondev Int'l Ltd. v. U.S. (Can. v. U.S.), ICSID Case No. ARB(AF)/99/2 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002) ¶ 23.

93. *Id.* ¶ 59.

94. René Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 251 (2001).

95. ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 309 (1938).

96. Lerner, *supra* note 94, at 262.

97. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003).

98. *Id.* ¶ 3.

99. *Id.* ¶ 4.

merits and ultimately settled the case for $175 million.[100] It then filed a NAFTA claim, arguing both that the procedural deficiencies of the Mississippi proceedings and the substance of the state courts' rulings violated international law.[101]

The United States ultimately escaped liability in both *Mondev* and *Loewen*. Both arbitral panels insisted that they were not conducting an appellate review of the state courts' judgments—and then proceeded to conduct such a review. The *Mondev* panel engaged in searching review of the Massachusetts Supreme Judicial Court's reasoning on the contract claim before determining that there had been no denial of justice.[102] The *Loewen* panel, on the other hand, actually did find that "the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law";[103] it determined that Loewen's claim was barred, however, by its failure to pursue local remedies and a jurisdictional problem arising from a change in Loewen's national identity during the course of the litigation.[104] Despite these different outcomes, however, what is striking about both *Mondev* and *Loewen* was the degree to which supranational tribunals were willing to second-guess state courts on matters plainly within their purview—the construction of state law and the conduct of trials on state claims. Although we have yet to see a massive wave of similar international challenges to domestic-court judgments under the "denial of justice" principle, informed observers have suggested that such claims "are likely to proliferate" in the future.[105]

Denial of justice claims are structurally similar to judicial takings claims in that both begin with an allegation that a particular court—in the former case, *any* domestic court—misconstrued its own law, then

100. *Id.* ¶ 7.

101. *Id.* ¶ 39.

102. Mondev Int'l Ltd. v. U.S. (Can. v. U.S.), ICSID Case No. ARB(AF)/99/2 42 I.L.M. 85 ¶¶ 129–38 (NAFTA Ch. 11 Arb. Trib. 2002).

103. *Loewen*, 42 I.L.M. 811 ¶ 54.

104. *Id.* ¶¶ 149, 225, 240. *See also* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2041 (2004) (noting that the "technical and . . . perhaps fortuitous nature" of the grounds of dismissal "offers little reason to believe that liability for U.S. judicial conduct will not be imposed in the future").

105. Ahdieh, *supra* note 104, at 2141; *see also* William S. Dodge, Loewen v. United States*: Trials and Errors under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 575 (2002) (explaining that "domestic court review . . . is likely to be most attractive to those foreign investors with the weakest claims").

transform that allegation into a potential violation of another kind of law. Denial of justice claims thus allow supranational courts to review the decisions of domestic courts on domestic law; judicial takings claims similarly permit federal courts to review the decisions of state courts on state law. In each case, there is little reason to expect that the reviewing court will have a better chance of getting the law right than the court that considered the question in the first instance. Additionally, because denial of justice claims proceed as a form of collateral review, they multiply the potential for delay and proliferation of litigation costs that a simple appeal from the state courts to the U.S. Supreme Court would present. Depending on the remedies available for judicial takings—a difficult question that we touch on only briefly in this article—takings claims may pose a similar risk.

A final analogy may pose a helpful perspective on the scope of the intrusion on state courts that a robust judicial takings doctrine would represent. Supreme Court review of state-court decisions has always been a limited check on errors and bias; a single appellate tribunal simply cannot hope to police fifty state courts, especially when it is also responsible for overseeing thirteen busy and often fractious federal circuit courts.[106] The more important federal judicial constraint on the state courts is the system of *collateral* review of state-court proceedings by federal writs of *habeas corpus*. This system effectively allows the lower federal courts to stand in for Supreme Court direct review to ensure that state courts are respecting federal rights.[107] Unlike the sporadic and aberrational Supreme Court review of state questions antecedent to federal rights or the nascent system of denial of justice review by supranational tribunals, the *habeas* system is well-developed.

Four points about the *habeas* system are critical for present purposes. First, it arose by deliberate legislative choice in response to specific and compelling historical circumstances. During

106. *See, e.g.*, Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335 (2002) (noting a dramatic decline in the number of state supreme court cases in which the U.S. Supreme Court grants certiorari).

107. *See generally* Brown v. Allen, 344 U.S. 443 (1953) (holding that *habeas* petitioners may relitigate claims that their convictions violated federal rights, even though those claims were fully and fairly litigated in the state courts); HART & WECHSLER, *supra* note 45, at 1229–30 (discussing the view that "habeas jurisdiction, though not technically appellate review by district courts, serves as a substitute for Supreme Court review to ensure that federal constitutional claims are heard by a federal court").

Reconstruction, Congress for the first time established the federal courts as the primary guarantors of federal rights by enlarging those courts' jurisdiction over federal claims, providing new remedies for individuals whose rights had been violated by state officials, and extending the federal *habeas* remedy to persons in state custody.[108] Contemporary concerns about judicial takings among property rights advocates, however, have not persuaded Congress to authorize specific federal remedies or to constrain the common-law powers of state courts.

Second, federal *habeas corpus* review of state-court proceedings is confined to a particular subject matter (criminal procedural rights) that was deemed to present a unique concern about state respect for federal rights. However compelling a judicial takings claim may be in particular instances, we are unaware of any *general* concern that the states have been insufficiently solicitous of property rights, much less that the state courts are inadequate fora for protecting those rights. If anything, the widespread state efforts to constrain takings in the wake of *Kelo v. City of New London*[109] suggest that concern for property rights is alive and well in the states.[110]

Third, the *habeas* system generally does *not* review the state courts' construction of their *own* law; review is confined to state-court compliance with federal norms that are distinct, substantively speaking, from the state-law questions arising in criminal cases. Hence, federal *habeas* courts do not consider whether state courts have correctly construed their criminal statutes. Federal courts have even eschewed any general license to inquire into whether the individual petitioner was properly found guilty under those statutes—that is, *habeas* law generally considers the actual guilt or innocence of the defendant to be a state-law question outside the scope of *habeas* review.[111]

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108. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (extending the federal writ of *habeas corpus* to prisoners in state custody); HART & WECHSLER, *supra* note 45, at 1220–23 (discussing the history of the *habeas* extension).

109. Kelo v. City of London, 545 U.S. 469 (2005) (permitting governments to use their eminent domain powers to take private property for the purpose of economic development).

110. *See, e.g.*, Rhode Island Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 108 (R.I. 2006) (holding that a parking garage seized for use as airport parking was not for a public use or purpose).

111. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) (holding that a criminal defendant must have a constitutional claim independent of an assertion of his innocence in order to be entitled to habeas review).

Finally, federal *habeas* review is pervasively constrained by norms of deference—both statutory and judge-made—to state courts. State courts' findings of fact must be treated as presumptively correct, and even state courts' decisions of mixed questions of fact and (federal) law must be accorded deference on collateral attack in federal court.[112] Numerous other procedural limitations, such as strict rules of exhaustion and procedural default,[113] insist on respect for the primary role of the state courts in criminal cases.

The structure of the *habeas* regime demonstrates that even in an area of particular historical mistrust of state courts—where collateral review of state-court judgments is explicitly authorized by statute—both Congress and the federal judiciary have respected the autonomy of state courts and tailored their interventions to avoid federal review of state constructions of state law. It would be odd indeed if, without any prompting from Congress or evidence that state courts have frequently changed state property rights in ways detrimental to rightholders, the federal courts were to fashion a more intrusive regime of federal review for judicial takings.

III. FEDERAL PROPERTY RIGHTS AND THE POTENTIAL FOR FEDERAL JUDICIAL TAKINGS

The analysis is somewhat different for alleged judicial takings involving *federal* property rights. Here, the paradigm case is patent law: federal law creates property rights in patents, and those rights are (pretty much) exclusively interpreted by the federal courts.[114] Hence, a

112. *See* 28 U.S.C.A. § 2254(d) (West 2011) (precluding *habeas* relief unless the state-court decision was either (i) contrary to or an unreasonable application of clearly established law or (ii) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding); Williams v. Taylor, 529 U.S. 362, 383–84 (2000) (holding that state-court decisions on mixed questions are entitled to some degree of deference).

113. *See* 28 U.S.C.A. § 2254(b)–(c) (West 2011) (codifying the exhaustion doctrine); *see generally* Wainwright v. Sykes, 433 U.S. 72 (1977) (procedural default).

114. We say "pretty much" because patent issues can still arise in state courts in certain circumstances. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), for example, involved a dispute between the maker of one device and a competitor, who made a similar device and owned a patent on that device. *Id.* at 258. The competitor alleged to potential customers that the first device infringed the competitor's patent, but did not actually sue for patent infringement. *Id.* Instead, the maker of the first device sued the competitor for libel under state law. *Id.* This suit was held to arise under state law, notwithstanding the fact that the key issue litigated in the case would be the question of infringement as an element of the competitor's truth defense to the libel claim. *Id.* at 259–60. This case is the original source of the "Holmes Rule" for federal question jurisdiction, which is that a case ordinarily arises under the law that creates the plaintiff's cause of action. *Id.* at 260; *see generally* HART & WECHSLER, *supra* note 45. As *American Well Works* illustrates, the jurisdictional statutes have gaps that

Federal Circuit decision that departed significantly from prior law in a way that diminished a patent holder's rights might well raise similar judicial takings issues to the state-court scenarios that we have been discussing. As Justice Kennedy acknowledged in a recent decision,

> Fundamental alterations in [patent] rules risk destroying the legitimate expectations of inventors in their property. . . . "To change so substantially the rules of the game now could very well subvert the various balances the [Patent and Trademark Office (PTO)] sought to strike when issuing the numerous patents which have not yet expired . . . ."[115]

As one of our former students has argued in an excellent note, "when the Federal Circuit makes a fundamental change in the law that dramatically departs from settled precedent, that change should raise questions under the Takings Clause of the Fifth Amendment."[116]

Without a doubt, a federal judicial decision concerning a federal right may undermine people's expectations about the existence or value of their property in much the same way that a state-court construction of property law can. Indeed, we can think of several instances in recent years where the federal courts have changed course in a way that disrupted expectations and narrowed the subject matter or scope of intellectual property rights. In the trademark area, the Supreme Court swung broadly in favor of protecting trade dress through the mid-1990s, but thought better of its largesse and scaled back on such protection just a few years later.[117] In patent law, the Court disrupted decades of settled practice by abandoning the presumption in favor of injunctive relief against infringers.[118] In none of these cases did the Court acknowledge changing course; it

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allow patent issues to be litigated in the state courts from time to time.

115. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 739 (2002) (quoting Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 32 n.6 (1997)).

116. J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747, 1749 (2005).

117. *Compare* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 774 (1992) ("We see no basis for requiring secondary meaning for inherently distinctive trade dress protection under § 43(a) but not for other distinctive words, symbols, or devices capable of identifying a producer's product."), *with* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 216 (2000) (treating product design trade dress as incapable of being protected without secondary meaning); *see also* TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 32 (2001) (denying trademark protection to features that are part of what make products work, despite years of case law recognizing such protection).

118. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006) (requiring a plaintiff seeking an injunction to show irreparable harm, no other adequate compensation, that an injunction is warranted, and that ordering such would not be contrary to public policy).

distinguished its earlier decisions and purported to be acting consistent with them. In both the patent and trademark context, however, the intellectual property claimants could make a strong showing that prior case law gave them reason to have confidence in the existence and scope of their rights.

The prospect that judicial decisions like these could be classified as takings reinforces our worry about a broad, expectations-based judicial takings doctrine. If a federal court ran the risk of "taking" property each time it recognized a new limitation on intellectual property rights, judges might hesitate to adopt such limits, even when they would best serve the interests of the intellectual property system and the public. Any such risk aversion, moreover, would always work in one direction: to deter judicial innovations that limit intellectual property rights, rather than the other way around.

In any event, because of structural considerations judicial takings are likely to play a less significant role in the context of intellectual property or other federal law. A state court can change state property law because it is endowed with common-law authority to *make* the law of the state; this is the source of its authority to take actions that may trigger an obligation of just compensation under the Takings Clause. Federal courts, on the other hand, generally lack that power.[119] So-called "federal common law" is most often either a somewhat more open-ended form of statutory interpretation or interstitial gap filling that is itself unlikely to radically change property rights in a way sufficient to effect a taking.[120] The federal judicial decisions that people usually point to as raising takings questions—e.g., patent cases—usually involve changes in the way that federal courts interpret important federal statutes.

When they interpret federal statutes, federal courts are supposed to follow the intent of the enacting Congress. Of course there is ambiguity in many federal statutes, and of course the way that courts respond to such ambiguity may change over time. But in principle—and it is an important principle—federal courts simply lack the power to *change* federal statutes. That principle is reflected in the nearly

119. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[t]here is no federal general common law").

120. To the extent that federal common law may go further, one of us would be inclined to say that it is unconstitutional. *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1679 (2008) (arguing the importance of restricting the scope of federal common law in order to maintain the divisions inherent in the federalist system).

absolute rule of *stare decisis* that the Supreme Court has adopted for statutory construction decisions.[121] This means that if the Federal Circuit substantially departs from the prior meaning of the patent statute, that decision is wrong and should be reversed—but it is not a "taking." Takings law assumes that the relevant government actor actually possesses the authority to change the law, so long as it compensates injured property holders, and that is a power that federal courts simply lack.

We recognize that the interstices in intellectual property statutes can be substantial, leaving courts to make important substantive decisions in intellectual property cases. In some other areas of federal law, too, courts may have been delegated—or at least think they have been delegated—common-law powers by Congress. Admiralty is the classic example,[122] although one of us is pretty sure that the common lawmaking power exercised by federal admiralty courts is unconstitutional,[123] and in any event federal maritime law is largely a creature of statute nowadays. To the extent that Congress can and has validly delegated lawmaking authority to the federal courts, judicial decisions in intellectual property cases raise issues identical to the state property cases discussed above. If takings analysis is to apply at all to such cases, we think it important to limit it to cases involving clear, acknowledged changes in the law, resulting in a transfer of a property right from a private property owner to the government. But we think these circumstances are extremely rare, if they exist at all.

IV. CONCLUSION

On its face, the Takings Clause does not distinguish between judges, legislatures, and executive actors, which makes the notion of judicial takings superficially appealing. A robust judicial takings doctrine, however, would radically transform the way that state courts go about the business of deciding disputes and thereby shaping the common law. Even a relatively deferential approach to judicial takings would inevitably embroil federal courts in disputes over the

121. *See* Ill. Brick co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

122. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 ("Admiralty law is judge-made law to a great extent.").

123. *See* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 276–77 (1999) (arguing that broad federal common-law powers in admiralty cases are inconsistent with modern preemption law and the core precepts of federalism).

meaning of substantive state law. In our view, history, prudence, and federalism concerns all argue against recognizing judicial takings, unless the state court actually acknowledges that it is substantially changing the preexisting law in a way that burdens property owners for the benefit of the general public. In effect, this standard would treat courts the same as legislatures and executive officials when they self-consciously change the law, but bar takings claims that are, in reality, simply collateral attacks on an alleged error in interpreting state law. Except in unusual situations, judicial takings should remain the stuff of law review articles and plurality opinions, rather than the law of the land.