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## NOTES

### JUDICIAL TAKINGS, JUDICIAL FEDERALISM, AND JURISPRUDENCE: AN *ERIE* PROBLEM

The Takings Clause protects against governmental takings of property without just compensation.<sup>1</sup> Traditionally, takings claims have not expanded beyond actions performed by the political branches of government. This invites the question: What about the third branch? When a court overrules a prior declaration of common law property rights, has it “taken” property? The Supreme Court has wrestled with the question of judicial takings but has yet to give a decisive answer. Its most recent encounter, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>2</sup> offered the most robust analysis of a potential judicial takings doctrine but left the question open, with four Justices in favor of the doctrine and four Justices declining to reach the issue. This Note serves as a cautionary flag as the Court continues to develop its understanding of judicial takings. The judicial takings doctrine advocated by the *Stop the Beach* plurality poses a serious risk to the autonomy of states and state courts to adhere to their preferred jurisprudential philosophies. By categorically assuming that all state courts are making law, *Stop the Beach* set a course for judicial takings that would impose federal judges’ views of jurisprudence onto state courts.

While *Stop the Beach* broke new ground in judicial takings, its understanding of jurisprudence did not chart new territory so much as continue along the trail blazed by Justice Holmes in the early twentieth century and followed by a majority of the Court in 1938. In *Erie Railroad Co. v. Tompkins*,<sup>3</sup> the Court derisively dismissed the declaratory theory of common law in favor of legal realism, abolishing federal general common law in the process. Ironically, while grounding its constitutional holding in the independence of state courts from federal interference, *Erie* at best assumed and at worst mandated a particular jurisprudential philosophy for state courts. The *Stop the Beach* plurality followed in *Erie*’s footsteps in assuming all state courts were making law.

A judicial takings doctrine that perpetuates *Erie*’s jurisprudential assumptions risks exacerbating its error. As this Note argues, the viability of a judicial takings doctrine depends critically on the nature of

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> 560 U.S. 702 (2010).

<sup>3</sup> 304 U.S. 64 (1938).

common law adjudication.<sup>4</sup> If common law judicial decisions themselves establish novel property rights — that is, if judges *make* new law — then the concept of a judicial taking is conceptually sound, at least in terms of jurisprudential philosophy. If, on the other hand, judicial decisions merely declare the law as it has existed — that is, if judges only ever *find* law — then a judicial takings doctrine is conceptually hollow, for the simple reason that an overruling declares that the claimant did not have a property right to be taken in the first place. A categorical judicial takings doctrine blind to this distinction would preclude state courts from adhering to the declaratory theory of common law adjudication in property law.

This Note offers a course correction. To protect the autonomy and independence of state judiciaries — indeed, to comply with the principles of judicial federalism underlying *Erie*'s constitutional holding — it is essential that any judicial takings doctrine account for the possibility of differing jurisprudential philosophies among the states. While the declaratory theory has taken a beating in the United States, it retains significance in legal scholarship and jurisprudence; for instance, at least one state supreme court recently reaffirmed its commitment to the declaratory theory in the choice-of-law context.<sup>5</sup> Fortunately, the Court's existing doctrine for review of state court decisions on state law issues easily accommodates a more nuanced approach to judicial takings without compromising the security of Takings Clause protection against unfaithful state evasion.

This Note proceeds as follows. Part I provides a brief overview of the judicial takings issue and *Stop the Beach*. Part II argues that the Takings Clause protects rights, not mere expectations, and therefore that the nature of common law adjudication is conceptually crucial to judicial takings. Part III describes the irony of *Erie* and the risk that a judicial takings doctrine poses for judicial federalism. It then proposes a path forward that fits within current Supreme Court jurisprudence.

## I. THE QUESTION OF JUDICIAL TAKINGS: LONG ASKED, NEVER ANSWERED

In 1897, the Supreme Court held that the Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment.<sup>6</sup> Since then, courts have regularly imposed takings restrictions on the political branches of state governments.<sup>7</sup> What is unclear is the extent to

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<sup>4</sup> This Note does not consider the merits of a judicial takings doctrine outside of this conceptual point.

<sup>5</sup> See *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 834 (Ga. 2017).

<sup>6</sup> *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

<sup>7</sup> For example, it is well settled that the Federal Takings Clause prohibits states from using eminent domain to strip private property owners of property without providing just compensation,

which the Takings Clause's prohibitions extend beyond the political branches to the judicial branch. It remains an open question whether courts can "take" property by overruling prior judicial decisions that appeared to grant private property rights.

An example illustrates what a judicial taking might look like. Suppose that Rivera owns land abutting a bend in a river. The state owns the submerged lands underlying the river.<sup>8</sup> At Time 1, the state's highest court issues a decision declaring that the common law confers upon riparian landowners ownership of adjacent, previously submerged lands that are uncovered by a sudden, avulsive change in the course of a river. At Time 2, a fierce hurricane causes the river to straighten its course such that the bend adjacent to Rivera's property is no longer submerged. Rivera, who has been longing for some extra land on which to build a greenhouse, initiates a quiet title action to establish her ownership of the now-dry riverbed.<sup>9</sup> At Time 3, the high court rules in favor of the state, overruling its decision at Time 1. The court looks to the ancient common law of riparian ownership, noting the distinction between accretions and avulsions: When the course of a river changes slowly over time, riparian owners gain title to the accretions that gradually build up on their property.<sup>10</sup> On the other hand, when a river changes course suddenly due to an avulsive event, title to the riverbed remains fixed.<sup>11</sup> These principles were recognized by Blackstone<sup>12</sup> and date back as far as Roman civil law.<sup>13</sup>

Under the law as stated in the Time 1 decision, a property right in the uncovered riverbed vested in Rivera at Time 2. After the Time 3 decision, Rivera lacks such a property right. Does Rivera have a colorable claim that the state high court violated her federal constitutional rights at Time 3 by taking her property without just compensation?

The Supreme Court did not squarely address the issue of judicial takings until 2010 in *Stop the Beach*, but the question of whether courts can "take" property by changing state law has been floating around the

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*see id.*, enacting regulations that completely extinguish all economic value from a piece of private property, *see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), or imposing unrelated or disproportionate conditions or fees on new uses of private property, *see* *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

<sup>8</sup> *See* *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012) ("Upon statehood, the State gains title within its borders to the beds of waters then navigable . . .").

<sup>9</sup> Some state high courts have held that state sovereign immunity does not bar quiet title actions against the state. *See, e.g.,* *Welch v. State*, 853 A.2d 214, 216–17 (Me. 2004); *Brousseau v. N.M. State Highway Dep't*, 587 P.2d 1339, 1341–42 (N.M. 1978).

<sup>10</sup> *See, e.g.,* *Georgia v. South Carolina*, 497 U.S. 376, 403–04 (1990).

<sup>11</sup> *See, e.g., id.* at 404.

<sup>12</sup> *See* 3 WILLIAM BLACKSTONE, COMMENTARIES \*262.

<sup>13</sup> *See* J. INST. 2.1.20–21 (J.B. Moyle trans., 5th ed. 1913).

courts since the early 1900s.<sup>14</sup> Despite having been on the table for over a century, the question of judicial takings remains without a definitive answer from the Supreme Court; most perspectives that touch on the issue appear in dicta, plurality opinions, separate opinions, or lower court opinions, and some are only tangentially related to judicial takings.<sup>15</sup> Much of the contorted history of judicial takings has been capably reported by other scholars,<sup>16</sup> and there is little need to reiterate it here. Suffice it to say that by the time *Stop the Beach* finally addressed the issue head-on, the question of judicial takings had been thoroughly muddled.

Unfortunately, while *Stop the Beach* elucidated some of the arguments for and against a judicial takings doctrine, it did little to clarify the state of the law. The case involved a Florida statute authorizing local governments to combat beach erosion by depositing sand onto the state's submerged lands.<sup>17</sup> A group of waterfront landowners challenged one such restoration, arguing that it unconstitutionally took certain littoral rights that existed under Florida common law without compensation, including "the right to receive accretions to their property" and "the right to have the contact of their property with the water remain intact."<sup>18</sup> The Florida Supreme Court disagreed, citing the common law doctrine of avulsion, which allows a landowner to reclaim land lost due to an avulsive event.<sup>19</sup> Thus, the statute authorizing reclamation of the state's shoreline lost due to avulsive storms was constitutional because the common law supported such actions.<sup>20</sup>

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<sup>14</sup> See, e.g., *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544 (1905).

<sup>15</sup> See, e.g., *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211–13 (1994) (Scalia, J., dissenting from denial of certiorari); *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring); *Great N. Ry. Co. v. Sunburst Oil & Refin. Co.*, 287 U.S. 358, 364–65 (1932); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930); *Tidal Oil*, 263 U.S. at 455; *Muhlker*, 197 U.S. at 572–76 (Holmes, J., dissenting).

<sup>16</sup> See, e.g., Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1440–43 (2015); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1463–72 (1990); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 425–33; W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1502–10 (2004).

<sup>17</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 709 (2010).

<sup>18</sup> *Id.* at 711. Florida courts had defined these littoral rights as property protected by the Takings Clause. See *Bd. of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987).

<sup>19</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1117 (Fla. 2008). Avulsion is "the sudden or perceptible loss of or addition to the land by the action of the water or a sudden change in the bed of a lake or the course of a stream." *Id.* at 1116 (quoting *Sand Key*, 512 So. 2d at 936).

<sup>20</sup> *Id.* at 1117–18.

Persistent as the tides, the landowners sought review in the United States Supreme Court, arguing that the Florida Supreme Court's decision *itself* unconstitutionally took their property without compensation.<sup>21</sup> All Justices agreed that the Florida Supreme Court's decision in that case did not effect a taking because it was "consistent with . . . background principles of state property law."<sup>22</sup> However, the Court split 4-4<sup>23</sup> on whether a decision by a state high court *could* amount to an unconstitutional taking.

Justice Scalia's four-Justice plurality proclaimed that a judicial taking occurs when a court rules in such a way as to revoke a claimant's "established right of private property."<sup>24</sup> Noting that the text of the Takings Clause "is not addressed to the action of a specific branch or branches,"<sup>25</sup> Justice Scalia argued 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."<sup>26</sup> In a strange move for the Court's leading originalist, he conceded that "the Framers did not envision the Takings Clause would apply to judicial action," but he brushed that historical nugget aside because "the Constitution was adopted in an era when courts had no power to 'change' the common law."<sup>27</sup> Justice Scalia declared that courts had "assume[d]" this power in the nineteenth century but could not use it to eliminate established property rights.<sup>28</sup> Brazenly ignoring many of the Court's early twentieth-century cases asserting that state courts may overrule their decisions free from federal constitutional restraints,<sup>29</sup> he concluded that "[o]ur precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary."<sup>30</sup>

<sup>21</sup> *Stop the Beach*, 560 U.S. at 712.

<sup>22</sup> *Id.* at 731.

<sup>23</sup> Justice Stevens recused himself because he owned property on a Florida beach, but he criticized Justice Scalia's plurality opinion after his retirement. See John Paul Stevens, *The Ninth Vote in the "Stop the Beach" Case*, 88 CHI.-KENT L. REV. 553 (2013).

<sup>24</sup> *Stop the Beach*, 560 U.S. at 715 (plurality opinion).

<sup>25</sup> *Id.* at 713.

<sup>26</sup> *Id.* at 714.

<sup>27</sup> *Id.* at 722. This argument appears to conflict with Justice Scalia's position nine years earlier in *Rogers v. Tennessee*, 532 U.S. 451 (2001), where he argued that the Due Process Clause prohibited a state court from retroactively abolishing a common law protection in criminal cases because the Framers did not believe that courts held the power to change the common law. *Id.* at 472-78 (Scalia, J., dissenting).

<sup>28</sup> *Stop the Beach*, 560 U.S. at 722 (plurality opinion).

<sup>29</sup> See *infra* notes 137-145 and accompanying text.

<sup>30</sup> *Stop the Beach*, 560 U.S. at 714 (plurality opinion). For support, Justice Scalia cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Stop the Beach*, 560 U.S. at 714-15 (plurality opinion). In *PruneYard*, the Court applied a standard takings analysis to hold that the California Supreme Court did not violate the Takings Clause when it overruled a prior interpretation of the state's constitution. 447 U.S. at 82-84. But nothing in the opinion indicates the Court thought it was breaking

The four other Justices to consider the case declined to hold that judicial decisions can violate the Takings Clause. Justice Kennedy's concurring opinion, joined by Justice Sotomayor, flagged "certain difficulties" raised by the prospect of a judicial takings doctrine<sup>31</sup> and argued that the Due Process Clause was a more appropriate vehicle for protecting established property rights from judicial reconstruction.<sup>32</sup> Justice Breyer's concurring opinion, joined by Justice Ginsburg, criticized the plurality for failing to "decid[e] only what is necessary to the disposition of the immediate case"<sup>33</sup> — here, that the Florida court's decision was not an unconstitutional judicial taking, if there was such a thing — and expressed concerns about opening the floodgates to federal takings claims that would allow federal judges to shape state property law.<sup>34</sup>

Despite the relative depth of analysis regarding judicial takings in *Stop the Beach*, the case's precedential value leaves much to be desired. As no position commanded a majority of the Court, the narrowest concurring opinion controls under the rule set forth in *Marks v. United States*.<sup>35</sup> Both nonplurality opinions in *Stop the Beach* ruled on narrower grounds than did the plurality opinion, as the nonplurality opinions held that the decision below did not constitute a judicial taking without deciding the broader question of whether such a creature can exist.<sup>36</sup> Arguably, Justice Breyer's opinion is narrower than Justice

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new ground by deciding a judicial takings case, and the opinion is ambiguous as to whether it decided the constitutionality of the California Constitution or the California court's interpretation of it. Compare *id.* at 76 (framing the issue as "whether state constitutional provisions . . . violate the shopping center owner's property rights"), with *id.* at 88 (holding that the owner's property rights were not "infringed by the California Supreme Court's decision"). In *Webb's*, the Court stated that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money,'" 449 U.S. at 164, but the unconstitutional taking was plainly perpetrated by the Florida statute, not the Florida court's decision. See *id.* at 155–56, 164–65. Thus, *Pruneyard* and *Webb's* are, at best, shaky precedent.

<sup>31</sup> *Stop the Beach*, 560 U.S. at 734 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>32</sup> See *id.* at 737 ("The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005))).

<sup>33</sup> *Id.* at 744 (Breyer, J., concurring in part and concurring in the judgment) (quoting *Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 373 (1955)).

<sup>34</sup> *Id.* at 743–44.

<sup>35</sup> 430 U.S. 188 (1977); *id.* at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

<sup>36</sup> But see Josh Patashnik, Note, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 262–64 (2012) (arguing that, under the *Marks* rule, Justice Scalia's and Justice Kennedy's opinions should be taken together to establish precedent for recognizing some form of judicial takings claim, under either the Takings Clause or the Due Process Clause).

Kennedy's because it did not suggest due process as an alternative claim. But both opinions, while casting doubt upon the possibility of judicial takings, reserved the question for another day.<sup>37</sup> Thus, all *Stop the Beach* ultimately stands for is that, whether or not judicial takings can occur, this was not one.

## II. JUDICIAL TAKINGS' IMPLICIT JURISPRUDENTIAL PHILOSOPHY

Part I demonstrated that the possibility of a judicial takings doctrine remains unresolved. This Part argues that implicit in the notion of a judicial taking is a certain understanding of the nature of common law adjudication. As section B describes, when courts "make" new law, they change the law. And when any branch of government changes the law such that you now lack a property right you previously possessed, that branch has taken your property. On the other hand, when courts "find" the law, they declare what the law has been. When a court declares that the law has been, up to and including at the time of decision, such that you lack a property right, you possessed no property right for the court to take, even if you (or a court) previously thought otherwise. Of course, a prerequisite for this distinction is that the Takings Clause protects only actually held property rights rather than mere expectations. Section A establishes this preliminary premise.

### A. *Rights and Expectations Under the Takings Clause*

The next section relies on the fundamental premise that the Takings Clause protects rights, not expectations. In other words, in order to have a legitimate takings claim, it is not enough that one reasonably expects to possess a certain property right; one must actually possess that right. If reasonable expectations were sufficient for Takings Clause protection, the importance of a jurisdiction's jurisprudential philosophy would evaporate; even under the declaratory theory, a claimant could have a strong claim to a reasonable expectation of a property right based on a court's prior erroneous characterization of the law. Professor Barton Thompson recognizes ambiguity in the Court's opinions as to what exactly the Takings Clause protects<sup>38</sup> and suggests that an expectations

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<sup>37</sup> *Stop the Beach*, 560 U.S. at 733–34 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause . . ."); *id.* at 742 (Breyer, J., concurring in part and concurring in the judgment) (arguing that the question of judicial takings is "better left for another day").

<sup>38</sup> Thompson, *supra* note 16, at 1530 ("Actually, the Court's opinions are unclear on whether the Court believes that the Constitution protects merely those property rights recognized by positive law (a pure positivist approach) or instead those expectations that reasonably flow from statutes, opinions, and other indicia of positive law (an expectations approach)."). While Thompson uses a

approach better advances the Takings Clause's motivations, given the indeterminacy of whether a decision actually changes legal rights.<sup>39</sup> Similarly, Professor Thomas Merrill argues that reasonable expectations about what kinds of interests qualify as property sometimes supersede actual positive law in motivating the Court's takings decisions.<sup>40</sup> Professor Jerry Anderson argues that "any right in property must be grounded in the property owners' legitimate expectations about what interests the law will protect."<sup>41</sup> On the other hand, Professors Stacey Dogan and Ernest Young caution against an expectations approach because "federal courts should stay out of the business of assessing the certainty and predictability of state common law."<sup>42</sup> And Professor Joseph Sax thinks it "self-evident" that "[o]ne cannot claim that property was taken away if one did not have property to begin with."<sup>43</sup> This section argues, in accord with Sax, that even expectations backed by judicial assertions of law are not subject to the Takings Clause unless those expectations are grounded in an actual property right.

We can begin (and arguably end) with the text of the Takings Clause, which protects "private *property*."<sup>44</sup> Evidence of the clause's original meaning is relatively lacking,<sup>45</sup> and most originalist analyses of the clause focus on whether it originally applied to regulatory takings.<sup>46</sup> But

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"positivist" notion of rights, any source of legitimate property right could stand in against an expectations approach. The question for the moment is not where property rights come from, but rather whether a takings claim requires a property right at all.

<sup>39</sup> *Id.* at 1531–41.

<sup>40</sup> See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 934–42 (2000).

<sup>41</sup> Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529, 529 (1989).

<sup>42</sup> Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 118 (2011).

<sup>43</sup> Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993).

<sup>44</sup> U.S. CONST. amend. V (emphasis added).

<sup>45</sup> See Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 182 (1999) (noting the Takings Clause's "scant and ambiguous historical record"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) ("There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.").

<sup>46</sup> See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057–58 (1992) (Blackmun, J., dissenting). Most conclude it did not. See, e.g., *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting); *Lucas*, 505 U.S. at 1057–58 (Blackmun, J., dissenting); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 731 (2008); Treanor, *supra* note 45, at 798. But see Gold, *supra* note 45, at 242 ("It is quite possible, but far from clear, that the original understanding of the Takings Clause included regulatory takings."); John Greil, Note, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J.L. & PUB. POL'Y 373, 374 (2018) (arguing that the original meaning of the Privileges or Immunities Clause guards against regulatory takings).

if we are to take Justice Scalia seriously that “[w]here the text [the Framers] adopted is clear, . . . what counts is not what they envisioned but what they wrote,”<sup>47</sup> the clause unequivocally requires a claimant to possess “property.”

The Court’s treatment of the clause comports with this interpretation. In *Board of Regents of State Colleges v. Roth*,<sup>48</sup> the Court made clear that the Constitution itself does not create “property.”<sup>49</sup> Instead, the property interests the Constitution protects “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>50</sup> Generally, then, a claimant must establish possession of a legitimate property right under state law. The Supreme Court has consistently treated this principle as a necessary antecedent condition in takings cases, requiring that a claimant actually possess “property” — whatever that is — in order to invoke the clause’s protection. In the early twentieth century, for example, the Court stated that state courts “may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.”<sup>51</sup> A more explicit rejection of an expectations approach would be hard to come by.

The Court has adhered to a rights-based understanding of the Takings Clause in its more recent cases as well. In *Roth*, it stated that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement* to it.”<sup>52</sup> *Roth* was a due process case, but the Court has since extended the requirement of a “legitimate claim of entitlement” into the takings context.<sup>53</sup> In *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*,<sup>54</sup> for example, the Court emphasized that “a mere unilateral expectation or an abstract need is not a property interest entitled to protection” under the Takings Clause.<sup>55</sup> The Court found the creditors in that case entitled to Takings Clause protection because they “had more than a unilateral expectation. . . . [They] had a state-created property

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<sup>47</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 722 (2010) (plurality opinion).

<sup>48</sup> 408 U.S. 564 (1972).

<sup>49</sup> *Id.* at 577; see also *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“[T]he Constitution protects rather than creates property interests . . .”).

<sup>50</sup> *Roth*, 408 U.S. at 577.

<sup>51</sup> *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930).

<sup>52</sup> *Roth*, 408 U.S. at 577 (emphasis added).

<sup>53</sup> *But see Merrill*, *supra* note 40, at 887–88 (“In the takings context, the understanding that a claimant must demonstrate the existence of a property interest is reflected in older federal eminent domain decisions, and thus antedates *Roth*.”).

<sup>54</sup> 449 U.S. 155 (1980).

<sup>55</sup> *Id.* at 161.

right to their respective portions of the fund.”<sup>56</sup> Similar language in other cases has the same effect.<sup>57</sup>

Notably, the plurality opinion in *Stop the Beach* itself is an especially strong rejection of an expectations approach to the Takings Clause. Justice Scalia repeatedly emphasized that a judicial taking requires the claimant to possess an “established property right.”<sup>58</sup> He made clear that “[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.”<sup>59</sup> And he explicitly foreclosed an expectations approach by rejecting the petitioner’s proposal that “a decision that constitutes a sudden change in state law, unpredictable in terms of relevant precedents,” is sufficient to constitute a judicial taking.<sup>60</sup> Rather, “a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is.”<sup>61</sup>

To be sure, the Court frequently considers a claimant’s justified expectations when determining whether a taking has occurred, particularly in the context of regulatory takings.<sup>62</sup> But whether there *has* been a taking is a separate inquiry from the antecedent question whether there *can* be a taking, and that question turns solely on the existence of a private property right.<sup>63</sup> In other words, a justified expectation may in some cases be necessary for there to be a taking, but it is never sufficient. The distinction is well illustrated in *Ruckelshaus v. Monsanto Co.*,<sup>64</sup> where the Court engaged in a sequential analysis of Monsanto’s takings claim, first asking whether Monsanto’s trade secrets were “property” eligible for the Takings Clause’s protection and only then asking

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<sup>56</sup> *Id.*

<sup>57</sup> *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (noting that “property” in the Takings Clause has been construed to mean “the group of rights inhering in the citizen’s relation to the physical thing,” *id.* at 378); *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (“It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.”).

<sup>58</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 726 & n.9, 727 (2010) (plurality opinion); *see also id.* at 715, 717, 722, 725, 728, 732, 733 (using various permutations of nearly identical language).

<sup>59</sup> *Id.* at 732.

<sup>60</sup> *Id.* at 728 (internal quotation marks omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (listing “the extent to which the regulation has interfered with distinct investment-backed expectations” as a factor relevant to whether a regulation constitutes a taking (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001))); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>63</sup> *See Merrill, supra* note 40, at 888 (“[T]he Court has pointedly asked whether a claimant has a cognizable interest in property before proceeding to consider whether this interest has been taken.”).

<sup>64</sup> 467 U.S. 986 (1984).

whether the Environmental Protection Agency's use of the data in reviewing other applicants and in public disclosures effected a taking.<sup>65</sup> In determining that Monsanto's data were "property for the purposes of the Taking Clause,"<sup>66</sup> the Court looked only to Missouri law and the similarity of trade secrets to other forms of recognized property; it made no mention of Monsanto's expectations.<sup>67</sup> Only *after* holding that Monsanto possessed a protected property right did the Court consider justified expectations in deciding whether a taking of that right occurred.<sup>68</sup> *Monsanto* highlights the relationship between rights and expectations in the takings context: a claimant's justified expectations may play a role in determining whether to extend Takings Clause protection to governmental regulation of a particular property right, but they do not extinguish the requirement that the claimant have a property right in the first place.<sup>69</sup>

Furthermore, an expectations-based understanding of the Takings Clause would lead to strange results in contexts less controversial than the declaratory theory of common law. Consider, for example, judicial construction of statutes granting property rights. Most agree that when the Federal Circuit departs from a prior interpretation of a patent statute in a manner that limits patentholders' rights, it does not take rights that the statute previously conferred. Rather, the statute never conferred the rights in the first place, and the more recent judicial interpretation simply clarifies the statute's meaning.<sup>70</sup> Yet surely such a

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<sup>65</sup> *Id.* at 1000 ("(1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking[s] Clause . . . ? (2) If so, does EPA's use of the data . . . effect a taking of that property interest?").

<sup>66</sup> *Id.* at 1001.

<sup>67</sup> *See id.* at 1001–04.

<sup>68</sup> *See id.* at 1005–10.

<sup>69</sup> The exception to regulatory takings recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), for "background principles" of property and nuisance law also comports with the rights-based conception of the Takings Clause. *Id.* at 1029; *see also* Sax, *supra* note 43, at 943–46. In *Lucas*, the Court described the nature of the claimant's property rights as the subject of a "logically antecedent inquiry" to a regulatory takings claim. 505 U.S. at 1027. If state property or nuisance law already prohibits a particular use of property, a claimant has no property right to that use because "the proscribed use interests were not part of his title to begin with." *Id.* Thus, a regulation affirming that restriction cannot be a taking because it does not interfere with any property right that the owner possessed. *See id.*

<sup>70</sup> Even some card-carrying legal realists accept that courts may be restricted to "finding" law when they interpret statutes. *See, e.g.,* Dogan & Young, *supra* note 42, at 132–33 ("[F]ederal courts simply lack the power to *change* federal statutes. . . . [I]f the Federal Circuit substantially departs from the prior meaning of the patent statute, that decision is wrong and should be reversed — but it is not a 'taking.'"); Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 STAN. L. REV. 963, 1018 (2019) ("A court that reinterpreted [a patent] law in 2018 but did not apply the new rule retroactively would not be making new law; it would merely be finding the law as it should be understood in contemporary times."); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999) ("Since an unchanging statute backs the judicial interpretations, it makes sense to say that while

departure contravenes patentholders' justified expectations. Thus, assuming patents are property for Takings Clause purposes,<sup>71</sup> an expectations-based approach to the Takings Clause necessarily implies that these decisions are unconstitutional judicial takings.

A rights-based approach in the judicial takings context might seem to unfairly upend reliance interests based on prior judicial statements of law.<sup>72</sup> But the fact of the matter is that “[j]udicial decisions have had retroactive operation for near a thousand years.”<sup>73</sup> Indeed, the Supreme Court did not consider whether a state court could decide *not* to apply its decisions retroactively until the 1930s.<sup>74</sup> The Supreme Court itself recognizes a general rule under which “a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts.”<sup>75</sup> Judicial decisions containing new assertions of common law, new interpretations of statutes, and new understandings of constitutional principles are frequently applied retroactively to actions performed under a different understanding of the law. There is little reason to think the Takings Clause creates an implicit exception for property rules, especially because it was drafted at a time when the prevailing understanding of common law adjudication inherently produced retroactive results.<sup>76</sup>

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decisions may change, the law remains the same. An overruled decision is simply wrong; it is not and was never the law.”). The declaratory theory is more palatable in the statutory context because it does not require belief in a “brooding omnipresence in the sky,” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); the source of the law is the statute, and the statute has a single, consistent meaning independent of any particular judicial construction.

<sup>71</sup> Although the Supreme Court has unmistakably held that patents are property under the Due Process Clause of the Fifth Amendment, *see Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999), their status under the Takings Clause has been the subject of some debate. Compare Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 WASH. & LEE L. REV. 719, 775 (2016) (arguing that dicta in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), “left no doubt . . . that patents are subject to the Takings Clause”), with Masur & Mortara, *supra* note 70, at 993 (“[T]he law is still far from recognizing patents as property subject to the protection of the Takings Clause.”).

<sup>72</sup> *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (considering whether a judicial decision “establish[es] a new principle of law . . . by overruling clear past precedent on which litigants may have relied” in deciding whether to give the decision retroactive effect).

<sup>73</sup> *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting); *see also, e.g., BEN JURATOWITCH, RETROACTIVITY AND THE COMMON LAW* 42 (2008) (“[T]he common law has traditionally been tolerant of the retroactive effects of judicial decisions developing or changing a common law rule.”).

<sup>74</sup> *See Great N. Ry. Co. v. Sunburst Oil & Refin. Co.*, 287 U.S. 358, 364–65 (1932).

<sup>75</sup> *Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 96 (1993).

<sup>76</sup> *See, e.g., Roosevelt, supra* note 70, at 1082–83 (noting that the declaratory theory “will, of course, produce the uniformly retroactive result to which Holmes adverted,” *id.* at 1082, because, under that theory, “the concept of retroactivity has no place; ‘old law’ and ‘new law’ are necessarily the same,” *id.* at 1083).

*B. Common Law Adjudication and the Stakes for Judicial Takings*

Because the Takings Clause protects rights rather than expectations, the conceptual validity of a judicial takings doctrine hinges on a longstanding debate between two competing theories of common law adjudication. The first, the “declaratory theory,” maintains that common law judicial decisions merely recognize and declare preexisting rights and duties and do not themselves make law. The second, “legal realism,” holds that common law judicial decisions themselves establish novel rights and duties, meaning that courts actually make new law and change the law when they overrule precedent. This section provides a brief overview of the debate, and then illustrates why a judicial takings doctrine is conceptually sound under legal realism but not the declaratory theory.

In the seventeenth century, Sir Edward Coke proclaimed that “[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.”<sup>77</sup> William Blackstone picked up the declaratory banner in his highly influential *Commentaries on the Laws of England*, in which he expounded a view of the judge’s role as a “depositar[y] of the laws.”<sup>78</sup> On Blackstone’s account, the common law is not created by judicial decisions but rather exists independently in the “maxims and customs” of the land, which date back to time immemorial.<sup>79</sup> Judges therefore have no authority to make law and their decisions are merely “evidence” of the ancient customs that constitute the common law.<sup>80</sup> Because judicial decisions do not create law, “the law, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen, that the judge may *mistake* the law.”<sup>81</sup> Thus, when judges overrule precedent, they “do not pretend to make a new law, but to vindicate the old one from misrepresentation.”<sup>82</sup> In other words, “if it be found that [a] former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.”<sup>83</sup>

This vision of the common law carried the day for quite some time in U.S. jurisprudence. Professor Stephen Sachs notes that “the early American states inherited a tradition in which courts were charged to

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<sup>77</sup> EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 51 (London, William Rawlins & Samuel Roycroft 10th ed. 1703) (1642).

<sup>78</sup> 1 BLACKSTONE, *supra* note 12, at \*69.

<sup>79</sup> *Id.* at \*67; see also Thomas W. Merrill, *The Supreme Court’s Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENV’T L. 1, 4–5 (2018).

<sup>80</sup> 1 BLACKSTONE, *supra* note 12, at \*69, \*71.

<sup>81</sup> *Id.* at \*71.

<sup>82</sup> *Id.* at \*70.

<sup>83</sup> *Id.*

find law rather than make it.”<sup>84</sup> Until 1938, the federal courts also adhered to a conception of general common law that existed outside the judicial decisions of any particular sovereign. The Supreme Court expressly embraced the declaratory theory in *Swift v. Tyson*<sup>85</sup> when it stated: “[I]t will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.”<sup>86</sup> When state courts and federal courts ruled on common law issues under the *Swift* regime, they were applying neither state law nor federal law; instead, they were both applying the same general common law, which, as Justice Holmes put it, was “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>87</sup> Thus, under *Swift*’s regime, federal courts were not bound by state court common law decisions and could reach their own independent interpretations of the general common law.<sup>88</sup>

The twentieth-century legal realist movement pushed back against the notion of a body of common law existing independently of judicial decisions.<sup>89</sup> Realism’s greatest champion on the Court was Justice Holmes, who, as early as 1897, when he still sat on the Supreme Judicial Court of Massachusetts, rejected the view that the law “is something different from what is decided by the courts of Massachusetts or England, . . . which may or may not coincide with the decisions.”<sup>90</sup> Justice Holmes derided the notion of the general common law as a “brooding omnipresence in the sky,”<sup>91</sup> calling it a “fallacy and illusion.”<sup>92</sup> He believed that a sovereign’s common law exists only insofar as it is contained in the decisions of the sovereign’s judges.<sup>93</sup> Under this realist

<sup>84</sup> Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 573 (2019) (citing RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 11–13 (1977)).

<sup>85</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>86</sup> *Id.* at 18.

<sup>87</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

<sup>88</sup> *See Swift*, 41 U.S. (16 Pet.) at 18–19.

<sup>89</sup> *See generally* Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 528 (2011) (identifying legal realism as the source of departure from the declaratory theory); Curtis Nyquist, *Re-reading Legal Realism and Tracing a Genealogy of Balancing*, 65 BUFF. L. REV. 771, 801–30 (2017) (describing realist theory and critiques of classical legal thought); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 475–99 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)) (characterizing legal realism as a pragmatic critique of power).

<sup>90</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

<sup>91</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>92</sup> *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

<sup>93</sup> *See id.* (“[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it.”); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J.,

conception, overruling a prior common law decision does not correct mistaken law but rather makes new law.

A majority of the Court embraced Justice Holmes's realism in 1938 in the groundbreaking *Erie* decision.<sup>94</sup> In an opinion by Justice Brandeis, the Court overruled *Swift* and abolished federal general common law.<sup>95</sup> *Erie* and its implications are discussed in more detail below. For now, the important point is that *Erie* fully endorsed legal realism and, in doing so, "overruled a particular way of looking at law."<sup>96</sup>

*Erie*'s realism dominates the American legal academy today,<sup>97</sup> but there are some holdouts in the declaratory camp. For example, Georgia's choice-of-law jurisprudence is grounded in the notion "that there is one common law that can be properly discerned by wise judges, not multiple common laws by which judges make law for their various jurisdictions."<sup>98</sup>

Similarly, a number of contemporary scholars have stood their ground against the realist tidal wave by defending the declaratory theory in some form or another.<sup>99</sup> These modern defenses of the declaratory

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dissenting) ("The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else.")

<sup>94</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

<sup>95</sup> *Id.* at 77–78.

<sup>96</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

<sup>97</sup> See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991) ("It would be only a slight exaggeration to say that there are no more Blackstonians."); Lehari, *supra* note 89, at 529 (describing common law as "perhaps the least-contestable legal setting in which the court makes law"); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 115 (2010) (noting that "[e]very beginning law student is taught" that, in common law systems, "judges make law"); Roosevelt, *supra* note 70, at 1076 ("Once it was believed that the common law had a positive source independent of judicial decisions, but this view has no modern adherents."); Sachs, *supra* note 84, at 529 (describing "the view that unwritten law can be found, rather than made" as "not in vogue"); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006) ("It is thus no longer especially controversial to insist that common law judges make law.")

<sup>98</sup> *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 834 (Ga. 2017); see also Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1113, 1126 (2011).

<sup>99</sup> See, e.g., Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421 *passim* (2013); Lea Brilmayer, *Untethered Norms After Erie Railroad Co. v. Tompkins: Positivism, International Law, and the Return of the "Brooding Omnipresence,"* 54 WM. & MARY L. REV. 725, 727, 734–46, 752 (2013); John Finnis, *Judicial Law-Making and the "Living" Instrumentalisation of the ECHR, in LORD SUMPTION AND THE LIMITS OF LAW* 73, 74–80 (N.W. Barber, Richard Ekins & Paul Yowell eds., 2016) [hereinafter Finnis, *Judicial Law-Making*]; John Finnis, *The Fairy Tale's Moral*, 115 LAW Q. REV. 170, 172–73 (1999); Peter Jaffey, *Two Ways to Understand the Common Law*, 8 JURISPRUDENCE 435, 441, 457–59 (2017); Peter Jaffey, *Authority in the Common Law*, 36 AUSTL. J. LEGAL PHIL. 1, 30–32 (2011) [hereinafter Jaffey, *Authority*]; Sachs, *supra* note 84, at 532–70 (analyzing custom as a source of law that judges could find rather than make); Liron Shmilovits, *The Declaratory Fiction*, 31 KING'S L.J. 59, 79–82 (2020); Brian Zamulinski, *Rehabilitating the Declaratory Theory of the Common Law*, 2 J.L. & CTS. 171 *passim* (2014); Samuel Beswick, *Judicial Law-Making* (Apr. 23, 2020) (unpublished manuscript) (on file with the Harvard Law School Library) (arguing that judge-made law is inherently retroactive).

theory hail from a range of jurisprudential perspectives,<sup>100</sup> and not all of them are committed to the strong Blackstonian form under which judicial decisions can never make law and overruled decisions were never law. Some contemporary scholars concede that judges can make law, but insist that they do so *by finding law*.<sup>101</sup> Ironically, Justice Scalia himself usually held this view of common law adjudication.<sup>102</sup> Importantly for our purposes, many modern defenses of the declaratory theory do not insist that the overruled precedent was *never* the law; they simply maintain that it was not the law *at least* as of the time of the dispute at issue.<sup>103</sup>

<sup>100</sup> For example, Sachs takes a positivist approach, arguing that it is possible for judges to find positive law in a society's customs and social norms, Sachs, *supra* note 84, at 532–59, while Professor John Finnis embraces the theory from a natural law perspective, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 286–87 (2d ed. 2011).

<sup>101</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 229 (1986) (“Judges, however, are authors as well as critics. A judge deciding *McLoughlin* or *Brown* adds to the tradition he interprets; future judges confront a new tradition that includes what he has done.”); GIDON GOTTLIEB, *THE LOGIC OF CHOICE: AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY* 88 (1968) (“The doctrine of precedent . . . transmutes law-applying into law-making. Every inference made and every rule enunciated must be authorized or required by preexisting rules and principles, but precedent transforms that which is authorized or required into that which authorizes and requires. There is, therefore, no contradiction between the two propositions that courts always apply preexisting law and that courts create law.”); Samuel Beswick, *Retroactive Adjudication*, 130 *YALE L.J.* 299 (2020) (“[J]udges can be seen to *make* law through *declaring* the rules and principles that govern disputes before them.”); John Eekelaar, *Judges and Citizens: Two Conceptions of Law*, 22 *OXFORD J. LEGAL STUD.* 497, 510 (2002) (“[A] judicial decision is both interpretative of the past and creative of the present . . . .”); Jaffey, *Authority*, *supra* note 99, at 28 (acknowledging that judges “make law as they declare it”).

<sup>102</sup> See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (arguing that prospective overruling is beyond the judicial power because judges are constrained to “make [law] as judges make it, which is to say as though they were ‘finding’ it — discerning what the law is, rather than decreeing what it is today *changed* to, or what it will *tomorrow* be”); *id.* (describing the common law judicial power as “the power ‘to say what the law is,’ not the power to change it” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); *Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (arguing that “prospective decisionmaking is incompatible with the judicial role” because it “presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is”); see also Samuel Beswick, *Interference by Precedent*, in *ECONOMIC TORTS AND ECONOMIC WRONGS* (John Eldridge, Michael Douglas & Claudia Carr eds., forthcoming 2021) (manuscript at 23–24) (on file with the Harvard Law School Library) (critiquing Justice Scalia’s opinion in *Stop the Beach* as inconsistent with his stance on prospective overruling).

<sup>103</sup> See Beswick, *supra* note 102 (manuscript at 1) (“Courts operate from the perspective of hindsight — declaring today what the principles of law were that governed the rights and duties of parties at the time a dispute before them arose.”); DWORKIN, *supra* note 101, at 244 (“Judges . . . must deploy arguments why the parties actually had the ‘novel’ legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.”); Finnis, *Judicial Law-Making*, *supra* note 99, at 79 (“[D]eterminations of the law will in reality be applied to *past* dealings and interrelations of the parties before the court, and can only be just and properly judicial if they state law that can reasonably be said to *have been* the law that, *all things now considered*, was properly applicable at the time (even if not then generally recognised as such).”).

The debate between legal realism and the declaratory theory has significant implications for a judicial takings doctrine.<sup>104</sup> This is because, as established in section II.A, a necessary condition for a successful takings claim is that the claimant possessed an actual property right prior to the alleged taking.<sup>105</sup> And in a judicial takings case, whether the plaintiff possessed an actual property right prior to the alleged taking depends critically on the jurisdiction's jurisprudential philosophy.

Our friend Rivera from Part I will help illustrate. In a jurisdiction whose courts have the power to make law at Time 3 that did not exist at Time 2, Rivera may have a legitimate claim that the state court took her property by overruling its prior decision. In such a system, the Time 1 decision was the law at Time 2, even if it was bad law that failed to account for centuries of countervailing precedent. Thus, at Time 2, Rivera possessed an actual property right to the adjacent riverbed under the common law of her jurisdiction. At Time 3, the court revoked this property right. On this understanding, the court acted like a legislature by changing the law to conform to ancient common law principles.<sup>106</sup> Under a conception of common law that allows courts to make law in this way, "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property."<sup>107</sup>

The analysis looks different in a jurisdiction whose courts adhere to a form of the declaratory theory. Under the strong Blackstonian form, neither the decision at Time 1 nor the decision at Time 3 was ever law; both were mere declarations about what the court perceived the law to be. On this understanding, the Time 3 decision did not change a bad law that was made at Time 1, but rather corrected the mistaken assertion of law at Time 1, which *never was* the law. On a weaker, more contemporary version of the declaratory theory, the Time 1 decision may

<sup>104</sup> Others have recognized the stakes of this debate for judicial takings, to varying degrees of analytical depth, but have not fully developed the issue or analyzed its relationship to *Erie*. See Beswick, *supra* note 102 (manuscript at 3) (noting that the judicial takings doctrine "is steeped in a realist conception of legal relations. The idea that judgments might *interfere* with *established* rights presumes that such judgments are doing more than interpreting and declaring the content of legal rights — they are changing those rights. Judicial scepticism of the declaratory theory of adjudication thus emanates from the cases."); Williamson B.C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U. L. REV. 123, 134–35, 159–64 (1986) (describing the judicial takings issue as "set amidst the ongoing debate as to whether judges 'discover' or 'make' the law," *id.* at 134, and advocating for the declaratory theory, *id.* at 159–64); Walston, *supra* note 16, at 434–35 (acknowledging the "metaphysical" issue that judicial takings raise but giving it "little more than passing academic interest," *id.* at 434, because the possibility of judicial takings is foreclosed by courts' lack of police power).

<sup>105</sup> See *supra* section II.A, pp. 814–19.

<sup>106</sup> See Sarratt, *supra* note 16, at 1497 ("When state courts are wearing their legislative hats, they must be treated as wielding real lawmaking power — including the ability to take property.")

<sup>107</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion).

have been the law of the jurisdiction for a time, but *at least as of Time 2* the law was as stated in the Time 3 decision. Under either understanding, at Time 2 Rivera lacked an actual property right to the avulsively exposed riverbed for the court to “take” at Time 3. In other words, the court did not take Rivera’s property at Time 3; it simply declared that she lacked the property to begin with. As this example shows, a judicial takings doctrine is flatly inconsistent with the declaratory theory.

### III. AVOIDING *ERIE*’S TRAP IN JUDICIAL TAKINGS

Part II established that the nature of common law has high stakes for a judicial takings doctrine. In fact, it’s the whole conceptual ballgame. It comes as no surprise, then, that *Erie* — “a sea change in how judges view law”<sup>108</sup> — has serious reverberations in the judicial takings context. This Part explores the intersections of *Erie* and judicial takings. Section A discusses the tension between *Erie*’s constitutional holding and its jurisprudential assumptions, showing how *Erie*’s insistence that judges make law and dismissal of the declaratory theory undermine the very value its constitutional holding sought to vindicate: state judicial independence from federal interference. It then explains how a judicial takings doctrine risks perpetuating and exacerbating this error. Section B proposes a way forward under existing doctrine that limits the impact of *Erie*’s dogged realism on state judicial independence while avoiding the risk of turning a judicial takings doctrine into a mere drafting guide for state courts to circumvent the Takings Clause.

#### A. *Erie*’s Irony and the Risk of Judicial Takings for State Autonomy

1. *Erie*’s Irony. — At bottom, *Erie* was about state judicial independence and the allocation of power between the federal and state judiciaries.<sup>109</sup> The constitutional logic of the case, although the subject of much debate, underscores this point: the Constitution grants neither

<sup>108</sup> Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1902 (2011).

<sup>109</sup> See, e.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1478–90 (1997) (arguing that *Erie* rested on “judicial federalism,” *id.* at 1478); Jack Goldsmith & Steven Walt, *Essay, Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 675 (1998) (describing *Erie*’s constitutional holding as about “the allocation of authority between the state and federal governments”); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17, 18 (2013) (pronouncing *Erie* “the most important federalism decision of the twentieth century”); Sarratt, *supra* note 16, at 1514–28 (evaluating several alternatives for *Erie*’s constitutional basis and concluding that “federal interference with intrastate separation of powers,” *id.* at 1514, is the best fit); Joshua P. Zoffer, Note, *An Avoidance Canon for Erie: Using Federalism to Resolve Shady Grove’s Conflicts Analysis Problem*, 128 YALE L.J. 482, 509 (2018) (“The *Erie* decision itself reflects a deep-seated commitment to federalism.”).

Congress, through Article I, nor the federal courts, through Article III, the “power to declare substantive rules of common law applicable in a State.”<sup>110</sup> Thus, this power is “reserved by the Constitution to the several States” through the Tenth Amendment,<sup>111</sup> and federal courts’ practice of departing from state law under *Swift* was “an unconstitutional assumption of powers by courts of the United States.”<sup>112</sup> Reaffirming the centrality of state judicial independence to *Erie*’s Tenth Amendment holding, Justice Brandeis quoted a passage by Justice Field at length, part of which is worth reproducing here:

[T]here stands, as a perpetual protest against [the *Swift* doctrine’s] repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.<sup>113</sup>

As this passage demonstrates, the independence of state judiciaries from federal interference provided both a motive and a constitutional basis for *Erie*’s holding. While courts often place greater emphasis on *Erie*’s policy goals than on its constitutional holding when applying the *Erie* doctrine,<sup>114</sup> *Erie*’s federalism endures and continues to animate its application today.<sup>115</sup>

<sup>110</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>111</sup> *Id.* at 80; see also Sarratt, *supra* note 16, at 1523 (noting that this language “practically quoted the Tenth Amendment”).

<sup>112</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>113</sup> *Id.* at 78–79 (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

<sup>114</sup> See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (establishing *Erie*’s “twin aims” of “discouragement of forum-shopping and avoidance of inequitable administration of the laws” as essential to the application of the *Erie* rule); *Guar. Tr. Co. v. York*, 326 U.S. 99, 109–11 (1945) (referring several times to *Erie*’s “policy”); 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4505 (3d ed. 2020) (“For 18 years after *Erie* the Court refrained from referring to the Constitution in an *Erie* context.”); Craig Green, *Erie and Constitutional Structure: An Intellectual History*, 52 AKRON L. REV. 259, 261 n.5 (2018) (collecting early cases applying *Erie*’s result “without invoking its constitutional rationale”).

<sup>115</sup> See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 451 (2010) (Ginsburg, J., dissenting) (invoking “the federalism principles undergirding *Erie*”); *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (connecting *Erie*’s twin aims to its “federalism principle”); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (quoting *Erie*’s constitutional recognition of state judicial autonomy and independence to support holding that Congress cannot abrogate state sovereign immunity in state courts); *Hanna*, 380 U.S. at 474 (Harlan, J., concurring) (calling *Erie* “one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems”); Clark, *supra* note 109, at

But beneath the cloak of its federalism holding, *Erie* smuggled in a theory about the nature of common law: that common law exists only insofar as it is contained in the decisions of the sovereign's judges. To Justice Brandeis, as to Justice Holmes, "the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute'"<sup>116</sup> was a "fallacy."<sup>117</sup> Instead, *Erie* embraced a purely realist conception of the common law in which the decisions of state judges themselves establish law:

[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. . . . [T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.<sup>118</sup>

Thus, *Erie* declared that "the law to be applied in any case is the law of the State," whether that law "shall be declared by its Legislature in a statute or by its highest court in a decision . . . . There is no federal general common law."<sup>119</sup>

The consequences of *Erie*'s endorsement of realism did not stop at abolishing federal general common law.<sup>120</sup> As Sachs describes, *Erie* also "insisted that the *states* had adopted precisely the same views toward general law as happened to be held by Justices Holmes and Brandeis."<sup>121</sup> The assumption that state judiciaries embraced legal realism and the lawmaking function of courts is traceable to Justice Holmes's bold assertion that "when the Constitution of a State establishes a Supreme Court it by implication" declares "that on all matters of general law the

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1487–93 (arguing that *Erie*'s judicial federalism explains the development of two lines of *Erie* cases, one where there is a federal rule on point and one where there is not).

<sup>116</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

<sup>117</sup> *Id.*; see also *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting) (calling this view a "fallacy and illusion").

<sup>118</sup> *Erie*, 304 U.S. at 79 (final alteration in original) (quoting *Black & White Taxicab*, 276 U.S. at 533, 535 (Holmes, J., dissenting)).

<sup>119</sup> *Id.* at 78.

<sup>120</sup> Indeed, some have argued that *Erie*'s holding allocating power between the federal and state judiciaries was entirely independent from its realism. See Goldsmith & Walt, *supra* note 109, *passim*.

<sup>121</sup> Sachs, *supra* note 84, at 574 (emphasis added); see also *id.* ("Justice Brandeis simply assumed that finding general law was impossible, so the courts must be making it instead.").

decisions of the highest Court should establish the law.”<sup>122</sup> The assumption was unsupported and probably incorrect.<sup>123</sup> Yet the federal courts have perpetuated the assumption in spite of its historical dubiousness.<sup>124</sup>

An important question for our purposes is whether *Erie*'s assumption mandates that federal courts treat state court decisions as making law even where the state itself adheres to the declaratory theory. It comes as no surprise that there remains a difference of opinion on this issue,<sup>125</sup> since in most instances it makes little difference whether the federal court views the state court as making or declaring law. In either case, the federal court can satisfy *Erie*'s requirements by applying state law as asserted by the state court. But there are rare instances, and judicial takings are one of them, where it matters how the federal court views the state court's philosophy on common law adjudication.<sup>126</sup>

If *Erie* does require federal courts to treat state court decisions as though they make law, then it works a devious sleight of hand. With one hand it grants the states full independence over the substance of their common law while with the other it revokes their ability to adhere

<sup>122</sup> *Black & White Taxicab*, 276 U.S. at 534 (Holmes, J., dissenting). For an argument that Justice Holmes's assumption about state courts underpinned the *Erie* decision, see Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 980–82 (2013).

<sup>123</sup> See Goldsmith & Walt, *supra* note 109, at 696 (noting that “Louisiana courts frequently applied natural law” even after *Erie*); Green, *supra* note 98, at 1113 (“At the time that *Swift* was decided, most state courts had their own *Swiftian* conception of the common law. . . . [E]ven when *Erie* was decided in 1938, some states remained committed to this *Swiftian* view of the common law.”); Nelson, *supra* note 122, at 982–84 (arguing that the assumption “is at least contestable and may be false,” *id.* at 984); Sachs, *supra* note 84, at 573 (“On some historical accounts, the early American states inherited a tradition in which courts were charged to find law rather than make it.” (citing BRIDWELL & WHITTEN, *supra* note 84, at 11–13)); *id.* at 574 (“[M]any state constitutions — including, say, the Massachusetts Constitution of 1780 — were enacted well before the modern acceptance of judge-made law.”).

<sup>124</sup> See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 722 (2010) (plurality opinion) (“[C]ourts, in the 19th century, did assume the power to change the common law . . . .”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[I]n most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.”); *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“[S]tate-court judges possess the power to ‘make’ common law . . . .”).

<sup>125</sup> Compare Green, *supra* note 98, at 1125 (“*Erie* answered the question of whether state court decisions are binding *categorically*, rather than on a state-by-state basis. Under *Erie*, a federal court deciding a common-law case arising in Georgia is bound by the decisions of the Georgia Supreme Court, even though the Georgia Supreme Court does not *want* the federal court to be bound.”), and Sachs, *supra* note 84, at 577 (“[S]imply citing state court decisions as the sole source of authority — as the ‘*Erie* doctrine’ is thought to require — might well get the state’s law wrong.”), with Goldsmith & Walt, *supra* note 109, at 711 (“[I]f the state legislature directed that judicial decisions are not to count as a source of state law, presumably *Erie* would not require a federal court to apply state decisional law.”), and Sarratt, *supra* note 16, at 1527 (describing *Erie* as a “default rule” and suggesting that “[i]f an individual state wanted to reinstitute the *Swift* regime as to its own judicial decisions, it could override this default rule with a clear statement”).

<sup>126</sup> See *supra* section II.B, pp. 820–25.

to their preferred jurisprudential philosophy. Surely, the “autonomy and independence” of state judicial systems from federal oversight on which *Erie* based its constitutional holding<sup>127</sup> include the freedom to practice the state’s desired jurisprudential philosophy.<sup>128</sup> It is a stretch to say that allowing federal courts to reach independent conclusions on matters of general common law is a gross intrusion into state courts’ autonomy and independence but that binding the states to the jurisprudential philosophy of a few Justices on the U.S. Supreme Court is not. As Justice Holmes himself recognized in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>129</sup> a state’s choice of jurisprudential philosophy is beyond the scope of federal control.<sup>130</sup> In *Erie*’s words, how the states apportion lawmaking power “is not a matter of federal concern.”<sup>131</sup>

Indeed, *Erie*’s constitutional logic applies identically to a state’s substantive common law and jurisprudential philosophy. *Erie* held that, because the Constitution does not grant the federal government control over state substantive common law, the Tenth Amendment reserves that power to the states.<sup>132</sup> Similarly, nothing in the Constitution grants the federal government control over state jurisprudential philosophy.<sup>133</sup> Therefore, the power to adhere to a particular jurisprudential philosophy is also reserved to the states via the Tenth Amendment. A federal court’s projection of its jurisprudential philosophy onto a state court is equally “an unconstitutional assumption of powers.”<sup>134</sup>

Moreover, even if *Erie*’s constitutional logic applies only to substantive law, in judicial takings cases, a state’s jurisprudential philosophy *is*

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<sup>127</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

<sup>128</sup> W. David Sarratt makes this point. See Sarratt, *supra* note 16, at 1524 (“Justice Field’s frequent repetition of the word ‘independence’ suggests that the Constitution prohibits not only federal overreaching into areas of substantive law reserved for the states, but also federal interference with states’ independence to allocate power between the branches of state government.”). Sarratt argues that a judicial takings doctrine necessarily follows from *Erie*’s recognition of state courts’ authority to make law. *Id.* at 1528. He briefly suggests that a state could “opt out” of the default rule with a clear statement that its courts are constrained to find law, *id.* at 1529 & n.157, but his focus is on the implications of the freedom to make law. This Note argues the flip side of Sarratt’s argument: that state courts *must* be allowed to opt out of a judicial takings doctrine by adhering to the declaratory theory.

<sup>129</sup> 276 U.S. 518 (1928).

<sup>130</sup> *Id.* at 534 (Holmes, J., dissenting) (“If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain.”).

<sup>131</sup> *Erie*, 304 U.S. at 78.

<sup>132</sup> *Id.* at 78–80.

<sup>133</sup> See, e.g., *Great N. Ry. Co. v. Sunburst Oil & Refin. Co.*, 287 U.S. 358, 364–65 (1932) (stating that the “federal constitution has no voice,” *id.* at 364, on a state’s jurisprudential philosophy).

<sup>134</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

essentially part of its substantive law. The antecedent state law question in a takings case is whether the claimant had a property right, clearly an issue of substantive law. And, as argued in Part II, a state's approach to jurisprudence is a critical component of that inquiry when the taking is alleged to have occurred via judicial decision. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>135</sup> the Court held a different type of meta-law — choice-of-law rules — to be “substantive” for *Erie* purposes because those rules are frequently outcome determinative.<sup>136</sup> Similarly, in judicial takings cases, it makes little sense to draw a line between substance and jurisprudence when a state court's jurisprudence is dispositive of the substantive issue.

In the years leading up to *Erie*, Justices Holmes and Brandeis — and the Court as a whole — repeatedly affirmed state autonomy over jurisprudential philosophy. This line of cases makes it unlikely *Erie* was intended as a Trojan Horse that revoked the states' jurisprudential freedom under the guise of granting them control over their substantive law.<sup>137</sup> Perhaps the clearest assertion of state jurisprudential autonomy came just six years earlier in the Court's unanimous<sup>138</sup> opinion in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*,<sup>139</sup> which proclaimed that the “federal constitution has no voice” on whether a state court applies its decisions prospectively or retroactively.<sup>140</sup> In enabling state courts to prospectively overrule their prior cases, *Sunburst* offered the states complete jurisprudential freedom to accept or reject the declaratory theory.<sup>141</sup> This judicial federalism is in line with Justice Holmes's dissent in *Black & White Taxicab* — which Justice Brandeis joined and which provided a theoretical basis for *Erie* — arguing that federal courts have no power to second-guess state courts' declarations of jurisprudential philosophy.<sup>142</sup> While Justice Holmes was advocating

<sup>135</sup> 313 U.S. 487 (1941).

<sup>136</sup> *Id.* at 496.

<sup>137</sup> *Cf.* Stevens, *supra* note 23, at 564 (“I am sure Justice Brandeis would not have joined Justice Scalia's plurality opinion in *Stop the Beach*.”).

<sup>138</sup> Justice Brandeis joined Justice Cardozo's unanimous opinion; Justice Holmes had retired ten months prior. See Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1848 (1983).

<sup>139</sup> 287 U.S. 358 (1932).

<sup>140</sup> *Id.* at 364.

<sup>141</sup> See *id.* at 364–65 (“A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.”).

<sup>142</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534 (1928) (Holmes, J., dissenting) (“If a state constitution should declare that on all matters of

the states' freedom to reject the declaratory theory and adopt legal realism,<sup>143</sup> the same principle would prevent federal courts from second-guessing the states' acceptance of the declaratory theory. Indeed, two years later Justice Brandeis himself wrote in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*<sup>144</sup> that "[s]ince it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is,"<sup>145</sup> indicating that he accepted state courts' use of the declaratory theory. And over and over again, the Court stressed that state courts are free to overrule their precedents without violating the federal Constitution.<sup>146</sup> It would be underhanded indeed for *Erie* to walk back this jurisprudential autonomy while espousing the independence of state courts.

2. *The Risk of Judicial Takings*. — But whether or not *Erie* in fact requires federal courts to treat all state court decisions as making law, its mistaken assumption continues to pervade the federal courts.<sup>147</sup> Most of the time, this assumption is harmless. Sometimes, it is not.<sup>148</sup> Judicial takings make up one context in which the assumption has particularly pernicious results for state autonomy and independence.

By advocating a categorical judicial takings doctrine that assumes all state courts are making law, the *Stop the Beach* plurality perpetuated Justices Holmes and Brandeis's mistake. Its adherence to the realist assumption is evident in the opinion. Justice Scalia rejected Justice Kennedy's originalist argument because, in his view, courts "assume[d]

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general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain.").

<sup>143</sup> See *id.*

<sup>144</sup> 281 U.S. 673 (1930).

<sup>145</sup> *Id.* at 681 n.8. Justice Brandeis continued: "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.*

<sup>146</sup> See *Sunburst*, 287 U.S. at 364–65 (stating that the Constitution has no say over the power of state courts to apply their decisions retroactively); *Brinkerhoff-Faris*, 281 U.S. at 681 n.8 ("State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions."); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924) ("The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution."); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 572–76 (1905) (Holmes, J., dissenting) (arguing that state courts are free to overrule prior decisions without interference from the federal Constitution).

<sup>147</sup> See cases cited *supra* note 124.

<sup>148</sup> For example, Professor Michael Steven Green points out that one way *Erie* constrains state jurisprudential philosophy is by restricting state courts' ability to fully implement a general common law system, as *Erie* revokes the authority of states who "do] not want the federal court to be bound" to allow federal courts to reach independent determinations of general common law. Green, *supra* note 98, at 1125.

the power to change the common law” in the nineteenth century.<sup>149</sup> The plurality’s realist assumptions shine through most prominently in its statement that “courts have no peculiar need of flexibility. It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so.”<sup>150</sup> This passage asserts that “cases” establish actual property rights, precisely as the political branches’ statutes and regulations do. This assertion is in direct conflict with the declaratory theory, which holds that judicial decisions are different in kind from statutes and regulations in that judicial decisions do not themselves establish rights but merely declare them. Thus, while Justice Scalia did little to clarify his “established property right” test,<sup>151</sup> it is clear he considered common law judicial decisions sufficient to establish law such that a subsequent overruling would be a taking.

*Stop the Beach* was not the first time this realist assumption made its way into the judicial takings discussion. Dissenting from a denial of certiorari in an earlier case, Justice Scalia argued a judicial taking would occur if a state court changed property rights “by invoking nonexistent rules of state substantive law.”<sup>152</sup> This is flatly inconsistent with the declaratory theory, under which newly announced rules were not previously “nonexistent” but rather were part of the state’s common law even before being recognized in a judicial decision. And Justice Stewart’s concurrence in *Hughes v. Washington*<sup>153</sup> argued that “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.”<sup>154</sup> Of course, this kind of retroactive assertion is the modus operandi of the declaratory theory.

The consequence of sticking to *Erie*’s jurisprudential assumptions in the context of judicial takings is that state courts are precluded from adhering to the declaratory theory in certain cases. Because the issue whether a claimant has a property right under state law is antecedent to the question of federal right — whether there was a taking under the U.S. Constitution — federal courts may independently review state court decisions on the existence of a property right in judicial takings

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<sup>149</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 722 (2010) (plurality opinion).

<sup>150</sup> *Id.* at 727.

<sup>151</sup> He stated merely that “[a] property right is not established if there is doubt about its existence.” *Id.* at 726 n.9.

<sup>152</sup> *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari).

<sup>153</sup> 389 U.S. 290 (1967).

<sup>154</sup> *Id.* at 296–97 (Stewart, J., concurring).

cases.<sup>155</sup> Thus, under the *Stop the Beach* plurality's approach, if a state court overrules a clear, incorrect statement of property law, it will get reversed for taking property even though, on the state's understanding, the claimant never had property to begin with. By restricting states' abilities to engage in their preferred jurisprudential philosophy, such a doctrine embraces *Erie*'s realism while undermining its vision of autonomy and independence for state judiciaries.

### B. A Path Forward

If we are to have a judicial takings doctrine, it is essential that it preserves state autonomy and independence over jurisprudential philosophy. The simplest way to achieve this goal is for federal courts to let the states decide whether to accept or reject the declaratory theory and to respect their decisions. In short, in Justice Cardozo's words, "[t]he choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."<sup>156</sup> Thus, when a state court overrules a prior decision about property rights, a judicial takings claim is possible if and only if the state court rejects the declaratory theory. This Note goes further than Dogan and Young's argument for substantial deference to state courts on whether their decisions are in fact inconsistent with precedent;<sup>157</sup> it argues that even when a state court *explicitly* overrules its precedent, there is no taking so long as that court adheres to the declaratory theory. Happily, a system that takes account of states' jurisprudential philosophies fits neatly into the existing framework for review of state court decisions on state law.

Recall that federal courts conduct independent reviews of state courts' rulings on state law issues antecedent to questions of federal right. But in doing so, federal courts are still bound to apply state law.<sup>158</sup> Indeed, federal courts accord a significant degree of deference to state

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<sup>155</sup> See *Stop the Beach*, 560 U.S. at 727 (plurality opinion) ("A constitutional provision that forbids the uncompensated taking of property is quite simply unsusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law."); see also *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 628 (1813).

<sup>156</sup> *Great N. Ry. Co. v. Sunburst Oil & Refin. Co.*, 287 U.S. 358, 365 (1932).

<sup>157</sup> See Dogan & Young, *supra* note 42, at 111–30, 134. Dogan and Young embrace a realist conception of state court common law decisions, see *id.* at 117 ("Property rights . . . are whatever the relevant state authorities, usually courts, say they are."), and therefore are concerned only with the same question as Justice Scalia: whether the state court actually overruled its prior decisions, see *id.* at 118.

<sup>158</sup> See *Anderson*, 303 U.S. at 100 (stating that determining whether a contract exists for Contract Clause purposes "involves an appraisal of the statutes of the State and the decisions of its courts").

courts when reviewing these antecedent state law questions.<sup>159</sup> An important antecedent question in takings cases is whether the claimant possessed a property right under state law.<sup>160</sup> Thus, in takings cases, federal courts must look to state law to determine whether a claimant has a property right.<sup>161</sup> It is a small step, arguably no step at all, for “state law” here to include both state substantive law (“the statutes of the State and the decisions of its courts”<sup>162</sup>) and state jurisprudential practice (whether state courts make or find law).<sup>163</sup> This solution allows for a robust judicial takings doctrine, assuming such a thing should exist at all, while preserving the autonomy of the states envisioned by *Erie*.

In determining state law on this jurisprudential issue, federal courts should look first to state constitutions, statutes, and judicial decisions that bear on the state’s approach to common law adjudication. If those sources legitimately express the state’s acceptance or rejection of the declaratory theory, the presumption should be that a judicial decision by that state’s courts adheres to that mandate. Next, federal courts should look to the reasoning of the state court decision at issue to determine whether the court engaged in making new law or declaring already-existing law when it overruled its precedent. If the state court’s jurisprudential methodology remains unclear, the federal court may make an “*Erie* guess” as to how the state high court *would* characterize its approach<sup>164</sup> or it may certify the question to the state high court.<sup>165</sup>

Once a federal court determines how the state understands its jurisprudence, the federal court should defer to that view so long as there is a “fair or substantial basis” for the assertion that the state court adhered to the state’s understanding in the case at issue.<sup>166</sup> If there is no fair or

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<sup>159</sup> See *Stop the Beach*, 560 U.S. at 726 n.9 (plurality opinion) (“The test we have adopted, however (deprivation of an *established* property right), contains within itself a considerable degree of deference to state courts.”); *Anderson*, 303 U.S. at 100 (“[W]e accord respectful consideration and great weight to the views of the State’s highest court . . .”).

<sup>160</sup> See *supra* section II.A, pp. 814–19.

<sup>161</sup> See *Stop the Beach*, 560 U.S. at 727 (plurality opinion) (discussing federal courts’ “power to decide what property rights exist *under state law*” (emphasis added)).

<sup>162</sup> *Anderson*, 303 U.S. at 100.

<sup>163</sup> In terms of Merrill’s “patterning definition” framework of constitutional property, which identifies property as interests that fit a set of federal constitutional criteria, Merrill, *supra* note 40, at 927, the patterning definition should *not* include assumptions about the jurisprudential status of state court decisions.

<sup>164</sup> See, e.g., *Temple v. McCall*, 720 F.3d 301, 307 (5th Cir. 2013).

<sup>165</sup> See, e.g., *Fiore v. White*, 528 U.S. 23, 29 (1999) (certifying a question to a state high court to “determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case”).

<sup>166</sup> *Demorest v. City Bank Farmers Tr. Co.*, 321 U.S. 36, 42 (1944) (quoting *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930)). The appropriate standard of deference for antecedent state law questions is the subject of academic debate. Compare, e.g., Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101

substantial basis — for example, if a state’s legislature or high court announces that the state’s courts follow the declaratory theory but the high court issues an opinion that screams “judicial legislation” — the federal court need not defer to the state’s assertions.<sup>167</sup> The “fair or substantial basis” standard is rooted in the Court’s “adequate and independent state grounds” jurisprudence<sup>168</sup> and was proposed for judicial takings by the respondents in *Stop the Beach*.<sup>169</sup> Contrary to Justice Scalia’s musings that the test is “not obviously appropriate” in the takings context,<sup>170</sup> the fact that the test was “designed to determine whether there has been an evasion” of federal review<sup>171</sup> makes it seem particularly appropriate for addressing the concern of state circumvention of the Takings Clause.<sup>172</sup> Indeed, the Court applied the test in the very context of antecedent state law questions of constitutional property in *Demorest v. City Bank Farmers Trust Co.*<sup>173</sup>

*Demorest* provides an example of how respect for state court characterizations of prior cases with regard to a federally protected right could work in practice. In that case, petitioners challenged a New York

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MICH. L. REV. 80, 89 (2002) (proposing a “proven mistrust” standard that would require the reviewing federal court to “identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review”), with Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1964 (2003) (arguing that deference to state courts should be “a rule of practice only”). The precise standard is not critical to this Note, whose primary thesis is that state jurisprudential philosophy should matter in judicial takings cases; who adjudicates that philosophy in a particular case is secondary. An alternative to the “fair or substantial basis” test is the “objectively reasonable application” of precedent test set forth in *Lucas*. 505 U.S. 1003, 1032 n.18 (1992); see Monaghan, *supra*, at 1960–61 (citing the test as an example of deference review alongside *Demorest*’s “fair or substantial basis” test). This test seems more difficult to apply when the state’s precedent does not clearly accept or reject the declaratory theory.

<sup>167</sup> See *Demorest*, 321 U.S. at 42 (quoting *Broad River*, 281 U.S. at 540).

<sup>168</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 725 (2010) (plurality opinion). Federal courts generally lack jurisdiction to review even federal questions so long as there was an adequate and independent state law ground for the state court’s ruling. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

<sup>169</sup> *Stop the Beach*, 560 U.S. at 725 (plurality opinion).

<sup>170</sup> *Id.* at 726. In any event, Justice Scalia found the test “no different” from the “established property right” test. *Id.* The two differ, however, in that the “established property right” test does not discern differences in jurisprudential philosophy; it looks only to the clarity of precedent and not its jurisprudential status.

<sup>171</sup> *Id.*

<sup>172</sup> Roderick Walston also suggests that the test is appropriate for judicial takings cases. See Walston, *supra* note 16, at 430–33. Professor Amnon Lehavi, on the other hand, argues that “when the state court itself is suspected of committing a constitutional wrong, the federal reviewer could not defer to the ‘fair and substantial basis’ and to the state court in learning the content of the state’s common law.” Lehavi, *supra* note 89, at 563. He seems to base his argument on the fact that it is the state court itself that creates a potential constitutional violation when it changes the common law. *Id.* But the test developed precisely to protect against end runs around the Constitution by state courts. See, e.g., *Broad River*, 281 U.S. at 540. If anything, this makes the test seem especially suited to the judicial takings context.

<sup>173</sup> 321 U.S. 36 (1944); see also *id.* at 42 (quoting *Broad River*, 281 U.S. at 540).

statute under the Due Process Clause, arguing that the statute retroactively took their property established by prior New York Court of Appeals cases.<sup>174</sup> The Court of Appeals held that its prior decisions did not establish a property right,<sup>175</sup> reading the rule pronounced in those cases as “tentatively stated and expressly recognized as subject to change.”<sup>176</sup> Furthermore, the court made a statement about the state’s treatment of precedent: “Before a judicial declaration, thus tentatively stated, becomes a rule of property, it must have become permanently fixed and long continued.”<sup>177</sup> Having concluded that its prior decisions did not establish a property right, the New York court disposed of the case because petitioners “never possessed under New York law such a property right as they claim has been taken from them.”<sup>178</sup>

The Supreme Court’s treatment of the New York court’s ruling in *Demorest* is instructive for how it might approach judicial takings cases. Although *Demorest* was brought as a due process case, it could just as easily have been a judicial takings case; state high court precedent arguably vested petitioners with certain property rights that the state court later declared nonexistent. And in *Demorest*, the Court respected the state court’s approach to common law jurisprudence. It held that the state court could “formulate general rules”<sup>179</sup> without establishing property rights. It asked only “whether the decision of the state court rests upon a fair or substantial basis”<sup>180</sup> and concluded that it did.<sup>181</sup> Similarly, state courts should be able, in good faith, to recognize prior common law decisions as misstatements of the law that did not establish property rights.

Three potential concerns with this proposal are worth addressing. First, because the Takings Clause confers a federal constitutional right, it may seem odd to have its scope determined in part by state law and the practice of state courts. Second (and relatedly), it may appear counterintuitive that the clause’s protections would apply unequally to states that accept the declaratory theory and those that reject it. The simple response to these objections is not that they are necessarily wrong but that they are too late. Antecedent to any federal takings claim is the

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<sup>174</sup> *Id.* at 37–41. The petitioners were remaindermen on mortgages who argued that the statute’s rule of apportionment of proceeds on salvage operations of mortgaged property was less favorable than the rule established by the Court of Appeals to remainder interests. *Id.* at 41.

<sup>175</sup> *Id.* at 41.

<sup>176</sup> *In re West’s Est.*, 46 N.E.2d 501, 505 (N.Y. 1943), *aff’d sub nom.* *Demorest v. City Bank Farmers Tr. Co.*, 321 U.S. 36 (1944).

<sup>177</sup> *Id.*

<sup>178</sup> *Demorest*, 321 U.S. at 42.

<sup>179</sup> *Id.* at 44.

<sup>180</sup> *Id.* at 42 (quoting *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930)).

<sup>181</sup> *Id.* at 42–43.

question of whether the claimant possesses a property right.<sup>182</sup> At least as of *Roth*, that question is generally one of purely state law.<sup>183</sup> This farming out of the definition of constitutional property to the states means the Supreme Court may not be comfortable with the results, creating what Professor Jerry Mashaw and others have labeled the “positivist trap.”<sup>184</sup> Moreover, it means that the scope of the Takings Clause’s protections varies along with the varying property laws of the several states. Thus, the Supreme Court has already relinquished complete control over the Takings Clause’s scope and forgone its uniform application among the states by placing this prerequisite in the states’ hands. Section II.B established that this necessary condition of a legitimate property right turns not only on a state’s substantive law but also on its jurisprudential philosophy. Recognizing that the relevant state law includes the latter would not effect a shift in power from federal to state courts or create discrepancies among the states to a significantly greater extent than *Roth*’s framework already has.

The third objection is that acknowledging a distinction in the application of a judicial takings doctrine based on acceptance or rejection of the declaratory theory amounts to a drafting guide for states and state courts to get around the strictures of the Takings Clause. This concern is understandable, but there are at least two reasons why it is not entirely well founded.

First, as discussed above, a federal court need not defer to a state court’s claim of adherence to the declaratory theory if there is no fair or substantial basis for the state court’s assertion. While federal courts accord deference to state courts when reviewing antecedent state law questions,<sup>185</sup> they retain the power to reach their own conclusions.<sup>186</sup> This check allows federal courts to police bad faith evasion of the Takings Clause by state courts.

Second, as a practical matter, the fear that state courts will exploit the distinction to avoid federal constitutional limitations rests on a mistrust of state courts that is probably unjustified. While many state courts took an openly hostile approach to Supreme Court opinions in the 1950s and 60s,<sup>187</sup> the Supreme Court has since recognized that state

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<sup>182</sup> See *supra* section II.A, pp. 814–19.

<sup>183</sup> See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

<sup>184</sup> Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888 (1981); Merrill, *supra* note 40, at 922. “Positivist” here simply means “nonconstitutional.” See Merrill, *supra* note 40, at 920 n.144.

<sup>185</sup> See cases cited *supra* note 159 and accompanying text.

<sup>186</sup> See cases cited *supra* note 155 and accompanying text.

<sup>187</sup> See Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC’Y REV. 109, 109–11 (1973); G. Alan Tarr, *State Supreme Courts and the U.S. Supreme Court: The Problem of Compliance*, in STATE SUPREME COURTS:

courts are perfectly appropriate forums for vindicating federal constitutional rights.<sup>188</sup> Furthermore, while many state judges are elected or otherwise subject to political pressure, potentially raising concerns that they may sacrifice a lone property owner's rights to the will of the majority, there is little empirical or historical evidence backing this concern, at least in the takings context.<sup>189</sup> For one thing, state courts have more experience than federal courts in adjudicating takings cases.<sup>190</sup> For another, empirical analysis has found "strong evidence of parity in the takings area" between state and federal courts.<sup>191</sup> One study analyzed state and federal court interpretations of *Nollan v. California Coastal Commission*,<sup>192</sup> which applied the Takings Clause to conditions on land-use permits,<sup>193</sup> and found that, "as a whole, the state and federal courts have interpreted *Nollan* very similarly."<sup>194</sup> Similarly, the Justice Department, in a letter to the House Committee on the Judiciary, found "no evidence that State courts, on the whole, are failing to do an adequate job of protecting property owners in the hundreds, if not thousands, of cases that come before them each year."<sup>195</sup> Instead, "[g]uided by recent Supreme Court decisions, State courts are likely to be as sympathetic to local property owners as Federal courts and as competent as Federal courts to decide Federal constitutional claims under the Just Compensation Clause."<sup>196</sup> Thus, there is little support for a mistrust of

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POLICYMAKERS IN THE FEDERAL SYSTEM 155, 155 (Mary Cornelia Porter & G. Alan Tarr eds., 1982).

<sup>188</sup> See *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.")

<sup>189</sup> See Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 *ECOLOGY L.Q.* 749, 786–88 (2011) (collecting evidence of state courts' institutional capacity to adjudicate takings claims and stating that "[j]udicial takings advocates . . . fail to muster recent, convincing examples of state court abuses," *id.* at 787–88); David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 *YALE L.J.* 967, 968 (2011) ("[F]ederal courts historically have refused to interfere with the land-use decisions of local governments or to second-guess the rulings of state courts.")

<sup>190</sup> See, e.g., *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 347 (2005) (putting trust in the "fully competent" state courts, which "undoubtedly have more experience than federal courts do in" adjudicating takings challenges).

<sup>191</sup> Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 *HARV. J.L. & PUB. POL'Y* 233, 285 (1999).

<sup>192</sup> 483 U.S. 825 (1987).

<sup>193</sup> *Id.* at 834.

<sup>194</sup> Gerry, *supra* note 191, at 239.

<sup>195</sup> H.R. REP. NO. 106-518, at 37 (2000).

<sup>196</sup> *Id.*

the “presumptively competent” state courts to adjudicate in good faith respecting the Takings Clause.<sup>197</sup>

#### CONCLUSION

The question of judicial takings is far from settled. While the Supreme Court has been aware of the question for over a century, it has yet to provide a definitive answer as to whether a judicial takings doctrine even exists. Ironically, while we still do not know whether a judicial takings doctrine exists, we have a sense of what one might look like from the plurality opinion in *Stop the Beach*. This Note’s purpose is to flag a potential unintended consequence of that approach before it is embraced by a majority of the Court. The Court should not blindly follow *Erie*’s mistaken assumption about the nature of common law while unintentionally undermining its spirit by revoking state autonomy over jurisprudential philosophy. Should a majority of the Court wish to adopt a judicial takings doctrine, this Note suggests a framework for doing so that can be easily implemented in a manner consistent with the Court’s current doctrine and that strikes a balance between preserving state judicial independence and protecting federal rights.

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<sup>197</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).