
Article

**Protecting Property Through Politics:
State Legislative Checks and Judicial
Takings**

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INTRODUCTION

A dominant theme in the legal and political literature is that the legislative function and its attendant rent-seeking threaten property rights and promote their coercive redistribution.¹ Yet, as some scholars have recognized, in certain circumstances politics may promote private property protection.² I view this debate through the lens of judicial takings, a doctrine espoused in a plurality opinion in the 2010 Supreme Court

1. See, e.g., Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850–1915*, 54 ALB. L. REV. 301, 355 (1990) (describing how courts distrusted political solutions to regulating land use competition); Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 916 (1993) (discussing harms to democracy from resource entitlement destabilization by the political process). This argument is central to the voluminous literature examining the impact of rent-seeking special interests groups, as well as to Richard Epstein's work on takings. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 199–209 (1985) (voicing concerns about rent-seeking factions gaining the property of others); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1586–90 (1986) (reviewing EPSTEIN, *supra*) (describing the centrality of the rent-seeking concern to Epstein's theory of takings). For literature on the dynamics of legislative rent-seeking, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 132–67 (1971) (discussing theoretical underpinnings of special interest groups); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–31 (1985) (describing the power of “discrete and insular minorities” to capture the legislative process).

2. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 339–40 (1995); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 137–38 (1992); cf. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 155 (1992) (arguing that property rights should not be left entirely to political process).

case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.³ The discourse on judicial takings has focused on the constitutionality and comparative institutional competence of federal courts versus state courts to address judicial property activism.⁴ This Article brings a neglected player to the fore—state legislatures. I advance a state legislative process theory, grounded by takings federalism, that calls into question the need for judicial takings and reveals underappreciated benefits of the status quo. State legislative checks of court activism suggest one explanation for why judicial takings protection has not developed in either the federal or state systems—and an argument against adopting a federal judicial takings doctrine now.

In *Stop the Beach*, the Supreme Court addressed whether a Florida Supreme Court decision to uphold Florida's Beach Shore Preservation Act effected an unconstitutional taking of private property rights.⁵ After sanding a seventy-five-foot wide strip to create new shorefront, the state replaced the mean high water line with a "fixed erosion control line," which meant that the state owned the restored portion of the beach and any future accretions (i.e., gradual additions of sand to the beach).⁶ The U.S. Supreme Court held that there had been no taking because under *Martin v. Busch*, an obscure Florida precedent brought to light in the U.S. Solicitor General's amicus brief,⁷

3. 130 S. Ct. 2592 (2010).

4. See *id.* at 2619 (Breyer, J., concurring) (voicing concern about federal judges playing "a major role in the shaping of a matter of significant state interest—state property law"). For academic scholarship on this point, see D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 932–36 (2011) (analyzing tensions of federal court review of state court decisions); Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 116–18 (2011) (discussing judicial federalism concerns); Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 561 (2012) (examining principles that limit federal review of state court decisions); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 251–59 (2011), <http://yalelawjournal.org/images/pdfs/946.pdf> (discussing the relationship between judicial takings and due process).

5. See *Stop the Beach*, 130 S. Ct. at 2600–01 (citing *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116–21 (Fla. 2008)).

6. *Id.* at 2599 (citing FLA. STAT. §§ 161.161(3)–(5), 161.191(1)–(2) (2010)). The state assumed ongoing obligations to maintain the restored beach and did not claim any rights of public use. *Id.*

7. Brief for the United States as Amicus Curiae Supporting Respondents at 26, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3183079 at *26 (citing *Martin v. Busch*, 112 So. 274, 284–85 (Fla. 1927)).

man-made avulsions that expose previously submerged land seaward of the littoral property belong to the state.⁸

The constitutional innovation in *Stop the Beach* came when a plurality of four of the eight sitting Justices announced that the Fifth Amendment Takings Clause should apply to the judiciary—a doctrine without precedent beyond passing reference in a few cases and discussion in two law review articles.⁹ Rejecting due process protection as insufficient, the plurality maintained that if “a court declares that what was once an established right of private property no longer exists, it has taken that property.”¹⁰ State court decisions that “merely clarify and elaborate property entitlements” are not judicial takings.¹¹ Justice Scalia, writing for the plurality, offered a textualist justification: the Takings Clause “is not addressed to the action of a specific branch or branches . . . the particular state actor is irrelevant.”¹² The plurality further concluded that state courts cannot redress state supreme court takings and that these cases must be heard by the ostensibly less compromised federal courts.¹³

Judicial takings doctrine, at least in the expansive form proposed by the plurality, is a costly innovation.¹⁴ Scholars have described the potential harms from judicial takings, prin-

8. See *Stop the Beach*, 130 S. Ct. at 2596. “Avulsion” refers to the sudden loss or addition of land by the force or action of water. See *id.* at 2598. But see Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 37, 65 (2011) (arguing that the Supreme Court misinterpreted *Martin v. Busch*).

9. See *Stop the Beach*, 130 S. Ct. at 2602. For early scholarly discussions of judicial takings, see Williamson B.C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts “Take” Property?*, 2 U. HAW. L. REV. 57, 78 (1979); Barton H. Thompson Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1472–1512 (1990).

10. *Stop the Beach*, 130 S. Ct. at 2602. In the plurality opinion, Scalia rejected the notion of “using Substantive Due Process to do the work of the Takings Clause,” arguing that to do so would require reliance on a “more generalized notion of Substantive Due Process” despite “an explicit textual source of constitutional protection.” See *id.* at 2606 (internal quotation marks omitted) (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994)).

11. *Id.* at 2609.

12. *Id.* at 2601–02.

13. See *id.* at 2609.

14. Of course, costliness depends on the breadth and construction of judicial takings doctrine. See, e.g., Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 90 (2012) (noting that applying certain limiting principles would make judicial takings “something rarely encountered in the wild”).

cipally the chilling of common law development and infringement on state autonomy.¹⁵ A spate of scholarship also details how judicial takings will waste judicial resources, hamstring environmental protection and responses to climate change, create perverse litigation incentives, and threaten the internal consistency of federal takings jurisprudence.¹⁶ Even a narrowly crafted judicial takings doctrine has the potential to increase litigation and court costs and, in some cases, frustrate public efforts to protect property.¹⁷ In view of these costs, it is worth examining existing institutional mechanisms more closely in considering whether to adopt judicial takings, and if so, how broadly to define this doctrine.

The narrative that accompanies judicial takings is that state courts are prone, or at least vulnerable, to overreaching and “taking” private property rights and when this occurs there is no effective check.¹⁸ State legislative protection is a counter-narrative that has been ignored in the judicial takings debate, which has focused on the propensity of state courts to overreach and the capacity of federal courts to address these abuses. In the unusual instances when radical state court decisions eliminate clearly established property rights, state legislatures often respond with legislation that restores most or all of the original private property entitlement.¹⁹ State legislative checks not only revise state court judgments *ex post*, they also influence courts

15. See Dogan & Young, *supra* note 4, at 115–16 (discussing costs to common law development and federalism); Mulvaney, *supra* note 4, at 266 (“[T]he new judicial takings construct may very well threaten the ability of the law to adapt and evolve in the face of changing economic, environmental, social, and technological developments.”).

16. See, e.g., Donna R. Christie, *Of Beaches, Boundaries and SOBs*, 25 J. LAND USE & ENVTL. L. 19, 71–72 (2009) (discussing the consequences of judicial takings doctrine on legal responses to climate change); Michael B. Kent, Jr., *More Questions than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 VA. ENVTL. L.J. 143, 156–66 (2011) (examining the unresolved questions about the relationship between judicial takings and regulatory takings as prescribed by *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 335–54 (2011) (describing the perverse incentive created by a judicial takings for underinvesting in litigation to clarify common law property rights).

17. *But see* Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 557 (2012) (contending that in some circumstances judicial takings can provide beneficial transition relief for property law changes).

18. See, e.g., Thompson Jr., *supra* note 9, at 1495–98.

19. For case studies of legislative checks in Hawaii, Minnesota, Utah, and California, see *infra* Part II.

ex ante toward property stability. Legislative revisions offer other advantages: state legislatures can adopt middle ground solutions, pay off losers, frame revisions to build consensus and increase political palatability, and, through their role as state constitutional backstops, perhaps even fortify legislators' constitutional commitments.²⁰

A recent example of a state legislative check of judicial property activism is the case *Conatser v. Johnson*, in which the Utah Supreme Court abruptly eliminated riparian owners' riverbed property rights.²¹ Breaking with longstanding precedent and state understanding of public water rights, the Utah Supreme Court held that the public had the right to stand on riverbeds, opening up a massive fishing industry within feet of private homes and retreats.²² The legislature responded swiftly with the Public Waters Access Act that restored the property rights to the private riverbed owners, the original entitlement holders.²³ The legislature also offered a degree of implicit compensation to the losing recreational users by granting rights of portage and adverse possession and by prohibiting the practice of stringing wire across rivers to block recreational users.²⁴

In a legislative process model, state court restraint works in a balanced tandem with legislative revision. Legislative checks are too resource intensive and variable to serve as a first-line response. State courts have evolved doctrinal substitutes for judicial takings, such as state common law doctrines of vested rights, that orient courts toward property rights stability and conservatism.²⁵ Political pressures on elected state court judges also mitigate judicial activism. We need not char-

20. Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–58 (1999) (arguing that the federal courts' robust constitutional role reduces attention to constitutional concerns by Congress).

21. See 194 P.3d 897, 902 (Utah 2008).

22. See *id.* (“[E]very private landowner to whom the [public water ownership] easement applies [is] subject to the reasonable burdens imposed by the easement. These burdens include the public’s right to both travel over private property when floating and to touch the water’s bed while floating.”).

23. See UTAH CODE ANN. §§ 73-29-201(3), -202(3) (West 2012).

24. *Id.* § 73-29-202(2) (granting the right to “portage around a dangerous obstruction”); *id.* § 73-29-203(1)(a) (“Public recreational access is established if: the private property has been used by the public for recreational access requiring the use of the public water for a period of at least 10 consecutive years”); *id.* § 73-29-207 (allowing a land owner to place a fence across public water, but requiring the fence to be in compliance with other state and local laws).

25. See *infra* Part I.A.

acterize state court judges as rent-seeking political actors or anti-majoritarian angels to recognize that they operate within political networks characterized by a non-trivial degree of pressure from campaign financing (primarily by business and conservative interests) and electoral scrutiny.²⁶ If these political influences affect state court decisions, they cut more often than not in the direction of private property *protection*, at least with respect to in-state owners and rights.²⁷

No system, whether state legislative checks or a newly minted judicial takings doctrine, is fail-safe (e.g., judicial takings require costly appeals that some would-be claimants cannot afford to pursue). Majoritarian support or strong interest group support for a “judicial taking” can block legislative checks. State legislatures may have little motivation to check state supreme court decisions that validate favored enactments. When legislative revision does occur, it is not invariably efficient or fair. Certainly, there are examples of dysfunctional legislation in the histories of state and local land use regulation.²⁸ Accordingly, the robust role of state courts as a first-line defense is important, as is the vigorous politics that attend the high-stakes natural resource and land use contexts of most alleged judicial takings.²⁹

26. This is a political iteration of social networks theory. See Mark Granovetter, *The Strength of Weak Ties*, 1 SOC. THEORY 201, 203–07 (1983).

27. In some instances, lower court judges may have political motives to favor local interests in their property rights adjudications; however, the panel or en banc structure of state supreme court review addresses this sort of local bias. For an example of a controversial state court treatment of out-of-state property interests, see *In re SRBA*, No. 24546, 1999 WL 778325 (Idaho Oct. 1, 1999), *superseded on reh'g*, *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270 (Idaho 2000) (Justice Silak’s controversial opinion); John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 238–54 (2001).

28. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 625 (1981) (describing how a municipal legislature rezoned the landowner’s property to open-space intending to acquire the property and retained the zoning without compensation after the voters failed to approve funding for the park).

29. See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992) (noting that victims of takings have the organizational advantages of forming a small group with high stakes, sharing a geographic connection, and appealing to political parties or groups); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 235 (2004) (distinguishing takings questions from “free speech or equal protection controversies that typically pit a disenfranchised individual with an unpopular cause against the power of the state”).

My account of state legislative process protection for judicial takings hews to takings federalism and the rationales underlying the Supreme Court's longstanding delegation of much of regulatory takings doctrine to state courts.³⁰ Stewart Sterk describes how the Supreme Court has implicitly delegated power to the states by adopting a balancing test that establishes a high threshold for unconstitutional regulatory takings, relies on state law to define the "reasonable investment-backed expectations" component of that test, and almost invariably upholds state court determinations.³¹ As Sterk explains, this is not a matter of muddled takings jurisprudence but of federalism.³² Regulatory takings claims involve state- or local-level law and conflicts that federal courts lack the expertise, resources, and desire to resolve.³³ As a result, the Supreme Court has de facto devolved primary responsibility for regulatory takings doctrine to the states.³⁴ In the context of judicial takings, takings federalism undermines the case for expanding the Fifth Amendment's Takings Clause to encompass courts. Making the offending state supreme court a primary author of the judicial takings doctrine and substantive property law that will pur-

30. See Sterk, *supra* note 29, at 206–07, 254.

31. See *id.* at 251 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)) (internal quotation marks omitted).

32. See *id.* at 270–71.

33. See *id.* at 233 ("A statute or regulation enacted in one jurisdiction might pass constitutional muster even though an identical statute in another jurisdiction has proven constitutionally infirm—all because of a difference in background state law.").

34. See Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 498 (2000) (arguing that "the Court should give state and local governments a fairly wide berth when determining whether a landowner should be compensated for the developmental effect of land use regulations"); Marc R. Poirier, *Federalism and Localism in Kelo and San Remo*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 101, 117 (Robin Paul Malloy ed., 2008) (noting that the Supreme Court "in effect defer[s] to state court policing of state and local government implementation of the eminent domain power, whether via the federal public use clause or for other reasons and doctrines"); Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1684 (2007) ("[T]hough the federal courts are now much more active in takings cases than they once were, their decisions continue to leave the vast bulk of property and land use supervision to the state courts." (citing Sterk, *supra* note 29, at 238–44)); Sterk, *supra* note 29, at 206 ("The Supreme Court's . . . balancing test, which, as a matter of practice, results in deference to the state courts, recognizes the institutional advantages state courts enjoy in constraining regulatory abuse." (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978))).

portedly constrain it leaves the alleged judicial fox guarding the henhouse. Conversely, rigorous federal scrutiny and a robust judicial takings doctrine developed by federal courts not only chill state common law development but cast the Supreme Court back into the state law waters it has so studiously sought to exit.

The central thesis of this Article is that in view of takings federalism and the costs of judicial takings, the existing balance of state legislative checks and state court restraint works well enough to police against state court activism with respect to property rights. The Article proceeds in four parts. Part I describes the mechanisms of restraint that orient state court judges toward property rights stability. The limited number of state legislative checks of judicial “takings” are due in substantial measure to doctrines and norms of judicial restraint that make radical judicial confiscation, and the need for legislative revision, an unusual occurrence. Part II, the heart of the Article, advances a legislative process theory of judicial takings grounded in case studies of state legislative checks. I explore the comparative institutional advantages of situating judicial revision primarily in state legislatures. Part III considers the potential unintended consequences of the judicial takings doctrine elaborated in *Stop the Beach* for state legislative process. Part IV discusses the implications of my analysis, with particular attention to takings federalism, and addresses possible objections to my account. Throughout the Article, I assume that judicial takings doctrine is likely to follow the contours of regulatory takings doctrine, at least loosely, by requiring a substantial degree of property rights interference and by affording less protection to use rights. I leave as open questions the degree of judicial takings protection afforded to owners (i.e., the threshold for success) and whether temporary takings damages will apply under *First English*.³⁵

I. BASELINES OF RESTRAINT: DOCTRINAL AND POLITICAL CONSTRAINTS ON JUDICIAL ACTIVISM

Because of the high costs of legislative lawmaking, a legislative process approach to judicial takings requires that the state courts not tax legislatures too heavily with activism. As Isaac Ehrlich and Richard Posner have observed, legislation is

35. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

“an extremely expensive form of [law] production.”³⁶ This Part considers how doctrinal, institutional, and political forces constrain courts and limit property rights radicalism. The *Stop the Beach* plurality’s expansive judicial takings doctrine, which would apply to any judicial interpretation that eliminates a common law property right and possibly encompass private party cases, implies that state court overreaching is a problem of magnitude and breadth.³⁷ Some of the scholarly response, even that opposed to judicial takings doctrine, has accepted to a significant degree the narrative of state court property rights abuses—a major critique is not that state court judges are more constrained than assumed, but that federal court judges may be similarly activist.³⁸ Yet, neither the Supreme Court nor commentators advocating judicial takings have offered more than a handful of examples of state court property “takings,” much less systemic evidence of property rights overreaching, by state courts.³⁹

36. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1974).

37. See Mulvaney, *supra* note 4, at 260–01 (noting inconsistent language in the *Save the Beach* plurality opinion that “raises the question of whether the plurality’s standard applies where a state court, in adjudicating an exclusively private dispute, clarifies a property rule in a manner that effectively results in a private-to-private reassignment”).

38. See William P. Marshall, Keynote Address, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL’Y 1, 26 (2011) (“The premise that judicial decisions inevitably reflect political bias does not allow for exception and does not exclude Justices sitting on the United States Supreme Court.”); Peñalver & Strahilevitz, *supra* note 16, at 328–29 (describing risks for judicial wrongdoing). *But see* Lehavi, *supra* note 4, at 579–80 (arguing that judicial interpretations of broad legislative standards or legal issues left unaddressed in state statutes are an exercise of legislatively delegated authority, not a judicial taking).

39. See, e.g., Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 92–100 (2011) (arguing that the “principle [of judicial takings] follows logically from both the text and the original meaning of the Fifth Amendment”). Discrete examples of state court property activism include *County of Hawaii v. Sotomura*, 517 P.2d 57, 57–58 (Haw. 1973), *cert. denied*, 95 S. Ct. 132 (1974) (holding that landowners were not entitled to compensation for land below the seaward boundary line of an ocean front lot condemned by the state for public use) (reversed on appeal to federal district court), and *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330, 1345 (Haw. 1973), *adhered to on reh’g*, 517 P.2d 26 (Haw. 1973) (holding that “owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water, but no property in the water itself”).

What is the basis of the apparent belief of much of the Supreme Court and many legal commentators that state courts have a proclivity toward abusing or unsettling private property rights? In recent opinions, the Supreme Court has subscribed to a political view of state court judges. In *Republican Party of Minnesota v. White*, the Court invalidated, on First Amendment grounds, a Minnesota judicial canon forbidding candidates for judicial office from announcing their views on disputed legal or political issues.⁴⁰ The Court framed state court judges as political actors bound only by the requirement that they not act on personal bias against a particular litigant. In the absence of such bias, it is permissible, and indeed expected, that when a judge takes a stand during an election about an issue, subsequently “the party taking the opposite stand [in a case before that judge] is likely to lose. . . . not because of any bias against that party . . . [but because] [t]he judge is applying the law (as he sees it) evenhandedly.”⁴¹ Once the Court acknowledged the political nature of judging, it was a short step to envisioning its threat to private property rights. In *Stop the Beach*, a plurality of the Court took that step.⁴² They presented state courts as a comparably dangerous branch to legislatures with respect to property rights and announced that both bodies require the disciplining hand of the Takings Clause.⁴³

A. DOCTRINAL AND INSTITUTIONAL LIMITS ON STATE COURT PROPERTY ACTIVISM

Perceptions and intuitions about judicial property rights abuses derive disproportionately from canonical cases that followed the atypical path to Supreme Court review or are featured in law school curriculums and scholarly articles for their controversial positions or dramatic redistributions.⁴⁴ Hawaii,

40. 536 U.S. 765, 788 (2002).

41. *Id.* at 776–77.

42. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S.Ct. 2592, 2602 (2010).

43. Their opinion subsumed both courts and legislatures in the political category of state actors, declaring that “[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” *Id.* at 2601.

44. For example, famous takings cases heighten perceptions of the frequency of shoreline management plans depriving owners of all of their development rights, state courts redistributing property from employers to employee-tenants, localities abusing eminent domain for economic redevelopment to

with its unique and bitter history of land appropriation, conflict over native rights, and a century of attempted secession, also contorts the landscape of property law with cases such as *Hawaii Housing Authority v. Midkiff*, *County of Hawaii v. Sotomura*, and *McBryde Sugar Co., Ltd. v. Robinson*, that redistribute private property to the state or even to other private parties.⁴⁵ It is no surprise that Hawaii cases feature disproportionately in accounts depicting the problem of judicial takings.⁴⁶

But is this “property canon” the everyday stuff of state courts?⁴⁷ Cases where state courts apply precedent to uphold established common law property rights or overturn lower court property rights abuses are less thrilling to the imagination as well as less accessible (such cases lack written opinions more often than those overturning established rights).⁴⁸ Selec-

serve private interests, and courts transferring valuable water use rights from private parties to the public. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232–36 (1984); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

45. *See Midkiff*, 467 U.S. at 245 (upholding as constitutional the transfer of land via eminent domain from plantation owner oligopoly to private citizens); *County of Hawaii v. Sotomura*, 517 P.2d 57, 62–63 (Haw. 1973) (holding no compensation owed for eminent domain for land seaward of the upper reaches of the wash of the waves because the court rejected the longstanding prior common law seaward boundary); *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330, 1344 (Haw. 1973) (breaking with common law to hold that the normal surplus water was the property of the state and that riparian owners could not transfer that water outside the watershed). For accounts of the historical forces underlying Hawaiian property conflicts and the history of the Hawaiian sovereignty movement, see MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, *A CALL FOR HAWAIIAN SOVEREIGNTY* 107–29 (1993), and JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAII?* 1–10 (2008).

46. *See, e.g.*, Robert H. Thomas et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437, 442–50 (2010) (describing a number of takings cases from Hawaii); *see also* Barros, *supra* note 4, at 941 (citing two Hawaii cases as “good examples” of takings jurisprudence).

47. We need not believe these cases are strictly representative for ongoing exposure and engagement with them to affect our perceptions. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 11–14, 52–53 (2002) (critiquing the empirical and logical shortcomings of legal scholarship); *see also* Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 174–77 (2006) (exploring how selection bias affects conclusions).

48. *See* Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21, 22 (1991) (noting that several jurisdictions only publish opinions that “establish a new rule of law; that alter, modify, explain, or criticize an existing rule; that involve an issue of continuing public interest; that resolve conflicts; or that apply an existing rule to a new fact situation”).

tion bias, in the form of constitutional and scholarly focus on a small collection of exceptional cases, means that nonrepresentative cases have disproportionate influence in legal thought and policy.⁴⁹

The focus on exceptional cases belies the high baseline of state judicial restraint and property rights stability. Certainly, courts alter common law doctrines in light of changed circumstances and create exceptions to avoid forfeiture or other perceived unfairness.⁵⁰ Yet, the target of the *Stop the Beach* plurality—the wholesale elimination of established common law property rights—appears to be an unusual occurrence.⁵¹ Even among the small group of cases commonly understood as activist, most are less radical, or produce more ephemeral changes, than commonly assumed. For example, water and shoreline common law is interwoven with precedents recognizing public and private interests, often in a checkered or waxing and waning lineage.⁵² Sometimes what appears to be a sudden change in the law or a property redistribution actually reflects the judiciary strengthening or reviving longstanding threads of public common law water rights.⁵³ When state court holdings are truly radical, they are often narrowed over time as subsequent cases carve out exceptions and limit the precedent.⁵⁴ For exam-

49. Scientists and methodologists have long recognized the issue of selection bias and inferential error. See ROBERT M. GROVES, SURVEY ERROR AND SURVEY COSTS 28–30 (1989).

50. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 597–601 (1988).

51. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2616 (2010).

52. See, e.g., Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 4–10 (2010).

53. See, e.g., A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 882–83, 892–95 (2000) (contending that the common law of prior appropriation in water rights is mostly rhetoric and that it truly functions as an extreme default rule that induces cooperation and bargaining).

54. For example, in *State v. Shack*, the New Jersey Supreme Court departed from the traditional common law property right of owners to exclude by holding that trespass as defined in the New Jersey statute does not include the right to bar access to governmental services to migrant workers housed on private property. 277 A.2d 369, 374 (N.J. 1971). The New Jersey courts cabined this holding in subsequent cases. *State v. Schmid* adopted a multi-part test that restricted trespass depending on the nexus between the nature of the property and expressional activity. 423 A.2d 615, 621–22 (N.J. 1980). Then *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n* held that common interest communities were private property not subject to consti-

ple, the activist nature of *State v. Shack* and its sharp departure from precedent are renowned, but not the decision's erosion in a line of subsequent New Jersey cases.⁵⁵

In other cases, radical holdings seem less radical with a closer view of the circumstances. For example, Marc Poirier's historical study of *Matthews v. Bayhead*⁵⁶ and similar New Jersey beach access cases reveals that rather than a bald transfer of property rights, these cases were responses by the National Association for the Advancement of Colored People and the state government to de facto discrimination barring minorities from beaches.⁵⁷ In the famous case of *State ex rel. Thornton v. Hay*, the Oregon Supreme Court denied a legislative takings challenge by introducing a common law doctrine of custom that secured public use rights in beach areas.⁵⁸ Justice Scalia harshly criticized this case in his objection to the Court's denial of certiorari in *Stevens v. City of Cannon Beach*, a subsequent case upholding *Thornton*.⁵⁹ Scalia opined that a state court cannot evade takings liability by declaring custom to be a background principle of state law.⁶⁰ An underappreciated fact of the *Thornton* case, however, is that the public had already acquired those use rights through the more commonplace doctrine of prescription (a variant of adverse possession applicable to easements).⁶¹ Basing the decision on prescription would have

tutional limitations on state actors with respect to expressional activities and assembly. 929 A.2d 1060, 1072–74 (N.J. 2007).

55. See *supra* note 54.

56. 471 A.2d 355 (N.J. 1984).

57. Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 732–42, 772–75, 808–11 (1996). Although the litigants in many of the beach access cases focused their claims on statutory and public trust arguments rather than equal protection, racial discrimination remained in the backdrop of the cases. See *id.* at 762–65, 772–75. Another fact worth noting is that although the precedents in New Jersey are quite remarkable, lack of parking and public access points and creative beach fees technically within the letter of *Neptune* reduce the impact of these holdings. *Public Trust Doctrine and Public Access in New Jersey*, URBAN HARBORS INST., UNIV. OF MASS. BOS. 8–9 (Jan. 2003), http://www.uhi.umb.edu/pdf_files/public_access_in_nj.pdf.

58. 462 P.2d 671, 673 (Or. 1969) (holding that the state's refusal to allow a beachfront owner to install fencing was not a taking).

59. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 *passim* (1994) (Scalia, J., dissenting from denial of certiorari).

60. See *id.* at 1214.

61. 462 P.2d at 676 (holding that the public could have acquired the disputed land based on prescription rights).

led to years of fact-intensive parcel-by-parcel litigation whereas custom accomplished the same legal purpose, more bluntly perhaps, but with far less judicial and litigation expense.⁶²

Doctrinal and institutional, as well as political, forces orient state courts toward property rights stability so that legislative checks are rarely necessary.⁶³ As an *ex ante* matter, the “age of statutes” and codification limit the influence of the common law and judicial lawmaking—indeed, some scholars have argued that it strains the judicial function altogether.⁶⁴ Doctrinally, a number of common law doctrines function as judicial takings substitutes by preventing and invalidating judicial property redistributions (though not by providing compensation).⁶⁵ Canons of common law judging such as *stare decisis*, the principle that absent important countervailing considerations like cases should be decided alike, promote property rights stability.⁶⁶ State due process, wrongly painted with the

62. See Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 743 (2011).

63. Property theorists advocate stability of entitlement with a variety of rationales, including encouraging investment, facilitating transfer by minimizing information costs, strengthening relationships to property and community, and protecting democracy. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40–41 (8th ed. 2011) (discussing the need for stable property rights to encourage investment); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 63–64 (2000) (offering an information-minimization theory of property forms); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1894 (2005) (offering a relational theory of property); Sunstein, *supra* note 1, at 916 (arguing that property rights that are vulnerable to destabilization by the political process weaken democracy).

64. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1, 5–6 (1982). Responding to “statutorification,” Guido Calabresi has argued that common law courts should judge whether a legal rule is anachronistic or inapposite to the legal framework, and either renovate the rule or induce legislative reconsideration. *Id.* at 163–66.

65. In a 1992 article, Daniel A. Farber argued that judicial decisions should rarely be considered takings because “formalized procedures” make the risk of discrimination against a particular party or non-state actors comparatively low. See Farber, *supra* note 29, at 307.

66. 21 C.J.S. *Courts* § 194 (2012) (“The doctrine of *stare decisis* is designed to promote stability in the law, but is a principle of policy, rather than a rule requiring mechanical adherence.”); 20 AM. JUR. 2D *Courts* § 129 (2012). From Edward Coke to the present, the core conception of common law judging is of reliance on precedent rather than unpredictable changes or *sua sponte* reinterpretation. See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 55, 588 (2006) (advancing a theory of common law originalism at the time of the founding that balanced continuity with flex-

same brush as federal due process as inefficacious—a constitutional wimp—by the *Stop the Beach* plurality and some scholars, has been a major impetus in the development of common law property doctrines safeguarding private entitlements.⁶⁷ Vested rights doctrines, emanating from state due process, protect private property rights once an owner establishes that her expectations were reasonable and backed by financial investment.⁶⁸ These doctrines include “grandfathering” non-conforming uses despite later zoning changes⁶⁹ and protecting owners who make substantial good-faith investments from subsequent change in land use regulations that would prevent development.⁷⁰ Waiver protects a claimant’s reasonable and sufficiently crystallized expectations based on prior non-enforcement of covenants and rules by homeowners associa-

ibility by treating common law as “supplying the terms of a debate” about constitutional questions). Some state courts and practice guides counsel a strong form of stare decisis and require “urgent reasons for departures” while others frame it as a “principle of policy” and clarify exceptions for precedents that are “unworkable or badly reasoned.” *Compare* *Marsillett v. State*, 495 N.E.2d 699, 704 (Ind. 1986) (“[A] rule which has been deliberately declared should not be disturbed by the same court absent urgent reasons and a clear manifestation of error.”), *with* 1 MICHIGAN PLEADING & PRACTICE § 2:81 (2d ed. 2012) (“Stare decisis is a principle of policy rather than an inexorable command.”).

67. *See, e.g.*, *Friarsgate, Inc. v. Town of Irmo*, 349 S.E.2d 891, 894 (S.C. Ct. App. 1986) (holding that a developer had a vested property right that prevented the town from applying a new zoning ordinance to his condominium construction project); *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559, 564–65 (Utah 1967) (striking a zoning ordinance as an unconstitutional taking as applied to plaintiff’s parcel, which had vested rights).

68. *See* Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 641 (1978). The common law protections for vested rights apply unless owners act in bad faith, expand the use beyond their original vested right, abandon the property, or signal both attenuated expectations and limited harm (e.g., through lack of financial investment or steps toward construction). *See* Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373, 407–08 (1989) (describing variation and exceptions in vested rights doctrines).

69. *See* *Town of Surry v. Starkey*, 332 A.2d 172, 175 (N.H. 1975); *Gibbons & Reed Co.*, 431 P.2d at 563 (“[A] zoning ordinance which required the discontinuance forthwith of a nonconforming use would be a deprivation of property without due process of law.”).

70. *See, e.g.*, *Henry & Murphy, Inc. v. Town of Allenstown*, 424 A.2d 1132, 1133–34 (N.H. 1980) (“[T]he common-law rule is that ‘an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project’” (quoting *Gosselin v. Nashua*, 321 A.2d 593, 596 (N.H. 1974))).

tions.⁷¹ Similarly, laches prohibits the enforcement of an equitable servitude when the plaintiff has unreasonably delayed and in doing so altered the expectations of the defendant to her prejudice.⁷²

There is also little support for the claim that state courts will wrongfully favor or “collude” with legislatures in order to uphold state enactments—and if this does occur it can be redressed as a standard Fifth Amendment legislative taking.⁷³ Judicial favoritism toward legislatures or legislative enactments is not a straightforward matter: many enactments pass through divided legislatures and in some cases the political winds may have shifted and legislators no longer back the enactment. The legislature may be sympathetic to a takings claim against an agency-promulgated regulation they had not envisioned and do not favor. Also, many cases of court activism, or seeming court activism, focus on pure common law issues (often water rights) or interpret the common law in a way that either upholds or does not address a state legislative enactment.⁷⁴ In *Stop the Beach*, a case involving a state enactment and potential takings compensation, the Florida trial and appellate courts divided and the litigants failed to present a key precedent on avulsion.⁷⁵ Poor legal research, not favoritism toward the legislature, informed the Florida Supreme Court’s decision.⁷⁶

To be clear, my claim is not that state courts never err or overreach or that they resist incremental adjustments of prop-

71. See, e.g., *Woodlands Civic Ass’n v. Darrow*, 765 So. 2d 874, 876–77 (Fla. Dist. Ct. App. 2000) (holding that a restrictive covenant forbidding businesses in residential subdivision did not apply to owner’s chiropractic business when the immediate prior owner had run a business there for many years and made commercial changes to the exterior of the building without homeowner association enforcement).

72. See POWELL ON REAL PROPERTY: MICHAEL ALLAN WOLF DESK EDITION § 60.10[1] (Michael Allan Wolf ed., 2009). In addition, the emergence of “investment-backed expectations” as a major prong of regulatory takings analysis accords constitutional force to stability of expectations. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

73. I thank Stewart Sterk for this insight. For an account of the problem of courts colluding with legislatures to uphold legislative enactments, see Peñalver & Strahilevitz, *supra* note 16, at 328–29.

74. See *supra* notes 52–55.

75. For an overview of the procedural history, see *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2600–01 (2010).

76. See *id.*

erty rights. Carol Rose describes how courts “muddy” crystalline property rules over time with exceptions and rule variants that address changed circumstances, protect a guileless or stumbling party, protect property, or avoid forfeiture.⁷⁷ Some property law doctrines, such as adverse possession, allow changes to property rights, although state courts typically apply the legal standards stringently so prevailing on these claims is difficult.⁷⁸ Other cases, such as nuisance, address conflicting or unallocated property rights in a zero-sum manner; incursions on property interests are inevitable.⁷⁹ On the whole, however, state courts exercise a high baseline of restraint with respect to property rights through doctrines and norms that serve the prophylactic purpose now envisioned for judicial takings.

B. POLITICAL DISINCENTIVES FOR JUDICIAL PROPERTY ACTIVISM

In the judicial takings debate, the divided scholarly literature depicts state court judges as anti-majoritarian bulwarks aligned with the rule of law or as political actors requiring re-

77. See Rose, *supra* note 50, at 597–601.

78. For example, contrary to the doctrinal wisdom that most courts consider state of mind irrelevant to adverse possession, R.H. Helmholz’s classic study found that courts generally rule against adverse possessors when there is evidence that their encroachments are intentional. See R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 339–41 (1983). In a similar vein, the doctrine of changed circumstances enables courts to modify covenants in light of changed circumstances. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (2012). However, state courts typically require not mere changed circumstances but rather the impossibility of accomplishing the servitude’s purpose or something extremely close to it before a court will modify or terminate a servitude. See, e.g., *Rick v. West*, 228 N.Y.S.2d 195, 195 (N.Y. Sup. Ct. 1962) (denying a change of covenant to permit sale to a non-residential buyer even though portions of the neighborhood were unusable for residential purposes).

79. For example, nuisance law generally confronts the private right to commit a nuisance versus the private property right to be free of the nuisance. See, e.g., *Ark. Release Guidance Found. v. Needler*, 477 S.W.2d 821, 822 (Ark. 1972); *Oliver v. AT&T Wireless Servs.*, 90 Cal. Rptr. 2d 491, 500 (Cal. Ct. App. 1999). Incursion on someone’s private rights is inevitable and courts generally apply cost-benefit analysis to determine rights allocations. See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 967 (2004). Similarly, some of the common limitations in joint tenancies and concurrent estates that may seem at first blush to be appropriating or redistributing property rights are in fact trying to protect and balance property interests among multiple owners. See, e.g., Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 95 (1961).

straint through judicial takings.⁸⁰ Critics of judicial takings maintain that the doctrine disparages the anti-majoritarian role of the judge and subverts the autonomy of state courts.⁸¹ Opposing commentators, and the *Stop the Beach* plurality, fear that political influence over state court judges will translate into redistribution of private property rights and weaken the legitimacy of the courts.⁸² This Article departs from this binary debate. I contend that state court judges are politically responsive bodies and that this fact *undermines* the claimed need for judicial takings. Judicial politics, particularly in an age of property rights interest groups, more often than not cuts in favor of property rights stability and against radical divestment of private property rights. My argument is not that political responsiveness, standing alone, justifies federal Takings Clause immunity for state courts; if that were the case we would need to exempt legislatures from takings liability as politically responsive institutions. As I will explore in detail in Part IV, takings federalism and common law development are also at the heart of the case for eschewing judicial takings. My point here is that the political responsiveness of state courts is a factor that limits the strain on state legislative checks (which are too variable and resource intensive to serve as a first-line defense) and maintains stable systems of property rights.

80. In some respects, this divide maps onto the scholarly debate between legal formalism (i.e., rule of law judging) and a branch of legal realism that advocates that law is indeterminate and instead judges should consider political and economic factors. See Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 52–53 (Martin P. Golding & William A. Edmundson eds., 2003).

81. See Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 461–67 (2010) (arguing that judicial takings doctrine undermines state sovereignty and impedes the evolution of the common law); see also Christie, *supra* note 16, at 23; cf. Echeverria, *supra* note 27, at 300 (“[I]n the last few years, pro-business groups have mounted major campaigns to influence state environmental policies by altering the composition of the state courts.”). William P. Marshall has gone further to express concern that the Supreme Court’s framing of judges as political actors will become a self-fulfilling prophecy that will weaken the legitimacy not only of state courts but ultimately of federal courts and the Supreme Court as well. Marshall, *supra* note 38, at 25–28.

82. See Somin, *supra* note 39, at 100 (noting that one way that the “majoritarian’ argument against the judicial takings doctrine errs [is] in assuming . . . that courts are insulated from majoritarian pressures”); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 781–82 (2001); cf. Marshall, *supra* note 38, at 33–34 (arguing that judicial takings will increase political behavior by judges by eroding norms against such behavior and lessening its stigma).

Across the nation, the political and cultural demand for private property protection is robust and growing, as evidenced by both interest group politics and empirical research.⁸³ Powerful property rights interest groups have proliferated and the “wise use” conservative property movement has gained power in the western states. Conservative and business interest groups, who typically support strong private property protection, provide almost half of all judicial campaign money and are highly influential in judicial recalls.⁸⁴ The precise degree to which politics influences judges is unknowable—even if self-report on this topic was forthcoming, it would not be credible. However, it seems implausible that politics and the strong (though not unlimited) public support for private property rights protection have no influence over state court judges. Empirical research supports this intuition.⁸⁵ Even if political pressures merely reinforce existing legal and doctrinal property rights protections by increasing their salience in judges’ minds, this reduces the propensity for judicial “takings” that commentators and the Court intimate follow from political influence.⁸⁶

Alexander Bickel’s classic formulation of the “countermajoritarian problem” of judicial review is nowhere more doubtful than at the state court level.⁸⁷ State courts re-

83. See, e.g., JUSTIN LEWIS, *CONSTRUCTING PUBLIC OPINION* 96 (2001); Janice Nadler et al., *Government Takings of Private Property*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 286, 288–90 (Nathaniel Persily et al. eds., 2008); NAT’L CONSTITUTION CTR., *AUGUST 22–29, 2008 NATIONAL CONSTITUTION CENTER POLL, Q15* (2008), <http://surveys.ap.org/data/SRBI/AP-National%20Constitution%20Center%20Poll.pdf>. Admittedly, survey data has limitations based on the questions asked, the framing of questions, the hypothetical nature of the questions, etc. However, survey data is one source of information and like other indicators, such as the growing number of property protection interests groups, the empirical data reveals healthy, though not unqualified, public sentiments favoring property protection.

84. See DEBORAH GOLDBERG & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002*, at 9 (Bert Brandenburg ed., 2002), available at http://brennan.3cdn.net/3e06222f06bc229762_yom6bgubs.pdf.

85. For a summary of the research on the effect of election on judging, see generally CHRIS W. BONNEAU, *A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS* (Federalist Soc’y ed., 2012), available at http://www.fed-soc.org/doclib/20120719_Bonneau2012wp.pdf.

86. In addition, judges imbibe the sanctity of private property by cultural and moral beliefs and may be more likely to endorse private property protection and stability of property rights because they are typically upper-income property owners themselves.

87. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (2d ed. 1986).

spond to majoritarian interests in many respects, including through standards of common usage and the “ordinary person” as well as implicitly by privileging efficiency (which often corresponds to the interests of large numbers of citizens). Most powerfully, the pervasiveness of elections, and of election recalls, casts doubt on the countermajoritarian character of state courts.⁸⁸ Curiously, the academic commentary on judicial takings has not examined the prevalence of state court elections and the implications for the judicial takings debate.⁸⁹ At the trial court level, 64% of the states elect their trial court judges, mostly in nonpartisan elections, and 14% of the states employ periodic retention elections.⁹⁰ For intermediate appellate courts, 80% of states hold initial elections or uncontested retention elections.⁹¹ For state supreme court justices, 42% of states hold initial elections, and 34% have uncontested retention elections after initial appointment.⁹² And, of course, many state supreme court justices were previously lower court judges who have already passed through the electoral filter. Notably, election is a costly process with state supreme court candidates, for example, spending a total of \$45.6 million during the 2000 judicial elections.⁹³

Two major areas of electoral influence over judicial property rights decision-making are the initial “filtering” process of election and the threat of judicial recall once elected. First, in a climate where making the case that one will *not* be activist on the bench is a near requirement for election, successful candidates are likely to skew toward property conservatism.⁹⁴ It also seems likely that individuals willing to run for election self-

88. See *infra* note 90.

89. Much of the scholarly discussion about judicial takings appears to underappreciate the prevalence of judicial elections in state courts. See, e.g., Christie, *supra* note 16, at 23–27; Marshall, *supra* note 38, at 25–28; Peñalver & Strahilevitz, *supra* note 16, at 331. But see Somin, *supra* note 39, at 96–101 (arguing that judicial politics play a role in takings).

90. See *Fact Sheet on Judicial Selection Methods in the States*, AM. BAR ASS’N (last visited Apr. 17, 2013), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.

91. See *id.*

92. See *id.*

93. *Id.* Average per judge spending in partisan supreme court elections in 2000 was \$380,000. *Id.*

94. This process occurs with appointment too, because it influences who is proposed and the outcomes of confirmation processes as well, but the inquiry may be more prolonged in the election setting and, of course, revisited in retention elections.

select based on a higher degree of political savvy and sensitivity (appointment systems for judges presumably involve politicking too but in a more limited form). The majority of campaign financing comes from business and conservative interest groups (the Republican Party and the National Organization for Marriage have been major contributors in many states in recent years).⁹⁵ Candidates that appear activist or likely to eradicate established private property rights are unlikely to receive support from these interests.⁹⁶ In addition to filtering, election is also an acculturation process where popular, interest group, and legislative disapproval of activism is impressed upon the candidate.

A second point of political vulnerability for state court judges is from recall in retention elections. Historically, retention elections (often uncontested elections with a yes/no retention vote) exerted negligible political pressure and resulted in retention by wide margins for virtually all judges.⁹⁷ Rejecting political process as an adequate protective against judicial takings, William Fischel wrote in 1995 that he would take seriously the political accountability of judges only “when someone tells me of a judge being unelected because of unpopular decisions less prominent than the death penalty.”⁹⁸ In recent years, this has come to pass with recalls in multiple states, including recalls resulting from property rights cases. An Idaho justice lost a retention election because voters were angered over her opinion that congressional designation of three Idaho wilderness areas included federal reserved water rights senior to private agricultural and commercial water rights.⁹⁹ In response to a 2009 decision invalidating Iowa’s ban on same-sex marriage,

95. See ADAM SKAGGS ET AL., BRENNAN CTR. FOR JUSTICE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10: HOW SPECIAL INTEREST “SUPER SPENDERS” THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA’S COURTS 3 (Oct. 2011), http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf.

96. See *id.* at 9 (describing power of business and special interests in judicial elections).

97. See Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV. 69, 69–70 (2012).

98. See FISCHEL, *supra* note 2, at 332.

99. Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 122–24 (2001); see also *In re SRBA*, No. 24546, 1999 WL 778325 (Idaho Oct. 1, 1999), *superseded on reh’g*, *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270 (Idaho 2000) (Justice Silak’s controversial opinion).

voters ousted three Iowa Supreme Court judges.¹⁰⁰ Alaska Supreme Court Justice Dana Fabe was nearly removed after her votes in abortion cases by recall efforts funded by a group called Alaska Family Action.¹⁰¹ The Tea Party led the charge to remove two justices from the Florida Supreme Court for not allowing citizens to vote on a proposed constitutional amendment to bar the state from requiring individuals to purchase health insurance.¹⁰² Threats and agitation to recall judges have become an accepted aspect of the public debate over controversial state court property decisions.¹⁰³

In the *Stop the Beach* plurality opinion and the ensuing debate about judicial takings, there has been a curious neglect of the fact that if judges are influenced by electoral pressure and public opinion, this more often favors *protecting* existing private property entitlements. Of course, there are instances where a powerful interest group or citizen majority, with interests affected by the judicial resolution, might influence a state court to eliminate or redistribute private property rights. In most cases, however, property rights activism is risky for an elected state court judge in light of the intense public opposition to judicial property redistribution and the strong influence of conservative interests in judicial elections and recalls. The politics of judicial elections also cuts against concerns that judges will favor upholding state legislative enactments at the expense of private property rights.¹⁰⁴ A judge's professional political allegiance, if she has any, is likely to be to a major campaign contributor or powerful special interest rather than the legislature.¹⁰⁵ There are majoritarian safeguards as well. Not

100. See Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 118 (2010).

101. See Tracy Kalytiak, *Mailer Targets Justice: Nonprofit Targets State Supreme Court Judge*, MAT-SU VALLEY FRONTIERSMAN, Oct. 29, 2010, at A2.

102. See William Gibson, *Tea Partiers Campaign Against Justices*, SUN SENTINEL, Sept. 21, 2010, http://weblogs.sun-sentinel.com/news/politics/dcblog/2010/09/tea_partiers_campaign_against.html.

103. In a recent Colorado case, for example, there was some agitation for judicial recall after a Boulder couple lost part of their land when the judge applied clear, well-established statutory and common law on adverse possession. See Heath Urie, *Boulder's Infamous 'Land-Grab' Case Settled*, BOULDER DAILY CAMERA, http://www.dailycamera.com/ongoing-coverage/adverse-possession-case/ci_13106856 (last updated Aug. 14, 2009).

104. See Peñalver & Strahilevitz, *supra* note 16, at 328–29 (noting the potential for coordination between the judiciary and legislature in Takings Clause cases).

105. See SKAGGS ET AL., *supra* note 95, at 3–7.

only is the public generally suspicious of state appropriations of private property rights, there is some evidence that people are deeply angered when appropriations occur through seeming manipulation or arbitrage between state actors, in this case state courts and legislatures.¹⁰⁶

II. A POLITICAL PROCESS THEORY OF JUDICIAL TAKINGS: STATE LEGISLATIVE CHECKS OF STATE COURT ACTIVISM

When state courts overreach in property rights cases, state legislatures often check them through legislative revision. To date, there has been little attention to the institutional capacity and competence of state legislatures to check state courts. The Supreme Court plurality in *Stop the Beach* assumed that federal courts are the best-situated actors to address state court property rights abuses.¹⁰⁷ The mounting scholarship on judicial takings has focused on state versus federal judicial review.¹⁰⁸ The inattention to state legislatures may stem from the broader neglect of legislative checks of courts, federal or state, in our conception of the rights-protective function of separation of powers and checks and balances.¹⁰⁹ This Article fills that void by advancing a theory of legislative process protection against judicial takings and examining the benefits, and gaps, of state legislative checks of courts.

In the legal scholarship, several scholars have argued that the protections and correctives afforded by political process counsel a more limited role for Takings Clause protection against legislative acts. John Hart Ely theorizes that judicial

106. Janice Nadler and Shari Seidman Diamond's research provides evidence that manipulation and arbitrage by government actors heightens public outrage and produces very strong perceptions of unfairness and wrongdoing. See Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 745 (2008).

107. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601–02 (2010).

108. See, e.g., *supra* note 4.

109. There is a large body of scholarship exploring how judicial review, which enables courts to trump the decisions of popularly elected and politically accountable legislatures, provides an important check on political action. See, e.g., Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197–99 (1952); cf. Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 856 (2008) (positing that continued empirical study of judicial behavior has limited benefits).

review of legislative acts should occur to correct failures of democratic process—that is, when legislators act undemocratically to exclude or dilute minority interests or establish dual regulatory regimes with less advantageous regulation of minority interests.¹¹⁰ William Fischel's theory of regulatory takings predicates a circumscribed role for takings doctrine on robust coalition politics at the national and state level (more questionably, he argues that takings should focus on policing against local government incentives to behave unfairly to minority interests).¹¹¹ Taking a somewhat different tack, Daniel Farber observes that a no compensation rule for takings is more likely to reduce rent seeking and pork-barrel projects than compensation, which buys off the group "most likely to bring costs forcefully to the attention of legislators."¹¹² The reason for compensation in his view is that lobbying by the dispossessed (who are discrete, insular, and strongly interested minorities with more power than diffuse majorities) will block not only inefficient government projects but also efficient and desirable ones.¹¹³ Marc Poirier takes issue with the sweeping nature of these accounts and argues for context-specific approaches to public choice and legislative takings.¹¹⁴

To date, there has been no serious examination of the implications of state political process for judicial takings. This Article considers legislative checks from multiple states, focusing

110. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980); John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 834 n.4 (1991).

111. FISCHEL, *supra* note 2, at 7, 139 ("Local insiders can use regulation in a way that subverts the Constitution's clear command not to take property without compensation. The larger republics are less subject to that temptation because the burden of regulation is more likely to fall on properly represented insiders and their progeny."). The conclusion about local government is the most tenuous aspect of his theory, and its assumptions have been soundly criticized by localist Carol M. Rose. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1133–37, 1140 (1996) (reviewing FISCHEL, *supra* note 2).

112. See Farber, *supra* note 29, at 292–93; cf. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 308–11 (1990) (noting that takings compensation protects powerless individuals and groups).

113. See Farber, *supra* note 29, at 295–98.

114. See Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243, 246–47, 260–61 (1993) (questioning takings compensation for prohibitions on building in beach areas).

on the cases of *Conatser v. Johnson*,¹¹⁵ *Gion v. City of Santa Cruz*,¹¹⁶ and *Robinson v. Ariyoshi*.¹¹⁷ These case studies illustrate how state legislatures have revised activist state court property decisions, including controversial cases of water and shoreline rights and public recreational access. In some cases, these checks functionally reversed the court decision; in other instances legislatures have partially checked or tempered dramatic judicial changes to the common law.¹¹⁸ Concededly, there are a limited number of examples of state legislative checks. This is not because state legislatures are insufficiently concerned with property rights, but in large part because state court doctrines, norms, and politics make radical judicial appropriations of property rights an unusual occurrence. Legislative checks are high-cost endeavors in the currencies of effort, time, and political capital, and cannot function effectively as a first-line defense against property activism. Accordingly, legislative checks have co-evolved with state judicial restraint into a functional system of property protection.

In most cases, legislative checks restore the bulk of the private property right and sometimes “pay off the losers” in a conflict with in-kind or other benefits. As I will describe in the following Sections, state legislative checks have additional advantages, including offering swifter redress and democratic process, signaling legislative property norms, strengthening legislatures’ constitutional commitments, and creating disincentives for future judicial activism. Importantly, state legislative checks also offer a better fit to takings federalism than federal court review of state judicial takings, a point I take up in Part IV.¹¹⁹

115. 194 P.3d 897 (Utah 2008).

116. 465 P.2d 50 (Cal. 1970).

117. 477 U.S. 902 (1986).

118. For example, in a case against a common interest community—the type of private party case which may be included in the broad auspices of the *Stop the Beach* plurality’s judicial takings doctrine—the California Supreme Court replaced the longstanding rule of judicial review of common interest community association decisions with a rule of extreme deference, seemingly to avoid straining judicial resources. The legislature acquiesced to the change in law but created exceptions for an interest dear to the hearts of Californians—owners with pets. See *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1278 (Cal. 1994), *rev’d in part by statute*, CAL. CIV. CODE § 1360.5 (West 2012).

119. See *infra* Part IV.A.

Political forces, as well as concerns for state policy and constitutional rights, affect legislative checks of judicial property abuses.¹²⁰ As I will discuss in Section III.C, legislatures may fail to check judicial overreaching that has majoritarian or strong interest group support. Legislatures are also unlikely to revise state court judgments that validate favored state statutes or avoid state payment of compensation. However, the fact that vigorous interest groups on different sides of an issue are common in property conflicts reduces the frequency of legislative inaction and dysfunctional responses substantially. Ex ante high baselines of state court restraint also attenuate the impact of variable legislative responses.

A. STATE LEGISLATIVE REVISION: THE CASE STUDY OF
CONATSER V. JOHNSON

The case study of *Conatser v. Johnson* offers a closer view of the legislative check and the interactions between state courts and legislatures over property rights. In *Conatser*, the Utah Supreme Court expanded a common law easement for public recreation on non-navigable waters to include not only the long-established right to float but also the right to directly and non-incidentally touch private water beds when wading, boating, fishing, swimming, or engaging in other forms of water recreation.¹²¹ By statute, all the waters in the state are the property of the public, but in non-navigable waters, the majority in Utah, the waterbeds are mostly privately owned.¹²² A prior precedent, *J.J.N.P. Co. v. Utah*, had established a common law

120. For example, in a recent conflict over recreational access in Utah's streams and rivers following a judicial decision expanding public rights, private owners, farmers, anglers and wildlife, recreation, and environmental groups lobbied the legislature aggressively in response to the court decision and subsequent legislative bills. See Editorial, *Closed to Fishing*, SALT LAKE TRIB., Feb. 13, 2009, <http://archive.sltrib.com/article.php?id=11701247&itype=NGPSID> (describing opposition to public recreational use of streambeds by homeowners and farmers who own property along the rivers); Brett Prettyman, *Finally, Water Lovers in the Same Boat*, SALT LAKE TRIB., Feb. 19, 2009, <http://archive.sltrib.com/article.php?id=11743015&itype=NGPSID> (describing anglers, duck hunters, and kayakers descending on the Utah State Capitol armed with waders, paddles, nets, and duck calls to protest the initial bill proposed in response to the state supreme court decision broadening access).

121. 194 P.3d 897, 902–03 (Utah 2008). The court saw this shift from prior common law as “necessary for the effective enjoyment of all the rights provided for in the easement.” *Id.* at 902.

122. See *id.* at 900.

easement in the public to “utilize” non-navigable waters for recreation.¹²³ However, the Court in *J.J.N.P. Co.* indicated via citation to another case that the right was limited to “floating” on the water (not stopping, wading, or fishing).¹²⁴ This had been the accepted interpretation and popular understanding for almost three decades. In 2008, the Utah Supreme Court in *Conatser v. Johnson* abruptly eliminated riparian owners’ private property rights to non-navigable water beds.¹²⁵ Based on the common law doctrine that easement owners possess the corollary rights “to do such acts as are necessary to make effective his or her enjoyment of the easement,” the court reinterpreted the public right to “utilize” to include wading and fishing while standing on private riverbeds.¹²⁶ The holding effectively opened fishable Utah riverbeds to anglers and to the commercial recreational angling industry by enabling wading near private shores.

Within months, Utah Representative Ben C. Ferry proposed a bill to limit the public recreational rights granted by the Utah Supreme Court in *Conatser* to floating, with only incidental touching of private riverbeds, on fourteen rivers specified in the bill.¹²⁷ Interest groups, including Utah Trout Unlimited, the Utah River Council, the newly formed Utah Water Guardians, and the \$700 million Utah commercial fishing industry responded with public protests at the State Capitol

123. The *J.J.N.P. Co.* court held that the Utah statute providing that all waters are the property of the public, coupled with other statutory provisions requiring the State Engineer to consider public recreational uses prior to approving applications for appropriation and permits for stream relocation, created an easement for the public to engage in recreational uses when utilizing the water. 655 P.2d 1133, 1137 (Utah 1982) (“[T]he public . . . has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.” (citing *Day v. Armstrong*, 362 P.2d 137, 137 (Wyo. 1961))); see also UTAH CODE ANN. § 73-3-8 (West 2012) (application for appropriation); *id.* § 73-3-29 (stream relocation permit).

124. See 655 P.2d at 1137.

125. *Conatser*, 194 P.3d at 902–03.

126. *Id.*

127. See Recreational Use of Public Waters, H.B. 187, 2009 Gen. Sess. (Utah 2009). In addition, under the bill, the public would not be able to fish at all within 500 feet of a single family dwelling that had posted a no fishing notice. See Public Access to Private Stream Beds, H.B. 80, 2010 Gen. Sess. (Utah 2010). A controversial aspect of the legislative process was the fact that a legislator and his family owned land on one of the rivers that would now be closed to public fishing under Representative Ferry’s proposed bill. See Tom Wharton, *Stream Bill Would Protect Lawmaker’s Land*, SALT LAKE TRIB., Feb. 25, 2009, http://www.sltrib.com/ci_11784137.

brandishing paddles and fishing rods, meetings with representative Ferry, and professional lobbying of the legislature.¹²⁸ After multiple substitutions of Ferry's bill and twenty amendments, the bill was defeated. The following year, a more moderate bill, the Utah Public Waters Access Act, was enacted.¹²⁹

The Public Waters Access Act restored most of the property rights to the private riverbed owners, the original entitlement holders. Pursuant to the statute, recreationists have the right to touch streambeds only "incidentally" to flotation (i.e., boating, fishing from a boat, or other activities upon the surface of the water).¹³⁰ While the Public Waters Access Act mostly returned the law to the pre-*Conatser* state of play, it did offer several lower-value benefits to recreationists. They gained the right to portage (lifting and walking watercraft around obstacles).¹³¹ Although some Utah common law precedents on public water rights appeared to support a right of portage, the right had not crystallized in the state's common law.¹³² The Act also created a public adverse possession right when a riverbed has been used by the public for at least ten consecutive years¹³³ and prohibited private owners from stringing barbed wire across the rivers to keep boaters out.¹³⁴ Following the passage of the Act, the Division of Wildlife sought to expand its "Walk-in Access" program, which leases land and waterbeds from private owners for public access, fishing, and wading.¹³⁵

128. See Prettyman, *supra* note 120 (describing rally); Tom Wharton, *Anglers Rally to Fight Stream Access Bill*, SALT LAKE TRIB., Feb. 19, 2009, <http://archive.sltrib.com/article.php?id=11744385&itype=NGPSID> (quoting a representative from Utah Water Guardians about public rights); Tom Wharton, *Bill to Limit Riverbed Access Clears First Hurdle, Passes House Panel*, SALT LAKE TRIB., Feb. 23, 2009, <http://archive.sltrib.com/article.php?id=11767346&itype=NGPSID> (quoting the state chair of Utah Trout Unlimited on the unfairness of bill H.B. 187).

129. UTAH CODE ANN. §§ 73-29-101 to -208 (West 2012).

130. *Id.* § 73-29-202.

131. *Id.* § 73-29-202(2)(a)–(b). The Act limits the public's right to float in water that on the whole has "sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating." *Id.* § 73-29-202(1).

132. The portage right is an advance in public access rights but it accrues to a minority of river recreational users, boaters and rafters.

133. UTAH CODE ANN. § 73-29-203. The value of this benefit may turn out to be minimal because prevailing on the adverse possession claim involves rigorous proof and an expensive legal process to quiet title. See *id.* § 73-29-204 (describing procedural and other requirements for a quiet title action).

134. See *id.* § 73-29-207(1)–(2) (limiting fencing to agricultural and livestock fences that do not endanger public water users).

135. See *Walk-in Access*, UTAH DIV. OF WILDLIFE RES., <http://wildlife.utah>

The Utah case study reveals a more complex set of legislative motivations than the dominant rent-seeking model, where legislatures award the political spoils to the most powerful interest group.¹³⁶ In *Conatser*, both the riverbed owners and the anglers were formidable interests (the anglers included the multi-million dollar tourist fishing industry and the powerful interest group Trout Unlimited).¹³⁷ Interest group power did not clearly predict the outcome; the comparative strength of both interests should have yielded a more middle of the road division of rights. Instead, the legislature appeared motivated in substantial part to secure Utah's constitutional takings provisions against the state supreme court's sudden departure from precedent and to foster political accommodation.

The legislative history and statutory declarations record the state legislature's frustration with the Utah Supreme Court for, in their view, violating the state's constitutional property protections.¹³⁸ In the statute's declarations, the legislature took the *Conatser* court to task, admonishing that the "general constitutional and statutory provisions declaring public ownership of water and recognizing existing rights of use are insufficient to overcome the specific constitutional protections for private property."¹³⁹ The statute emphasized that the Utah Constitution's "prohibition on taking or damaging private property for public use without just compensation, protect[s] against government's broad recognition or grant of a public recreation easement to access or use public water on private property."¹⁴⁰ Political pressure and interest group lobbying were undeniably important to the legislature, but apparently so was the constitutional affront to private property in the *Conatser* decision.

.gov/walkinaccess/ (last updated Aug. 31, 2012).

136. *Cf. supra* note 1.

137. See Tom Wharton, *Bill Would Limit Fishing Ground Access*, SALT LAKE TRIB., Feb. 11, 2009, http://www.sltrib.com/news/ci_11684170 (interviewing the head of the Utah Rivers Council, who described the large financial value of Utah fishing).

138. See Jeremiah I. Williamson, *Stream Wars: The Constitutionality of the Utah Public Waters Access Act*, 14 U. DENV. WATER L. REV. 315, 317, 323 (2011).

139. UTAH CODE ANN. § 73-29-103(1)–(2) (West 2012) (establishing water access as a takings issue).

140. *Id.* § 72-29-103(3)–(6) (describing the legislature's intent to address the *Conatser* holding and restore the property rights as they existed prior to *Conatser*).

B. COMPARATIVE INSTITUTIONAL COMPETENCE: ADVANTAGES OF STATE LEGISLATIVE CHECKS

State legislative checks have an array of institutional strengths. State legislatures are knowledgeable about state property issues, competing demands and interest groups in the state, and the preferences of the state's citizenry and can craft legislation accordingly. Importantly, legislative revision of state court overreaching enables middle ground solutions, innovation, and implicit compensation for the losers in a property conflict. Legislative checks provide signals to the state's citizens about legislative commitments to property protection and can create beneficial second-order effects on courts. The revisionary role of the state legislature also creates court-legislature "networks" that may help to develop state property law as controversies pass between these institutions. These benefits weigh in balance against the primary disadvantage of legislative checks—the fact that checks may not occur in every instance they are needed because of limited institutional resources or political dynamics.

1. Intermediate Solutions and Political Accommodation

Intermediate solutions and political accommodation are key advantages of state legislative checks—advantages which may be muted or chilled under a federal judicial takings doctrine. Legislatures who check courts have the institutional capacity to offer middle ground solutions, often by restoring the bulk, but not all, of the property right.¹⁴¹ Although not inevitably the case, legislative middle ground solutions have the potential to be more efficient and politically palatable, as well as truer to the common law, than the binary rights determination of a judicial taking. Legislatures can also step back from the case at hand and address a need for comprehensive regulation in an area of property or water law. In contrast, courts are limited by the pleadings in the particular case, legal doctrines and precedents, and a reviewing court's inability to craft comprehensive regulatory approaches (as opposed to iterative rules).

Contrary to intuition, legislative enactments that adopt middle ground solutions and "split the baby" in terms of rights may more accurately reflect the competing threads of the com-

141. See, e.g., CAL. CIV. CODE § 1009 (West 2007) (providing opportunity for public access to property, while maintaining property owner's rights); MINN. STAT. ANN. § 462.357 subdiv. 6(2) (West 2011).

mon law as a whole than stylized federal judicial review of judicial takings (which would typically select a single case or line of cases as the definitive precedent). This does not occur because legislatures perceive their mission as interpreting the common law. Rather, it occurs because the common law frequently implicates interests in investment, stability, and fairness of the kind that legislatures consider—and because the underlying judicial decision and lobbying interest groups bring relevant precedents to the legislature’s attention.¹⁴² In many areas, including water law, the common law includes a multitude of precedents and the holdings are multiplex, waxing and waning, or checkered.¹⁴³ Federal court appellate review of a judicial takings claim would likely select a single “correct” common law rule from the relevant precedents. But is this a superior method of common law interpretation? In some instances, a checkered pattern or competing threads to the common law may support a legislative rule that “sums” the various precedents into an intermediate or hybrid approach not specifically articulated in prior precedents.

Intermediate solutions also allow political accommodation and “paying off losers,” a critical aspect of property rights transitions described in Gary Libecap’s work.¹⁴⁴ Fifth Amendment compensation for judicial takings is not the only way to compensate for property transitions. State legislatures can, and often do, craft intermediate solutions that pay off losers through implicit or non-monetary compensation. As Thomas Merrill and Henry Smith note, “legislature[s] can devise various means for affording implicit compensation to those adversely affected by the change [C]ourts will often not have the losers before them and in any event are endowed with a limited set of options in devising remedies.”¹⁴⁵ A common outcome of a legislative check of a state court decision is to restore most or all of the private property entitlement and to offer some mitigating

142. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 144–45 (1988).

143. See, e.g., A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770–71 (2001) (describing the evolution of the water law doctrine of prior appropriation).

144. Gary Libecap has most famously illustrated the importance of paying off losers in his study of oil field unitization. See Gary Libecap et al., *Contracting for Property Rights*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 142, 156–64 (Terry L. Anderson & Fred S. McChesney eds., 2003).

145. Merrill & Smith, *supra* note 63, at 65.

rights, benefits, or other form of compensation to the losers in a property rights conflict.¹⁴⁶ For example, the statute overturning *Conatser* provided recreationists with portage rights, adverse possession rights for longstanding public use, and redress for the problem of private owners stringing barbed wire across rivers.¹⁴⁷ This is not to say the losers in this dispute were perfectly satisfied (they are presently litigating the constitutionality of the legislative revision).¹⁴⁸ However, the legislative process offered them a forum and certain benefits that may not have occurred if the riparian owners succeeded in a judicial takings claim.

Compared to federal judicial review, the process of state legislative revision is a more democratic and, at times, a more politically palatable resolution. Legislatures are close to state citizens' and interest groups' sentiments and can use that information in crafting solutions and offering implicit compensation.¹⁴⁹ William Marshall has lauded judicial review of legislation as "end[ing] the debate without the possibility of political compromise. . . . [making it] far more definitive in defeating the popular will than are the other countermajoritarian structures."¹⁵⁰ However, in the context of property rights, which are often high-stakes, contested by multiple claimants, and subject to competing threads in the common law, it is often not a simple story of majoritarian wrongdoing, but rather a complex and opaque array of conflicting interests. The legislative check, informed by public input and interest group lobbying and subject to later judicial review, may move us closer to a property distribution that balances property protection, political sentiments, and social needs.¹⁵¹

146. The balance between accommodation and rights restoration is a fraught one, as evidenced by the Utah legislature's statement of its intent "to foster restoration of the accommodation existing between recreational users and private property owners before the decision in *Conatser v. Johnson*." UTAH CODE ANN. § 73-29-103(6) (West 2012).

147. See *supra* notes 131–34 and accompanying text.

148. See *Utah Stream Access Coal. v. ATC Realty*, No. 100500558, slip op. (Utah Dist. Ct. May 21, 2012).

149. See Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 898 (1987) (describing Roscoe Pound's belief that "legislation was the most democratic form of lawmaking," and that the common law "could not address the needs of modern society").

150. See Marshall, *supra* note 38, at 30.

151. For example, following legislative revision of the Utah Supreme Court decision redistributing private property rights in riverbeds to the public, the

2. Framing Legislation and Public Acceptance: The Example of *Gion v. City of Santa Cruz*

State legislatures can increase political acceptance of necessary revisions of state court decisions by emphasizing the consensus elements of a property rule or the benefits to the public of stable private property rights. *Gion v. City of Santa Cruz* offers an instructive example of such framing. In the consolidated cases of *Gion v. City of Santa Cruz* and *Dietz v. King*, the California Supreme Court departed dramatically from past precedents and extended the common law of implied dedication, previously applied only to roadways, to create a public recreational easement in private beaches.¹⁵² If members of the public walked across or used private beachfront property for more than five years, believing they had the right to such use and with no bona fide attempt by the landowner to exclude them, then the public acquired recreational use rights through implied dedication.¹⁵³ Soon after *Gion*, a California lower court reduced landowner compensation for a condemnation because it held that most of the area was subject to an implied dedication based on past public use.¹⁵⁴ The change in the common law was so radical that Michael Berger, writing in a 1971 law review article, charged that the *Gion* court had violated the constitutional prohibition on takings.¹⁵⁵

The California Supreme Court in *Gion* had premised their decision in part on the importance of assuring public access to

newly founded Utah Stream Access Coalition is currently appealing the legislative enactment on the theory that the Act violates Article XVII of the Utah Constitution, which recognizes, “[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose” and that existing rights at the time of statehood included public riverbed access. UTAH CONST. art. XVII; see also Williamson, *supra* note 138, at 329–33.

152. 465 P.2d 50, 60–61 (Cal. 1970). This case was a radical change from prior state precedents. See *Breidert v. S. Pac. Co.*, 77 Cal. Rptr. 262, 268 (Ct. App. 1969); *People v. Lundy*, 47 Cal. Rptr. 694, 696 (Cal. Dist. Ct. App. 1965).

153. See *Gion*, 465 P.2d at 56–58. Notably, the California Supreme Court held that intermittently posting no trespassing signs was not adequate in the specific cases before it, because the signs “cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property.” *Id.* at 58.

154. Richard E. Llewellyn II, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner: Gion v. City of Santa Cruz*, 4 LOY. L.A. L. REV. 438, 447 (1971).

155. Michael M. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. W. L. REV. 75, 93–94 (1971).

the waterfront.¹⁵⁶ However, the case had the opposite effect. Beachfront property owners immediately began to block public access, with news reports of owners building fences topped with barbed wire or with cactuses spread across the base, implanting traps such as old automobile transmissions in the ground to block vehicles, and hiring guards.¹⁵⁷

The California legislature responded with laws that reversed the California Supreme Court by prohibiting public use of private property from ripening into a vested right unless the owner had made an express written irrevocable offer of dedication.¹⁵⁸ The statute focused on the benefits to the public of removing the threat to beachfront owners' private property. It began with the finding that "[i]t is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use"¹⁵⁹ The next findings elaborated on the unintended consequence to the public of the Court's decision and described how the threatened loss of private rights compelled owners to exclude the public.¹⁶⁰ Californians at the time were likely not poring over the statutory text. However, the legislature's reasoning about protecting public access by protecting private rights was the product of a series of public deliberations that were highly publicized by the media throughout the state.¹⁶¹ By framing the political discourse and statute to emphasize how restoration of private rights benefited the public, the legislature increased the legitimacy and public acceptance of the enactment.

156. See *Gion*, 465 P.2d at 58 (describing as a basis for their decision the "strong policy expressed in the constitution and statutes of this state of encouraging public use of shoreline recreational areas").

157. See Michael A. O'Flaherty, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092, 1094-95 (1971); Philip Fradkin, *Fences Go up to Keep Public from Beaches*, L.A. TIMES, Mar. 21, 1971, at C1; Philip Fradkin, *Owners of Waterway Property Rushing to Block Access Paths*, L.A. TIMES, July 23, 1970, pt. I, at 3, 25.

158. CAL. CIV. CODE § 1009(b) (West 2012). Other provisions further reassured owners with clear safe harbors enabling them to record a document on the public record permitting public access and barring the creation of a prescriptive easement when the property owner has posted signs every 200 feet along the boundary granting a right to pass. See *id.* §§ 813, 1008.

159. *Id.* § 1009(a)(1).

160. See *id.* § 1009(a)(2)-(3).

161. See *supra* note 157.

3. The Fast Train: State Legislative Revision

For structural and political reasons, state legislatures act more quickly than the federal legislature and certainly more rapidly than the litigation process envisioned by the *Stop the Beach* plurality.¹⁶² Judicial takings involve a lengthy process with multiple rounds of litigation, removal to federal court, and the potential for prudential issues to short-circuit adjudication. For example, in *Robinson v. Ariyoshi*, a case that commentators point to as an instructive example of the need for a constitutional judicial takings doctrine, the litigation of the judicial taking claim lasted for decades before foundering on ripeness concerns.¹⁶³ The only relief the plaintiffs received was from the Hawaii legislature, which partially restored their rights through grandfathering provisions in the Water Code.¹⁶⁴

Most legislative checks of state court property activism occur in less than two years. In *Conatser*, legislation was proposed seven months after the state supreme court decision and enacted eleven months later.¹⁶⁵ The California legislature responded to *Gion* with an enactment in approximately eighteen months.¹⁶⁶ The Minnesota legislature rectified the *Krummenacher* decision, discussed in detail in Part III, in less than two years.¹⁶⁷ Indeed, one might question why, since legislative checks are so timely, litigants will bother to file judicial appeals and why judicial takings will matter at all. This view discounts strategic litigation decisions to appeal or threaten appeal, the possible compensation benefits from judicial takings claims, and the potential for judicial takings doctrine to “crowd out” state legislative checks by providing justifications for legislative inaction. Also, legislative checks are likely to be slower, or not occur at all, when there is strong political support for the court’s reallocation of private rights or when the

162. A case where a judicial taking, or at least a close relation, was raised as a claim was *Robinson v. Ariyoshi*. 887 F.2d 215 (9th Cir. 1989). This case wound its way through both state and federal courts for decades without resolution, repeatedly derailing on issues of ripeness and other concerns. *Id.* at 216.

163. *Id.* at 216–18 (describing lengthy history of the case).

164. See HAW. REV. STAT. § 174C-50 (2008).

165. UTAH CODE ANN. §§ 73-29-101 to -208 (West 2010).

166. CAL. CIV. CODE § 1009(b) (West 2012).

167. MINN. STAT. ANN. § 462.357, subdiv. 6 (West 2011).

state is attempting to resolve complex property rights distributions (e.g., creating a comprehensive water rights statute).¹⁶⁸

4. Legislative Signaling to Citizens

State legislative checks of judicial overreaching also have expressive value. Legislative checks are “costly signals” that indicate that legislators disapprove of and will expend substantial legislative resources to redress radical property rights redistribution by courts. Independent state legislative checks (i.e., not arising from federal order or the shadow of judicial takings liability) may assuage citizens’ concerns about the legislature’s position on property protection and judicial activism. Checks which substantially revise court opinions but offer some accommodations for public interests communicate the legislature’s commitment to protecting private property rights while also safeguarding public and environmental interests. Plausibly, these assurances of property protection may even increase tolerance for more modest property rights flux, at least if citizens interpret such signals to indicate that legislatures will adjust property rights modestly and in socially beneficial ways, but not radically disrupt property rights or dispossess broad swathes of owners.¹⁶⁹ Notably, legislative checks need not respond to every questionable judicial action to yield these benefits. The most controversial and highly publicized court cases are the ones most likely to capture citizen attention and to produce a legislative check and signal.

Signaling suggests the value of the seemingly ineffectual and symbolic state legislative responses following *Kelo v. City of New London*.¹⁷⁰ It may be that even weak legislation communicated state government concern about private property rights protection and legislative reluctance to support an economic development taking of the scope and nature of the New London redevelopment. The primary motivation for these laws may have been to garner public approval.¹⁷¹ However, the extensive

168. Cf. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2168–69 (2009) (discussing effect of public political ignorance on state legislative action following the *Kelo* decision).

169. See *id.* at 2170 (concluding that most state legislation enacted after *Kelo* was ineffective).

170. 545 U.S. 469 (2005).

171. See Somin, *supra* note 168, at 2165 (explaining how “state legislatures [sought] to satisfy vote demands by supporting . . . legislation that purported

process of lawmaking, including well-publicized hearings and statements by public officials, provided reassurances to citizens that property protection mattered to their legislators. Of course, the value of the legislative signal is not divorced entirely from content—strong substantive laws increase the strength and sincerity of the signal. In the context of legislative checks, which are not symbolic but instead reverse or substantially revise court property redistributions, the signal to the state’s citizenry about legislative intent and the limits on state courts is typically quite robust.

5. Second-Order Effects on State Courts and State Law Development

The legislative check means that courts act in the shadow of substantive legislative revision as well as jurisdiction-stripping legislation (and in turn, that legislatures act subject to judicial review). Legislative checks provide ongoing disincentives for judicial radicalism with respect to private property rights. This is not due to generalized state court deference to legislatures, but because state courts act in the shadow of permanent legislative alteration of the law. These dynamics may not always be an optimal state of judging or of public-private property law development. But from the perspective of private property protection—the relevant lens for the issue of judicial takings—they are a significant deterrent for state court activism.

Judges acting strategically to develop property law in a specific direction may behave more conservatively or incrementally because a legislative response may resolve the issue in a disfavored direction.¹⁷² Modern empirical and legal research has refined the claims of legal realism through studies of judges acting either “attitudinally” to effectuate their ideological positions in the instant case or “strategically” to prevent backlash and advance their ideological agendas long-term.¹⁷³ In the con-

to curb eminent domain, while in reality having little effect”).

172. Cf. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 60 (1997) (discussing strategic policy decisions of judges); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 15–23 (1964) (discussing the sources and instruments of judicial power).

173. Compare Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832–35 (2008) (describing “attitudinal” judging behavior), with MURPHY, *supra* note 172, at 50 (describing how judges influence policy over time), and Kevin T. McGuire & James A. Stimson, *The Least*

text of judicial property activism, the prospect of permanent legislative revision constrains in-the-moment, attitudinal judging that might favor elimination of private rights or radical redistributions in favor of stability or strategic incrementalism.

In addition, a legislative check greatly increases negative publicity and public scrutiny of the state court judge—a significant matter in an age of judicial recalls.¹⁷⁴ If the judicial action is extreme enough to prompt the legislature to action, there has likely been media attention already. A legislative revision process increases that attention exponentially and prolongs it over many months. Such publicity, coupled with the implication of judicial wrongdoing suggested by some forms of legislative revision, can tarnish a judge’s reputation or motivate attempts to oust a judge through retention election recall (if state law enables recall).¹⁷⁵ While publicity and politics may not fully or invariably constrain state court judges, undeniably they have a forestalling effect some of the time.

Legislative checks and the bi-directional interaction between state courts and legislatures are also important to developing and defining state property law. By this I mean not only the content of the legislative revision, which of course becomes part of state property law, but also the legislative check as an indicator of the degree of property flux and disrupted investment that a state will accept. For example, the federal constitutional regulatory takings test and many state counterparts weigh “reasonable” investment-backed expectations, based on state law, to determine whether a state or local regulation is a regulatory taking.¹⁷⁶ A state legislature that is quick to revise court overreaching signals a thicker approach to property rights protection that affects the property expectations component of the regulatory takings test. As I will discuss in Part III, the *Stop the Beach* plurality’s judicial takings doctrine places the legislature under direct federal court order, financial duress, or both to invalidate the state court decision (or to com-

Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences, 66 J. POL. 1018, 1019 (2004) (“[S]trategic justices must gauge the prevailing winds . . . politicians and make decisions accordingly.”).

174. See Hobbs, Jr., *supra* note 99, at 140–43 (discussing the publicity of state supreme court decisions and the impact on re-election).

175. See Pettys, *supra* note 97, at 70–72 (discussing various recent attempts to oust judges in retention elections).

176. For a description of how this approach represents implicit delegations to state law and courts, see Sterk, *supra* note 29, at 206, 231.

pensate). State legislative action in these circumstances does not send a clear signal about *state* legislative norms of property protection.

The interplay between state legislatures and courts may develop property law in other ways. The current system of state legislative checks of judicial overreaching may encourage more deliberative or balanced development of state property law than a system of revision situated predominantly within the judiciary. Legislative checks of state court decisions, and potential later judicial review of the legislative revision, create multiple inputs and checks that may tend to stabilize property rights, or at least discourage radical action by one branch. Todd Zywicki's work on the efficiency-enhancing effects of supply side competition among courts on the common law suggests another benefit: multiple inputs can improve the quality of law production.¹⁷⁷ He offers a historical account of how competition between common law courts motivated judges to carefully conceptualize and abstract the common law and encouraged high-quality rules and internal coherence.¹⁷⁸

Unlike systems of overlapping common law courts, state legislatures and state courts do not compete for clients. Indeed, both might prefer not to have a property law dispute deposited on their institutional doorsteps. However, the fact that state legislatures have the authority to revise non-constitutional property decisions of state courts creates an analogous jurisdictional overlap. As property disputes bounce between courts and legislatures, it may force both institutions to abstract the principles and interests underlying property law and to think more conceptually and carefully about state law development. For example, following the legislature's revision of *Conatser*, the issue is presently back in state trial court to determine the constitutionality of the new statute and to clarify the scope of the legislature's constitutional review role under the Utah Constitution.¹⁷⁹ This back and forth between state legislative revision and state court review can be a valuable part of refining and legitimizing legislative solutions (as well as clarifying state separation of powers).

177. See Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1586 (2003).

178. See *id.*

179. See *Utah Stream Access Coal. v. ATC Realty*, No. 100500558, slip op. (Utah Dist. Ct. May 21, 2012).

C. GAPS IN STATE LEGISLATIVE CHECKS: *ROBINSON V. ARIYOSHI* REVISITED

Legislative checks address state court overreaching without the costs of judicial takings doctrine to common law development and takings federalism. However, legislative checks do not work invariably or infallibly. Public choice dynamics and legislative inertia may stymie legislative correction.¹⁸⁰ Context-specific politics and circumstances can create instability within the political process or political capture that produces dysfunctional legislative responses.¹⁸¹ Legislative checks are also unlikely to occur when the court decision validates or otherwise benefits a statute or regulatory scheme supported by a majority of the state legislature. These dynamics underscore the importance of state court restraint and the doctrinal and political forces supporting judicial conservatism with respect to property rights.

In many cases, vigorous interest group politics reduces the risk that legislative checks will fail to occur. Natural resource and water law cases comprise the majority of “activist” state supreme court property cases. These are virtually always high-stakes cases with multiple interested parties vigorously defending their claims.¹⁸² Similarly, land use litigation often involves strong interests on both sides of a dispute and frequently implicates the legal rights of parties not before the court.¹⁸³ As Daniel Farber and Carol Rose have observed, property litigants are often “discrete and insular minorities” with surprising, and often superior, power compared to the diffuse majorities who in many cases are the beneficiaries and would-be defenders of

180. Conversely, relying on state legislative checks may raise concerns that state legislatures will overuse legislative revision to undermine judicial review. The high costs of legislative action, state constitutional restrictions, and judicial review of legislative revisions sharply constrain such behavior from legislatures. This type of litigation is presently ongoing in Utah following the legislature’s revision of the law based on the *Conatser* holding. See *supra* note 179.

181. See, e.g., Poirier, *supra* note 114, at 247 (discussing the politics of beachfront property law and policy development).

182. See Tarlock, *supra* note 143, at 773–74.

183. As Stewart Sterk notes in his discussion of legislative takings and state political process, “developers and local governments are both active in local politics . . . Takings questions are a far cry from free speech or equal protection controversies that typically pit a disenfranchised individual with an unpopular cause against the power of the state.” Sterk, *supra* note 29, at 235; see also FISCHER, *supra* note 2, at 4 (persuasively arguing that state legislative process provides substantial protection against legislative takings).

state enactments.¹⁸⁴ State statutes imposing limits on regulatory takings, requiring impact assessments, and restricting development moratoria attest to the influence of landowners and developers in state politics.¹⁸⁵ In addition, robust (though not unqualified) public disapproval of private property redistribution, as well as the growing number of private property protection groups, increases the responsiveness of state legislatures.¹⁸⁶ Apart from public choice pressures, legislators may also act upon their personal commitments to property protection.

Notably, some cases that might at first appear as failed legislative checks, such as *State ex. rel. Thornton v. Hay*¹⁸⁷ or *Matthews v. Bay Head Improvement Assoc.*,¹⁸⁸ on closer view do not appear to have escaped legislative revision due to political capture or legislative indolence. Rather, these court decisions and the legislature's acceptance of them reflect common intuitions across state institutions about issues such as preserving long-standing public access rights or preventing de facto racial segregation on beaches.¹⁸⁹ In other cases, reciprocal gains, or "givings," to owners deprived of their rights by courts mitigate harm and eliminate the need for a legislative response.¹⁹⁰ Litigants alleging a "judicial taking" may not merit compensation under a regulatory-takings style analysis of social benefits compared to the *net* loss (i.e., after subtracting gains to owners) imposed on an owner by a state court.¹⁹¹ The plaintiffs in *Stop the Beach*, for example, did not have to pay for extremely expensive beach restoration and maintenance provided by the state.¹⁹²

184. See Farber, *supra* note 29, at 289; Rose, *supra* note 111, at 1136.

185. See Sterk, *supra* note 29, at 257–60.

186. See, e.g., LEWIS, *supra* note 83, at 96; Nadler et al., *supra* note 83, at 286–89; NAT'L CONSTITUTION CTR., *supra* note 83, at Q15.

187. 462 P.2d 671 (Or. 1969); see *supra* notes 58–62 and accompanying text (discussing the *Thornton* case).

188. 471 A.2d 355 (N.J. 1984); see *supra* note 57 and accompanying text (discussing the *Bay Head* case).

189. See *supra* Part I.A.

190. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 555 (2001) (conceptualizing government acts that enhance value within takings theory).

191. See Fennell, *supra* note 14, at 109–14.

192. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2600, 2010–13 (2010).

While legislative gaps may be more confined than a pure public choice model would predict, on occasion a court may deprive a litigant of property, and the litigant may not receive relief because a legislative check does not occur (or because statutory relief does not apply retrospectively).¹⁹³ The fact that on occasion an individual property owner may not receive recompense from a change in the common law is less calamitous if one takes a social rather than individual perspective on property rights and judicial takings. Regulatory takings doctrine, for example, privileges social interests over absolutist protection by weighing public interests in its balancing test and focusing takings liability on acts that “single out” owners for very large diminutions in property value.¹⁹⁴ This perspective focuses on the legal superstructure of property rights, and the protection of property and other values, by balancing social and individual interests—not on the invariable protection or compensation of owners for every state incursion.¹⁹⁵ From this vantage, the fact that from time to time an owner may not receive compensation or other relief following a judicial decision “taking” property rights may be the toll for avoiding the larger costs to property common law and social goals from a robust judicial takings doctrine.

A particular point of vulnerability in a legislative process model is that legislatures are less likely to revise state court decisions that validate or prevent takings liability for state enactments. At first glance this appears to be a looming hole in the legislative process theory, but upon closer examination the problem is more confined. First, there are multiple circumstances in which legislatures may check their own statutory

193. For example, a recent case of an owner losing beachfront property rights dates to the period after the court decision allowing public access by adverse possession in *Gion v. City of Santa Cruz* but before the legislative revision. See Vitauts M. Gulbis, Annotation, *Implied Acceptance, by Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters*, 24 A.L.R. 4th 294 (1983); *Prescriptive Rights: Recreational Trail Users Win Right to Access Dirt Road*, CAL. PLAN. & DEV. REP. (Apr. 1, 2000, 1:00 AM), <http://www.cp-dr.com/node/1305>.

194. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–41 (2005); see also *Kent, Jr.*, *supra* note 16, at 157–66 (considering how judicial takings fits within the *Lingle* regulatory takings framework). As the Supreme Court has made clear, absolute redress for any property infringement, no matter how small, is the exclusive doctrinal domain of physical takings by the legislature. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–27 (1982).

195. I thank Robert Post for his comments on this point.

schemes or regulations, such as when the political winds have shifted the legislature's initial support of an act, the legislature is divided, the statute is dated and the legislature feels no particular affinity toward it, or interest group pressure has become overwhelming. For alleged judicial takings in cases addressing state agency regulations, the legislature may be quite willing to check its own enactments if it disagrees with an agency action. Second, as discussed in Part I, even if the legislature supports the enactment and is unlikely to check a judicial decision supporting it, there is little reason to presume, as some scholars have suggested, that courts are in danger of coordinating with the legislature to wrongfully uphold enactments.¹⁹⁶ Last, it is noteworthy that often the cases that seem to be the best candidates for the appellation judicial takings focus on common law questions rather than state enactments, or interpret statutes in a way that expands the law in a direction that either is disfavored by the legislature or off the legislative radar screen.¹⁹⁷ The true Achilles heel of legislative checks is likely not in-state public choice failure, but the inadequacy of state political process to protect out-of-state property interests (a point I take up in Part IV).

On the benefit side, one advantage of the variability of legislative revision is the potential for legislative filtering of claims. State legislatures can efficiently filter out, or not respond to, alleged judicial takings originating from court decisions that increase rather than diminish property values (the "givings problem"), eliminate negligible rights, or convey strong social benefits.¹⁹⁸ In comparison, the judicial takings doctrine articulated by the *Stop the Beach* plurality does not distinguish between major versus minor rights appropriations, and offers no standard for distinguishing between the elimination versus clarification of common law rights.¹⁹⁹ Concededly, exclusive Supreme Court jurisdiction of judicial takings claims would also serve as a filter. However, the Court's history of property case

196. Cf. Peñalver & Strahilevitz, *supra* note 16, at 328–29.

197. See *supra* Part I.A. But see *County of Hawaii v. Sotomura*, 517 P.2d 57, 57–58 (1973) (affirming the eminent domain acquisition of ocean front property under a Hawaii state statute).

198. See Bell & Parchomovsky, *supra* note 190.

199. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601–10 (2010). Even if a reformulated judicial takings doctrine were to address these problems, it would reduce but not eliminate the costs to common law development and judicial resources.

selection, and its decisions in those cases, do not consistently track metrics such as economic value, political will, efficiency, or the magnitude of violations of individual rights (e.g., federal regulatory takings doctrine makes it nearly impossible for affected owners to state claims that merit Supreme Court review and to prevail, while the Court's physical takings doctrine does not distinguish between minute versus major government takings). In addition, for third-party claims by individuals who are affected by a judicial taking but were not parties to the underlying state court litigation, the *Stop the Beach* plurality opinion leaves open the prospect of lower federal court review (if the final decision rule from *Williamson County*²⁰⁰ does not apply).²⁰¹

Turning to the case law, the Hawaii case *Robinson v. Ariyoshi*, famous as an example of a judicial taking, also exemplifies how legislative revision may partially restore property rights despite strong popular support for the state supreme court's redistribution.²⁰² This case suggests that the public choice dynamics surrounding state legislative checks are more complicated and difficult to predict than assumed. Legislative revision can occur in the face of strong political support for the court decision, although in such cases legislative action may be slower and restore rights only partially.

The dispute in *Robinson v. Ariyoshi* began in 1959 as an unremarkable squabble between sugar companies as to their respective water rights in the Hanapepe River.²⁰³ In *McBryde Sugar Co., Ltd. v. Robinson*, the Hawaii Supreme Court affirmed the sugar companies' appurtenant water rights to take the non-surplus water flow, but sua sponte held that all surplus water in the state, including the normal, storm, and freshet

200. See *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187 (1985) (“[A] claim that the application of government regulations effects a taking of property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”).

201. See *Stop the Beach*, 130 S. Ct. at 2609–10; see also Bloom & Serkin, *supra* note 17, at 604–08 (discussing forum considerations for third-party claimants).

202. 658 P.2d 287 (Haw. 1982) (reviewing alleged judicial taking in *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330 (Haw. 1973)); see also *infra* notes 217–21 and accompanying text (explaining that the *Ariyoshi* plaintiffs' rights were partially restored through grandfathering provisions implemented in Hawaii's Water Code in 1987).

203. See *Ariyoshi*, 658 P.2d at 292–93 (describing procedural history).

surpluses, was the property of the state.²⁰⁴ The Hawaii Supreme Court also held that landowners adjacent to the streams could not transfer their water to other parcels outside the watershed, reversing the sugar plantation owners' longstanding private right to transport water via irrigation systems to other areas.²⁰⁵ The decision abruptly reversed nearly a hundred years of legal treatment of surplus water rights as private property. This history of water rights was a source of much bitterness and conflict in the state.²⁰⁶ Water privatization had followed the overthrow of the Hawaii kingdom, the conquest of land and water rights, and the reversal of customary Hawaiian law of communal ownership of water.²⁰⁷

After an unsuccessful rehearing before the Hawaii Supreme Court, the sugar companies challenged the decision in federal district court.²⁰⁸ In *Robinson v. Ariyoshi*, the federal district court heard the sugar companies' claims that the Hawaii Supreme Court had violated substantive due process (the judicial taking claim) and procedural due process and enjoined state officials from enforcing *McBryde*.²⁰⁹ Subsequently, the Ninth Circuit certified questions back to the Hawaii Supreme Court about the meaning of state ownership of surplus waters in *McBryde*.²¹⁰ The Hawaii Supreme Court then sidestepped the judicial taking issue by holding that state ownership of the water did not refer to corporeal ownership (which would be a tak-

204. 504 P.2d at 1339–41.

205. *Id.* at 1339.

206. Since 1894, following the overthrow of the Kingdom of Hawaii, private water rights replaced the prior Hawaiian custom of communal ownership of water. While the surplus rights were well-established in the sense of being relatively longstanding, the legal validity of this regime, and the legitimacy of the business interest-dominated courts of that period, was controversial (especially because the private rights pre-dated Hawaiian statehood). See *Ariyoshi*, 658 P.2d at 306–08. For a fascinating discussion of the history of Hawaiian water rights, and the perspective of the Hawaii Supreme Court written by the former counsel to the Hawaiian Chief Justice Richards at the time of the *Robinson* cases, see Williamson B.C. Chang, *Judicial Takings: Robinson v. Ariyoshi Revisited*, 21 WIDENER L.J. 655, 682–706 (2012) (concluding that the *McBryde* holding was a “corrective decision [that] restored communal water practices in place of private ownership of water,” and that the case would not have been a judicial taking under the plurality’s test in *Stop the Beach* because private rights to surplus water were not sufficiently established in Hawaiian law).

207. See Chang, *supra* note 206, at 697–704.

208. *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977).

209. See *id.* at 564.

210. See *Ariyoshi*, 658 P.2d at 292–94.

ing) but rather reaffirmed the State's common law public trust rights over state waters.²¹¹ Functionally, the result was the same for the owners whose former private water rights were now public trust rights vested in the state. However, the fact that the state had not taken ownership but rather asserted longstanding background public trust rights meant that the matter was not constitutionally ripe as a taking. Additional court proceedings followed, including the U.S. Supreme Court's order to the federal courts to reconsider the case in light of *Williamson County*,²¹² and the federal district court's subsequent finding that the case was ripe for decision and possible relief.²¹³ Finally, in 1989, the Ninth Circuit dismissed the case for lack of ripeness.²¹⁴ After decades, the litigation petered out without resolution of the judicial taking claim.

As it turns out, the only relief that the former owners received was from the state legislature. Despite tremendous majoritarian support in Hawaii for the redistribution of private rights from the sugar companies to the state, the legislature acted to partially restore the private water rights.²¹⁵ Following the litigation, the legislature and executive branches did not enforce the Hawaii Supreme Court's decision and the sugar companies continued to use the surplus water.²¹⁶ The Hawaii Supreme Court decision establishing public trust rights wiped the legal slate sufficiently clean for the legislature over several

211. *See id.* at 310.

212. *See Ariyoshi v. Robinson*, 477 U.S. 902, 902 (1986). The 1985 Supreme Court decision in *Williamson County* held that a takings claim is not ripe until the government entity charged with the taking has reached a final decision as to how it will apply the regulation to the land in question. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

213. *Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1020–21, 1023–24 (D. Haw. 1987).

214. *See Robinson v. Ariyoshi*, 887 F.2d 215, 219 (9th Cir. 1989) (“To date, the State has not interfered in any way with the parties’ use or diversions of the waters of the Hanapepe and its tributaries. . . . [E]ven if the State of Hawaii has placed a cloud on the title of the various private owners, this inchoate and speculative cloud is insufficient to make this controversy ripe for review.”).

215. *See infra* notes 217–21 and accompanying text. The strong popular support for redistribution derived from the oligopoly of the sugar companies and bitter conflicts as to the validity of the plantation owners’ rights in light of Hawaii’s troubled history of native land dispossession. *See generally* Chang, *supra* note 206, at 697–704.

216. *See* Interview with Williamson B.C. Chang, Professor of Law, Univ. of Haw. at Mānoa William S. Richardson Sch. of Law (July 25, 2012).

years to complete a comprehensive state water code and to restore some of the sugar companies' water rights. As this case illustrates, legislative revision need not be exclusively motivated by a state court decision in order to address a judicial taking. The owners' rights in *Robinson v. Ariyoshi* were one item in a larger legislative agenda motivating the enactment of the Water Code.

The amended Water Code created a permit system that grandfathered in existing users, including the plantation owners in *Robinson v. Ariyoshi*.²¹⁷ The permits were transferable, in whole or part, and remained indefinitely in effect without renewal obligations.²¹⁸ The Water Code also restored the right to transfer water outside the watershed from which it was taken.²¹⁹ The practical impact was that the former private owners, such as the sugar companies, received about half of the water they had previously had rights to under the pre-*McBryde* water rights regime.²²⁰ In essence, the Water Code effected a compromise. Users who had lost their vested common law rights in *McBryde* gained much-needed clarity and certainty about their property rights as well as durable, generous permits that allowed them to continue a large share of their prior water appropriation.²²¹ The state gained greater control over water usage and the legal authority to manage water through the permit system in order to prevent resource degradation and harm to downstream users. In this case, coalition politics and logrolling yielded a viable intermediate solution to judicial activism and to the state's distribution of public and private water rights.

217. See HAW. REV. STAT. § 174C-50 (West 2008).

218. See *id.* § 174C-55 (providing that each permit is valid until the designation of the water management area is rescinded); *id.* § 174C-59 (providing that transfers are allowed with the same permit conditions). The Water Code limited permit revocation to cases where the commission rescinded the water management area designation, the permit holder engaged in partial or total non-use of the water, or the permit holder otherwise violated the application or permit requirements. See *id.* § 174C-58(1)–(4) (providing rules for the revocation of permits).

219. See *id.* § 174C-49(a) (conditions for a permit).

220. See Interview with Williamson B.C. Chang, *supra* note 216.

221. See *supra* notes 204–05 and accompanying text (discussing the *McBryde* case).

III. POTENTIAL UNINTENDED CONSEQUENCES OF JUDICIAL TAKINGS DOCTRINE

The public debate and legal scholarship have focused on how judicial takings will chill state courts' development of property common law.²²² Yet, the harms to property law also derive from the potential of judicial takings to alter or mute legislative checks and the legislative role in developing state property law. Depending on the degree of financial liability and political pressure confronting the state legislature, judicial takings may alter the likelihood of legislative revision, chill intermediate legislative solutions, crowd out legislators' constitutional property commitments, or create duplicative and overlapping federal court and state legislative revision processes. In theory, the same problems afflict federal court review of due process claims of state court wrongdoing. However, under the *Stop the Beach* plurality's expansive definition and likely remedy of compensation, a federal judicial takings doctrine is likely to create many more claims, and correspondingly more state legislative distortions, than federal due process.²²³

A. THE LIKELIHOOD OF INDEPENDENT STATE LEGISLATURE REVISION

The *Stop the Beach* plurality proposed that if the Supreme Court finds a state court has eliminated an established common law property right, it would invalidate the decision as applied to the litigants (typically this would functionally invalidate the statutory provision or relevant doctrine altogether). The state legislature would then have the choice to either pay compensation or acquiesce in the invalidation of the state court decision.²²⁴ The *Stop the Beach* plurality opinion did not clarify whether *First English*²²⁵ creates interim judicial takings liabil-

222. See, e.g., Dogan & Young, *supra* note 4, at 107–08.

223. This is particularly true because the judicial takings standard in *Stop the Beach* is expansive and may not include countervailing considerations, such as the public value of the government's action and reciprocity of advantage to the private owner. See generally Kent, Jr., *supra* note 16, at 158–68 (comparing judicial takings doctrine with the *Lingle* regulatory takings framework).

224. For a pure common law case, not involving a statute or regulation, it is not clear whether the *Stop the Beach* plurality contemplates federal court invalidation, a matter of some constitutional tension, or the arguably even stranger situation of the case returning to the state court with the legislature now involved in the judicial (or legislative?) compensation decision.

225. *First English Evangelical Lutheran Church of Glendale v. County of*

ity for the period from the judicial decision until its invalidation—another devil in the details of judicial takings doctrine.

The likelihood that state legislatures will act spontaneously (i.e., not under federal court order) to revise judicial activism depends on whether *First English* applies and creates state liability for interim takings damages. It also depends on the degree of political pressure or exigent need for legislative action to correct a court decision as well as the likelihood of federal review (i.e., whether the Supreme Court, with its limited docket, has exclusive jurisdiction over judicial takings claims or whether litigants or third parties can raise their claims before lower federal courts). When there are easy political gains from legislative revision or practical necessity to act, legislatures are likely to respond regardless of judicial takings doctrine—indeed, in some cases, legislators may gain political capital by acting immediately to right the judicial wrong. However, in these cases, as I will discuss in Part III.D, legislative action and a judicial taking appeal may overlap and lead to duplicative action and wasted resources.

If *First English* does not apply and the political pressure on the legislature is not overwhelming, state legislatures may be less likely to be first movers that initiate checks of state court activism independent of a federal court order to do so. In these circumstances, judicial takings doctrine provides “political cover” that allows legislatures to more easily evade or forestall public demands for action. A politically risk-averse or inert legislature now has the ready excuse that a federal court will be addressing the problem or that these claims are rightfully a matter for judicial review. Thus, in certain circumstances, judicial takings may reduce the involvement of institutions that are democratically accountable to the state’s citizens and expert in the state’s property law—state legislatures. Of course, the *Stop the Beach* plurality approach draws state legislatures into the process by returning the Supreme Court’s or lower federal court’s judgment of a judicial taking to the legislature to acquiesce in the invalidation or pay compensation. However, this form of federally-coerced state legislative involvement (which will typically result in invalidation) will tend to be formulaic and hollow, both substantively and in its expressive value to the state’s citizens.

If *First English* does apply and creates state liability for temporary takings damages, the incentives for state legislative action are very different. In this scenario, state legislatures have incentives to act quickly to revise state court judgments that threaten substantial takings liability and loss of state revenue (more strongly so if there is lower federal court review as opposed to exclusive Supreme Court jurisdiction). Indeed, if *First English* applies, it is quite possible that risk-averse state legislatures will overreact and revise too many state court opinions, or revise them too severely, thereby chilling the development of the common law.²²⁶ *First English* interim judicial takings liability may also distort legislative responses by encouraging legislative revision when there appears to be a low probability that the state court action was a judicial taking but huge financial liability under *First English* if a federal court later disagrees. The costliness of legislative process mitigates legislative overrevision of state court decisions to a degree (i.e., legislatures will compare the costs of revision to the expected value of temporary takings damages). However, state legislatures can reduce their costs of revision through steps such as creating state positions or institutions to monitor courts and formulate revisions for legislative vote.

Both with and without *First English* liability, there are expressive and symbolic losses to state citizens from judicial takings doctrine. As discussed previously, state legislatures that act as independent first movers to address judicial property activism express, or signal, the legislature's position on property rights stability and their intentions to avoid radical redistributions.²²⁷ Federal judicial takings liability mutes the expressive and symbolic value of state legislative checks. When legislative revision occurs, state citizens are less likely to view it as motivated from legislative commitments to property stability or balancing property interests and state needs. Rather, citizens may perceive state legislatures acting as the federal court's lackey or in a desperate rush to avoid temporary takings damages. One might respond that what matters both substantively and expressively to citizens is the fact of the reversal, or that citizens may not understand the federal role in the legislative

226. The costliness of legislative action mitigates against a high frequency of legislative revision in general. With temporary takings liability under *First English*, however, the legislature must weigh the costs of takings liability, both direct and political, against the costs of legislative revision.

227. See *supra* Part II.B.4.

reversal. The latter is possible but not universal, especially in light of the extensive media coverage that accompanies controversial court decisions on property rights. The former may (or may not) be true with respect to the particular “judicial taking,” but it will not generalize to other contexts in which state legislatures and state courts adjust and administer property rights. A federal judicial takings decision does little to address citizen confidence in state legislative judgment in the many situations where takings claims, legislative or judicial, would not apply or succeed.

B. COSTS TO PROPERTY LAW DEVELOPMENT AND POLITICAL ACCOMMODATION

In the face of a federal judicial taking determination, state legislatures are less likely to innovate, enact comprehensive legislation, or respond to state court activism with intermediate or compromise solutions. If the legislature wishes to craft its own legislation adjusting the adjudicated property rights, even in minor ways, following a federal court judgment of a judicial taking, it will reasonably fear that the judicial takings case has set the stage for subsequent Fifth Amendment takings liability against the legislature. Accordingly, state legislatures have diminished incentives to engage in lawmaking beyond a straightforward acquiescence in the federal invalidation of the state court decision. This will tend to chill the legislative development of state property law, including middle ground solutions and attempts by the legislature to address resource conflicts by enacting comprehensive regulatory approaches. Of course, the desirability of intermediate solutions and political accommodation depends on the particular facts and circumstances—the middle ground is not intrinsically efficient or principled. In many cases, however, intermediate solutions in property and water law conflicts are efficient as well as more politically palatable in the long-term than binary conflict resolution. As discussed previously, intermediate solutions may also be faithful to the common law by reflecting the underlying goals and intentions of common law rules or the common law history of the issue taken as a whole.²²⁸

Following a judicial taking determination, legislatures have reduced incentives to engage in a full political process and allow state interests to be heard. They are likely to invalidate

228. See *supra* Part II.B.1.

and either decision, compensate or invalidate, must be accomplished quickly if temporary takings liability is accruing. This has costs to public acceptance and the legitimacy of state property law. Political process increases the flow of information between interest groups and legislatures and, if sufficiently respectful and fair, can be a surprisingly important factor in citizens' satisfaction with outcomes.²²⁹ If legislative process does occur following a federal judicial taking determination, or the prospect of one, the niceties of "framing" the political process and the ensuing legislation to emphasize mutual benefits or public values may be lost—the legislature may feel the federal court order speaks for itself.²³⁰ These dynamics exist with and without *First English* liability, but are more intense when the legislature is acting quickly to minimize temporary takings damages.

The recent experience in Oregon is instructive. In 2005, Oregon enacted Measure 37, which required local governments to either compensate landowners for land use regulations that reduce property values or to repeal those regulations.²³¹ Nearly without exception, localities chose to repeal the regulations rather than pay compensation. Measure 37 chilled local government lawmaking, including regulations and potential amendments of contested ordinances, which would have provided net benefits. A number of local government measures that protected property and increased property values on net foundered because localities were averse or unable to pay compensation to the subset of negatively impacted property owners, including in some cases minimally harmed owners.²³² These problems led the Oregon legislature to enact a subsequent law, Measure 49, which greatly limited the property protection and compensation provisions of Measure 37.²³³ Admittedly, the analogy to judicial takings is imprecise because the decision to invalidate regulations or pay compensation in Measure 37 was vested in local

229. For an account of how procedural fairness in legal processes affects satisfaction with outcomes and perceptions of laws' legitimacy, see E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 76–83 (1988).

230. If framing or political accommodation does occur it may appear less credible against the backdrop of a federal court decision and the legislature's unwillingness or inability to pay compensation.

231. See OR. REV. STAT. ANN. § 195.305 (West 2013).

232. See Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 *FORDHAM L. REV.* 1281, 1329–30 (2009).

233. See OR. REV. STAT. ANN. §§ 195.300–.336.

governments. However, there is little reason to believe that following a federal judicial taking determination state governments will be dramatically more likely to open their coffers to pay compensation or any less risk averse about crafting subsequent middle ground solutions or compromise legislation. In the judicial takings context, some may view such legislative chilling as unproblematic on the theory that invalidation and full restoration of the contested common law right is the only correct course of action. However, this view does not account for cases where the common law is opaque or anachronistic or for the possibility of a superior legislative resolution.

C. CROWDING OUT STATE LEGISLATIVE CONSTITUTIONAL COMMITMENTS

Situating judicial takings oversight in state legislatures may be one important aspect of developing legislators' property constitutionalism. Judicial takings may crowd out to a degree state legislators' role in property protection and willingness to redress state court activism, at least with respect to independent legislative checks (i.e., not under a federal court order).²³⁴ Currently, state legislatures perceive themselves as the bodies responsible for redressing state court radicalism with respect to property rights, at least if no state court constitutional pronouncement is at play, or the state constitution does not restrict constitutional review to courts.²³⁵ For example, the legislative history of the *Conatser* case makes evident that one of the aims of the Utah legislature was to enforce state constitutional protection of private property rights.²³⁶ The difficulty of prevailing on federal due process claims supports this legislative perception.

234. See Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589, 589–97 (2001) (describing how external punishments and incentives can reduce intrinsic motivation).

235. For example, the legislature following *Conatser* discussed that a state constitutional conclusion from the state supreme court acted as an absolute restraint on legislative action. The legislator who introduced a bill seeking to restore the private owners' rights remarked in the house floor debate that the "good news is the court did not rely upon any constitutional provisions. There's no constitutional analysis; it relied on a statute. The legislature can deal with statutes; it can clarify and amend." See Audio recording: Floor Debate on House Bill 141: Recreational Use of Public Water on Private Property, 2010 Gen. Sess. (Utah 2010) (Feb. 22, 2010), available at <http://le.utah.gov/~2010/htm/doc/hbillhtm/HB0141.htm> (statement of Rep. McIff).

236. See Williamson, *supra* note 138, at 327–28.

In his theory of judicial overhang, Mark Tushnet contends that the federal courts' role reduces the incentives for Congress to consider constitutional concerns as part of the legislative function.²³⁷ Judicial overhang from a federal judicial takings doctrine may similarly lessen state legislators' view of their obligations as constitutional property rights protectors and signal to legislatures that checks of state court property activism are not within their properly understood sphere. This is particularly likely because judicial takings doctrine derives from the Fifth Amendment, which *empowers* government—apparently now including state courts—to take property.²³⁸ This reinforces to legislatures the notion that state court property abuses are now within the judicial sphere, seemingly as an affirmative state court right as well as a ground for federal court invalidation. If the takings power is equally vested in state courts and state legislatures, then why should state legislatures check state courts?

One may question whether it matters if legislators experience crowding out if judicial takings doctrine is available to address state court "takings." Notably, if the Supreme Court has exclusive jurisdiction to hear judicial takings cases (a point not clarified in *Stop the Beach* with respect to whether third-party claims can originate in federal court),²³⁹ the forum for judicial takings is limited. Destabilizing the legislative understanding of its constitutional obligations, even to a modest degree, may result in less redress for state court property activism. Also, this view looks too narrowly to state court activity that would fall within the auspices of a judicial takings doctrine. It neglects the many other property rights issues, in the state courts and state legislatures, for which a general legislative commitment to avoiding radical, uncompensated redistribution of property rights is important.

Of course, crowding out, like the other dynamics discussed in this Part, depends on political pressures and circumstances, the likelihood of federal forums in addition to Supreme Court review, and the details of judicial takings doctrine and the fed-

237. See TUSHNET, *supra* note 20, at 57–58.

238. For discussion of this point in *Stop the Beach*, see *Stop the Beach Re-nourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2616 (2010) (Kennedy, J., concurring).

239. See *id.* at 2609 (discussing respondents' arguments over whether federal courts have the capacity to address these claims without deciding if they have that power).

eral order to the state legislature. For example, one objection to my account is that if, as the *Stop the Beach* plurality suggests, federal courts must return judicial takings judgments to the state legislatures to acquiesce in the judgment or pay compensation, this may “crowd in” a property-protective role. I think this is unlikely and if it does so, it will be in the limited sense of the state legislature viewing its constitutional role as implementing federal court judgments. In a similar vein, if *First English* applies, legislatures will perceive if not a constitutional, at least a practical, obligation to act. However, the dynamic has changed in important ways from the legislature initiating change on its own volition to it scurrying to avoid racking up monetary liability.

D. PROCESS CONFLICTS AND MOOTNESS

Of course, judicial takings doctrine does not chill legislative revision in every circumstance. In the face of overwhelming political pressures or steep social or economic losses, the legislature often has no choice but to act. In *Krummenacher v. City of Minnetonka*,²⁴⁰ the Minnesota Supreme Court reversed the decades-old “reasonable manner” rule, a common law interpretation of an underspecified statutory provision, and held that granting a variance required a showing that the property in question could not be put to any reasonable use.²⁴¹ For a period of time, this holding effectively wiped out variances as a flexibility device for zoning across the state (though Minnetonka evaded the ruling by granting a retroactive expansion permit rather than a variance for a non-conforming building project).²⁴² Responding to enormous political pressure from a broad-based constituency of private and public interest groups, spearheaded

240. 783 N.W.2d 721 (Minn. 2010).

241. In this case, Beat Krummenacher sued the city after it granted his neighbor JoAnne Liebeler, former host of the PBS-TV remodeling show *Hometime*, a permit to remodel her roof in order to build a personal yoga studio and craft room. *Id.* at 724. Consistent with the bi-directional interaction between courts and legislatures, the *Krummenacher* court intimated that the legislature should reconsider the statute when it observed that the court’s hands were tied “unless and until the legislature takes action to provide a more flexible variance standard for municipalities.” *Id.* at 732.

242. See Katelynn Metz, *Minnetonka Zoning Fight Has Statewide Impact*, MINNETONKA PATCH, Nov. 17, 2010, <http://www.minnetonka.patch.com/articles/zoning-fight-hits-home-in-minnetonka> (interviewing owner of a construction company who could not receive the necessary permits for his clients following the decision).

by the League of Minnesota Cities,²⁴³ the legislature swiftly enacted a revision that reinstated the “reasonable manner” standard with minor modifications.²⁴⁴ It is not clear whether the *Krummenacher* case would qualify as a judicial taking or a mere restriction on land use (i.e., consonant with regulatory takings doctrine). However, the point of this case is not the taking per se. Rather, the case illustrates how exigent circumstances or fierce political pressure in response to a state supreme court property decision can provoke a rapid legislative response that may overlap and duplicate a federal judicial taking appeal.

In the face of intense political pressure or large economic losses from a state supreme court decision, state legislatures will act quickly. This creates a risk that the legislative process will operate concurrently with a judicial takings appeal, wasting institutional resources on duplicative efforts. The legislature may be considering bills, for example, while the federal court is reviewing the constitutional claim. Of course, political exigency and the litigants’ awareness of brewing legislative action may in some cases encourage litigants to hold off on federal appeal. In other cases, for a number of reasons, including strategic litigation decisions, uncertainty about the content of any state legislative revision, or even to strengthen their position in lobbying the legislature, litigants may file judicial takings appeals despite the likelihood of a legislative response.

243. See Katelynn Metz, *Fight Between Minnetonka Neighbors Finds Fix at State Capitol*, MINNETONKA PATCH, April 28, 2011, <http://minnetonka.patch.com/articles/fight-between-minnetonka-neighbors-finds-fix-at-state-capitol>.

The long list of interest groups in support of the revision included the League of Minnesota Cities, the Association of Minnesota Counties, the Association of Minnesota Building Officials, Metro Cities, the Minnesota Shopping Association, the St. Paul Chamber of Commerce, and many other public associations. State builders, realtors, and agricultural interests supported revision of *Krummenacher* on the condition that the revised law not give local government the authority to impose conditions on the grant of a variance. See *Variance Bill Alert and Update*, METRO CITIES (Feb. 18, 2011), http://www.metrocitiesmn.org/index.asp?Type=B_BASIC&SEC=%7BCB72E760-F9D0-4BE4-83C2-BC7C0D3B0B5A%7D (describing interest groups debating the proposed bills).

244. Applicants must show that they propose “to use the property in a reasonable manner not permitted by the zoning ordinance.” The legislature changed the standard for granting a variance to “practical difficulties” and retained the former prongs of the test requiring that unique circumstances of the property necessitate the variance and that the variance will not alter the essential character of the locality. MINN. STAT. § 462.357 subdiv. 6(2) (2011).

In addition to wasting resources in duplicative processes, temporal overlap between federal court review and state legislative revision may also stymie the judicial appeal process with prudential concerns. If *First English* does not apply and a legislative revision passes while the federal appeal is pending, it could moot the judicial takings claim, at least if invalidation is the remedy for judicial takings. If *First English* applies, the claim will not be mooted in its entirety, as the temporary damages remain. However, it is conceivable that state legislatures could attempt to dismantle *First English* takings liability, as they have done in some cases with legislative takings by localities, by enacting laws that make judicial takings void ab initio because the taker, here the state court, acted without authority.²⁴⁵ This would be vulnerable on federal and state grounds, but it is conceivable that such legislation would survive on the basis claimed by the *Stop the Beach* plurality: there is no federal constitutional distinction between state courts and legislatures.²⁴⁶

IV. IMPLICATIONS FOR JUDICIAL TAKINGS DOCTRINE

If judicial takings is a matter of constitutional necessity to protect property, as the *Stop the Beach* plurality claims, then why has it not developed in federal or state constitutional law? The framers did not envision judicial takings as a matter of original intent and there is no indication that it was part of the original understanding of the federal Takings Clause at the time of Constitution-making.²⁴⁷ In over two hundred years, the

245. I thank Stewart Sterk for this insightful point. See E-mail from Stewart Sterk, Professor of Law, Cardozo Sch. of Law, to author (Oct. 1, 2012, 9:15 EST) (on file with author).

246. See *id.*

247. Indeed, it appears that the framers contemplated only physical takings, not regulatory takings much less judicial ones. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *135 (eminent domain was a legislative, not judicial power). For an insightful historical account of the Fifth Amendment Takings Clause, see generally William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 700–17 (1985). Stacey Dogan and Ernest Young write that, “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.” Dogan & Young, *supra* note 4, at 114. For a discussion of how original meaning differs from originalism, see Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601–05

Supreme Court has not adopted a judicial takings doctrine or even discussed in detail in a majority opinion the application of the Takings Clause to the judiciary. The closest the Court has come is dicta in Justice Stewart's concurrence in *Hughes v. Washington*, in which he noted that while the state court decision at issue conformed to reasonable expectations, if the facts were otherwise "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."²⁴⁸ *Webb's Fabulous Pharmacies, Inc. v. Beckworth*, another case cited by the *Stop the Beach* plurality, did not directly address a judicial decision but rather whether a county clerk lawfully refused to return nearly \$100,000 in interest on purchase price money deposited into a bankruptcy receivership account because the statute, as interpreted by the court, deemed the interest "public money."²⁴⁹ At the state level, no state or state court has adopted a judicial takings doctrine. This does not appear to stem from state laxity toward property protection. Many states have imposed substantive limits and procedural hurdles that constrain regulatory takings more stringently than the federal constitutional floor of protection.²⁵⁰

This Article contends that the protective function of state legislatures and the advantages of state legislative checks offer a partial answer to why judicial takings doctrine has not developed to date. State institutions have evolved legislative checks, as well as common law doctrines and political restraints, as functional substitutes for judicial takings. The judicial takings debate has taken a myopic view, looking at institutional and doctrinal mechanisms in isolation and focusing narrowly on courts. Viewing only one moving piece biases toward the per-

(2004).

248. 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring).

249. 449 U.S. 155, 160 (1980). The Supreme Court also attempted to situate judicial takings in constitutional history with *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80–84 (1980), however, by the Court's own admission that "opinion addressed only the claimed taking by the constitutional provision" and "not the 'judicial reconstruction of a State's laws of private property.'" *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

250. See generally HARVEY M. JACOBS, STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND (1999) (reviewing state laws that provide enhanced substantive or procedural protection against regulatory takings).

ception that unchecked state court property rights abuse is a problem of greater magnitude than it is in reality. Working in concert, state legislative revision, judicial norms, and popular pressures inhibit and address judicial takings; where these checks fail in some cases due process claims have successfully restored private rights. Due process, with its high threshold for a claimant to prevail and nebulous doctrinal parameters, makes success, particularly on substantive due process claims, difficult and uncertain.²⁵¹ Although criticized by the *Stop the Beach* plurality on these bases, these qualities also roughly tailor due process to the most extreme and exceptional cases of state court abuse and encourage other avenues of redress, including state political process.²⁵²

The functionality of state legislative checks of courts is especially important in light of the high costs of a constitutional judicial takings doctrine. A growing collection of scholarship describes the potential costs of judicial takings doctrine to the development of the common law, judicial resources, federalism, environmental protection and climate change adaptation, and the internal consistency of Fifth Amendment takings jurisprudence.²⁵³ Most damagingly, a constitutional doctrine that re-

251. In addition, due process has benefited from several decades of Supreme Court review and federal-state accommodation that has lessened its effects on state autonomy. Indeed, the history of due process is instructive on the risk of creating new constitutional rights with no thought to the effects on the state legislative function. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 *passim* (1905). In *West Coast Hotel v. Parrish*, 300 U.S. 379, 382–85 (1937), and *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963), the Court held that the fundamental rights theory infringed on the authority of state legislatures. Subsequent cases have refined these holdings and charted a workable, if at times tense, balance between state autonomy and federal due process review.

252. *See, e.g.,* *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978).

253. *See* Christie, *supra* note 16, at 73 (criticizing freezing common law development via judicial takings doctrine at a time when the law requires flexibility to respond to climate change and rising sea levels); *cf.* Craig Anthony Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213, 257–58 (2011) (suggesting that judicial takings constraints should apply when judges eliminate property rights in static, unchanging or degraded land but not when the ecology or geomorphology of coastal lands is changing or has changed); Dogan & Young, *supra* note 4, at 115–16 (discussing costs to common law development and federalism); Kent, Jr., *supra* note 16, at 157–61 (identifying unresolved questions about the doctrinal impact and interaction of regulatory takings with the *Lingle* precedent and judicial takings); Mulvaney, *supra* note 4, at 266 (discussing harms to common law evolution); Peñalver & Strahilevitz, *supra* note 16, at 313 (addressing destabilized property doctrines).

stricts the elimination of a common law property right, no matter how out of sync that right may be with the current legal framework, limits the capacity of courts to respond to changed circumstances and arrests the development of the common law.²⁵⁴ This is problematic in many contexts, including the environmental issues raised in *Stop the Beach* where the state was responding to beach erosion likely caused or exacerbated by climate change.²⁵⁵ In addition to impeding common law evolution, judicial takings doctrine may also distort legislative property law development, as discussed in Part III.

There are also burdens to judicial administration from expanding the Fifth Amendment's purview. The availability of a judicial takings claim enables owners with financial resources to strategically threaten litigation and appeal on judicial takings grounds against less cash-flush opponents.²⁵⁶ Depending on its scope and standards, judicial takings doctrine may strain court dockets, as recognized by Justice Breyer who noted that "many thousands of cases involving state property law" could be subject to judicial takings claims under the *Stop the Beach* plurality's approach.²⁵⁷ As my discussion of the *Robinson v. Ariyoshi* case illustrates, there is also potential for complicated procedural and prudential issues to protract litigation and judicial takings appeals across many years.²⁵⁸ The magnitude of

254. See Dogan & Young, *supra* note 4, at 108 (discussing judicial takings as an impediment to common law evolution and a threat to the autonomy of state courts to interpret state law property doctrines); cf. A. Dan Tarlock, *Water Law's Climate Disruption Adaptation Potential*, N.W. L. SEARLE CENTER 7 n.28 (Apr. 18, 2011), http://www.law.northwestern.edu/faculty/programs/searlecenter/workingpapers/documents/Tarlock_Water.pdf.

255. See Christie, *supra* note 16, at 73 (discussing the environmental consequences of freezing common law development via judicial takings doctrine at a time when the law requires flexibility to respond to climate change and rising sea levels); cf. Arnold, *supra* note 253, at 257–58 (suggesting that judicial takings constraints should apply when judges eliminate property rights in static, unchanging or degraded land but not when the ecology or geomorphology of coastal lands is changing or has changed).

256. Eduardo Peñalver & Lior Strahilevitz make the claim that judicial takings doctrine disincentivizes investment in litigation to clarify property law rights at trial by providing a constitutional avenue of appeal for a decision against the plaintiff. See Peñalver & Strahilevitz, *supra* note 16, at 313.

257. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2619 (2010) (Breyer, J., concurring); cf. Barros, *supra* note 4, at 959 (arguing that if "the scope of the Just Compensation Clause is properly limited to government actions that result in public-private transfers, this prudential concern largely disappears").

258. See *supra* Part II.C.

these costs depends on how expansively the Court defines the standard for judicial takings.

Doctrinally, there are costs to specification of the issues left opaque in the *Stop the Beach* plurality opinion, such as the interaction between judicial takings and the framework for regulatory takings delineated by the Court in *Lingle v. Chevron* and whether the public use requirement applies or judicial takings encompass private party cases.²⁵⁹ In particular, remedy and the scope of damages liability raise thorny issues. Because the text of the Takings Clause explicitly requires “just compensation” it is likely that if the Court adopts judicial takings it will be with a compensation remedy rather than invalidation.²⁶⁰ As the branch with spending power, presumably state legislatures would need to be involved in the compensation decision, either by approving compensation in individual cases or by providing a pre-determined compensation fund; otherwise, courts could order virtually unlimited compensation.²⁶¹ This is a problematic form of a legislative check that may raise separation of powers issues, depending on individual state constitutional law, as well as claims that the legislature is violating the newfound takings power of the state courts. *First English* liability for temporary takings is another hurdle for judicial takings doctrine. If *First English* does not apply, it is likely to reinforce legislative inertia in the face of judicial overreaching as well as sever judicial takings from regulatory takings jurisprudence.²⁶² If it does apply, financial liability may spur state legislatures to check the courts too frequently or too severely, mute intermediate solutions, and truncate aspects of the political process important to public acceptance and the perceived legitimacy of legal transitions.²⁶³

259. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). For a discussion of the tension between regulatory takings and judicial takings and the potential impacts of *Stop the Beach* on future regulatory takings cases, see Kent, Jr., *supra* note 16, at 157–61. Judicial takings may exacerbate the “muddle” of federal takings law as described by Carol Rose. See Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–62 (1984).

260. See *Stop the Beach*, 130 S.Ct. at 2617 (Kennedy, J., concurring).

261. If legislatures did not have the right to approve compensation in some form, then they might have incentives to subvert the state courts by engaging in strategic non-enforcement aimed at causing the takings claim to fail on mootness or ripeness grounds.

262. See *supra* Part III.A.

263. See *supra* Part III.A–B.

This Article argues that state legislative process, coupled with other institutional restraints, provides substantial protection against judicial property activism. In this Part, I examine how takings federalism grounds and strengthens the case for the status quo of state political process protection. I address objections to my account, such as why institutional and political checks justify treating state courts differently than legislatures. I also offer some initial thoughts on whether the subset of cases involving out-of-state property interests necessitate constitutional judicial takings protection.

A. THE TAKINGS FEDERALISM CONUNDRUM: WHY WE SHOULD TREAT STATE COURTS DIFFERENTLY

Judicial takings create a dilemma: the Supreme Court must either embroil itself in state property law and local land use conflicts or devolve the development and oversight of judicial takings to the allegedly offending state courts. In the regulatory takings context, the closest analog to judicial takings, federal courts have found they are ill-equipped to address state property law issues and have de facto delegated primary responsibility for regulatory takings law development and administration to the state courts.²⁶⁴ This history of takings federalism puts into starker relief the problems with judicial takings doctrine—and the rationales for relying on existing political and institutional constraints on state courts.

The Supreme Court's Fifth Amendment jurisprudence makes clear that states, and state courts, define property. Regulatory takings doctrine relies on "background principles" of state law nuisance to determine takings claims.²⁶⁵ Property law varies significantly across the states based on differences in politics, natural resources, culture, fiscal conditions, and state-specific historical understandings of public versus private rights.²⁶⁶ Not only does state law create the baseline of property rights, it is also necessary to determine the degree of change from the baseline that is acceptable (this is represented in regulatory takings with the standard of "distinct investment-backed expectations").²⁶⁷ As Stewart Sterk explains, "[t]he Tak-

264. See Sterk, *supra* note 29, at 205–08.

265. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

266. Cf. Sterk, *supra* note 29, at 223 (discussing differences in states' definitions of property rights).

267. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124

ings Clause protects primarily against *change* in background state law.”²⁶⁸ Changes in property law may be takings in one state with a high and stable baseline of property protection but not in another state whose courts and legislature have historically protected public interests at the expense of development or ownership rights.²⁶⁹

Sterk’s account of regulatory takings describes how the Supreme Court defers to state courts, most potently by making the test for a regulatory taking so weak that state courts have de facto control over doctrine and case resolution.²⁷⁰ State courts and legislatures must provide specification and stronger standards, if desired.²⁷¹ In addition, precedents such as *San Remo* and *Williamson County* impose exhaustion and other requirements that channel takings cases to state courts and force state courts to develop and administer takings law, either as a state constitutional matter or, as is often the case, under co-terminous state and federal takings doctrines.²⁷² The Supreme Court has a strong incentive to delegate to the states, as Sterk observes, because regulatory takings decisions which depend on state law afford limited opportunities to provide national uniformity or guidance (important institutional goals of Supreme Court review).²⁷³ In contrast, in its physical takings jurisprudence the Supreme Court has been able to articulate a national standard, a permanent physical occupation of land, that applies across the states. Accordingly, the Court has been more active in the area of physical takings.²⁷⁴

(1978).

268. See Sterk, *supra* note 29, at 206.

269. See *id.* at 222; see also Bloom & Serkin, *supra* note 17, at 573–74.

270. See Sterk, *supra* note 29, at 230–31.

271. See *id.* at 231–32.

272. See *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323, 327 (2005); *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186–97 (1985); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 253–55 (2006) (ripeness requirements for federal review of takings cases is an “essential pillar” of the Court’s longstanding though unarticulated delegation of takings conflicts to the state courts).

273. See Sterk, *supra* note 29, at 228. Sterk notes that in discrete areas of regulatory takings where the Court can create nationally uniform rules it has done so, including the *Lucas* rule requiring compensation for regulations that deprive an owner of 100% of her property value and the *Nolan-Dolan* rule requiring a causal nexus between a development’s impact and a municipal exaction. See *id.* at 207.

274. See *id.* at 232.

In the judicial takings context, federal courts will need to review state court determinations about the scope and content of state-created property rights and untangle complicated histories of public and private rights. Like regulatory takings, many judicial takings claims will address state court decisions on local land use regulation, involving local circumstances and municipal law and procedure. If judicial takings doctrine tracks regulatory takings even loosely, federal courts will need to determine the substantive state law to resolve whether the state court “took” a common law property right and whether the degree of change violates the Takings Clause. The regulatory takings standard for investment-backed expectations is likely to apply in some form and require federal courts to determine the permissible degree of property change from the prior baseline of the state’s law and history of private property protection. Some scholars have also observed a property rights “trap” for judicial takings: if state laws define property, as the Supreme Court has long recognized, how can state courts as the authoritative interpreters of state law “err” so as to give rise to a judicial taking?²⁷⁵

Because judicial takings entail state law determinations of property rights, the Supreme Court will find itself mired in the very review of state property law that it has spent decades attempting to extricate itself from in its regulatory takings jurisprudence. True substantive protection against judicial takings (i.e., at least a moderately robust standard) will require several layers of Supreme Court effort. The Court must develop standards and resolve the doctrinal holes described previously, such as remedy and temporary takings liability. Then, the Court will need to create iterations and applications of judicial takings to individual state cases, each with its own state property law, background common law of nuisance, and reasonable expectations of property protection. This will require the Supreme Court to labor well outside its institutional expertise.²⁷⁶ Further, these opinions will not provide national (or even circuit-

275. Frederic Bloom and Christopher Serkin explain this view: “Judicial takings thus cannot be seen as a means of error correction, since authoritative state courts cannot be wrong about the content of their own law.” Bloom & Serkin, *supra* note 17, at 572 (arguing that judicial takings is a tool of legal transition relief, not error correction).

276. See Dogan & Young, *supra* note 4, at 115–17.

wide, in the case of appellate federal court review) uniformity or guidance.²⁷⁷

Alternatively, as with regulatory takings, the Supreme Court can (and is likely to) delegate de facto much of judicial takings doctrine development to the state courts through narrow federal protection and a high threshold for claimant success. If the Supreme Court follows this path, the federal standard for a judicial taking will likely be at a level of generality that offers limited guidance, substantive clarity, or conceptual traction (vagueness and generality enable a standard to apply across disparate state property law frameworks). Indeed, the Supreme Court, faced with the challenges of articulating a national constitutional standard for judicial takings amid the diversity of state property law, might develop the judicial takings doctrine so that it has virtually no impact—an outcome that raises the question of why we should adopt judicial takings at all.²⁷⁸ Delimiting judicial takings doctrine with a toothless federal standard or obstacles to the federal forum under the belief that state courts will develop and enforce substantive judicial takings law to restrain their own decisions threatens a constitutionally empty doctrine.

To be clear, the problem is not that state courts are globally unwilling to limit themselves—they already do so through state due process and the other common law doctrines discussed in Part I.²⁷⁹ What is unlikely is that state supreme courts will perceive the need to disrupt their present system of restraints to interpret cases so as to create a vigorous judicial takings doctrine absent a strong federal floor of protection (particularly since the doctrine state supreme courts develop will apply against them as well as lower state courts). It is also questionable whether state legislatures have an incentive to wade into the political and doctrinal quagmire to develop statutory judicial takings prohibitions, especially given their capacity for legislative override and judicial jurisdiction-stripping.

In summary, there does not seem to be a viable way for the Supreme Court to develop judicial takings doctrine except to follow the path it has chosen for regulatory takings and to implicitly delegate much of judicial takings development and in-

277. See Sterk, *supra* note 29, at 230–31.

278. Cf. Fennell, *supra* note 14, at 90 (describing a very narrow scope and impact of judicial takings).

279. See *supra* Part I.A.

terpretation to the state courts. Such delegation works for legislative takings in part because of institutional separation: legislative decisions are reviewed by the separate institution of the state court. For judicial takings, however, this creates a dubious situation of institutional self-policing with state courts de facto developing the federal constitutional doctrine meant to constrain them.²⁸⁰ These issues offer a rejoinder to the plurality's assertion that the Fifth Amendment does not differentiate among state actors.²⁸¹ The Fifth Amendment should be interpreted in view of its institutional and doctrinal ramifications. The infeasibility of the Supreme Court developing doctrine for state law-based judicial takings questions and state law-defined property on the one hand and the problems of implicit delegation of judicial takings doctrine to the states and state court self-policing on the other, are reasons why the Fifth Amendment does, and should, discriminate among state actors.²⁸²

B. OUT-OF-STATE INTERESTS

The strongest case for a federal judicial takings doctrine is to address interstate "spillovers" where a state court decision wrongfully contracts out-of-state, federal, or tribal property rights. William Fischel has discussed this problem of legal

280. The difficulties of judicial takings federalism address a seeming discrepancy in my account: even though state legislatures are subject to "checks" from state courts in the form of judicial review and are of course politically responsive bodies, state legislatures are still subject to federal takings liability. For judicial takings review, the problems of state court self-policing and the interference with takings federalism suggest a strong reason for treating state courts differently than state legislatures for Fifth Amendment purposes.

281. Justice Scalia wrote, "There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

282. In addition, the Takings Clause does not contain the term "state"—if, as a textual matter, the failure to specify a branch of government means that the Takings Clause applies to all branches, then should the omission of the term "state" extend the Takings Clause to private actors? For an intriguing theory of private takings, see Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 560–71 (2009). Bell also observes that the Fifth Amendment never explicitly granted the takings power exclusively to the states, although the fact that at the time of its adoption the Fifth Amendment applied only to the national government indicates that it was an enumerated power. See *id.* at 525. For a discussion of the limits of textualism, see generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

spillovers in the context of regulatory takings and property rights protection.²⁸³ When such a case is in state court, there may be a stronger rationale for enhanced constitutional protection of out-of-state interests. In theory, there is a greater risk for judicial redistribution to favor in-state interests (notably in a recent case a state court justice lost a retention election following her opinion validating federal water rights).²⁸⁴ And of course there is no incentive, and indeed a strong disincentive, for the legislature to intervene and check the state court decision.

Given the lack of data and comprehensive examination of this issue in property rights cases, at this juncture I am reluctant to recommend extending judicial takings narrowly to cases addressing out-of-state interests. Resolving this question requires an in-depth inquiry, partially empirical, that is not presently available. It is not clear that judicial favoritism toward in-state interests occurs with enough frequency, or in the absence of adequate legal protection from other doctrines, to justify the costs of even a narrowly cabined judicial takings doctrine—or that a judicial takings doctrine is the best legal prophylactic. Diversity and federal question jurisdiction mean that such cases often, though not inevitably, are heard in federal court. Importantly, there are an array of other laws, norms, and rules, including conflict of laws doctrines, which protect against unfair treatment of out-of-state interests. For example, in water law cases (a common setting for significant shifts in common law property rights), interstate compacts, the common law of equitable apportionment, and the dormant commerce clause either constrain judges directly or supply norms against disadvantaging out-of-state interests.²⁸⁵ In sum, the legal system has developed doctrines and norms to address out-of-state property interests that counsel caution in innovating additional Fifth Amendment protection.

283. See FISCHER, *supra* note 2, at 326–27.

284. See *In re SRBA*, No. 24546, 1999 WL 778325 (Idaho Oct. 1, 1999), *superseded on reh'g*, *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270 (Idaho 2000) (Justice Silak's controversial opinion); Echeverria, *supra* note 27, at 238–54.

285. I thank Dan Tarlock for his helpful points on this topic and on the *Conatser* case as well.

CONCLUSION

In *Stop the Beach*, a Supreme Court plurality opinion launched judicial takings in political and scholarly debate and laid the groundwork for future elaboration of a judicial takings doctrine. This Article has explored a neglected institution in this debate—state legislatures. State political process protection calls into question the need to innovate a Fifth Amendment judicial takings doctrine and offers a compelling defense of the status quo. Case studies reveal unique institutional strengths to legislative checks of courts and suggest that legislative process provides substantial protection against judicial overreaching. Moreover, state legislative process accomplishes this without the costs to property law development and federalism of a constitutional judicial takings doctrine.