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How To Review State Court Determinations of State Law Antecedent to Federal Rights

ABSTRACT. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010), a plurality of the Supreme Court endorsed a judicial takings doctrine for the purpose of policing wayward state property law decisions. The plurality's opinion culminates several decades' worth of effort by legal scholars and property law groups to secure closer federal review of state court property law determinations antecedent to federal takings claims. In a great victory for these groups, but in an opinion that also cuts against more than a century of Supreme Court deference to state courts in this area, the plurality adopted a new standard of independent review for antecedent state property law determinations. This Note examines the tradition of deference cast aside by the plurality's opinion and makes a case for its rehabilitation. Important purposes are served by Supreme Court deference to state court determinations of antecedent state law; not least of these is the check that deference places on the Supreme Court's own power over state court decisionmaking. This Note concludes that the damaging consequences of independent review ultimately outweigh any benefits that may accrue to property owners; it urges the Court to return to a deferential standard of review and leave state courts free to develop distinctive bodies of property law responsive to their states' local needs and histories.

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INTRODUCTION

State courts have not fared well at the Supreme Court in the last decade. While the Court has been unusually sensitive to issues of state sovereignty generally—fashioning a robust doctrine of state sovereign immunity in a succession of decisions[1] underscoring the "autonomy, the decisionmaking ability," and the dignity of states[2]—the Court has simultaneously tightened its scrutiny of state court decisionmaking. Although it has been "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States,"[3] the Court has demonstrated an increasing willingness to independently review state court determinations of state law antecedent to federal claims.

Bush v. Gore marked the beginning of the trend in this direction.[4] Chief Justice Rehnquist's concurrence in that opinion brought a relatively underanalyzed federal courts issue into the limelight: the proper standard for Supreme Court review of state law antecedent to a federal right.[5] He proposed a sweeping standard of review on this front, urging the Court to independently review antecedent state law where nationally important interests—such as

1. Under Section 5 of the Fourteenth Amendment, the Court has required Congress to show a "pattern of unconstitutional discrimination" before Congress may abrogate state sovereign immunity and open states up to discrimination suits in federal court. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 370 (2001) (finding that "half a dozen examples" of irrational discrimination against the disabled "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000) (holding that Congress had failed to demonstrate the pattern of age-based discrimination necessary to justify abrogation of state sovereign immunity under the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507, 520, 530, 531 (1997) (establishing the "congruence and proportionality" test for Section 5 legislation and invalidating the Religious Freedom Restoration Act under this test after finding that Congress had uncovered only "anecdotal evidence" and had failed to reveal a "widespread pattern of religious discrimination"). The Supreme Court has also held that Congress may not subject an unconsenting state to private suit for damages in state courts absent "evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action." Alden v. Maine, 527 U.S. 706, 758 (1998).

2. *Alden*, 527 U.S. at 750.

3. *Id.* at 755.

4. 531 U.S. 98 (2000) (per curiam).

5. *Id.* at 114 (Rehnquist, C.J., concurring).

presidential elections—are at stake.[6] His opinion also helped lay the groundwork for independent review in other areas where federal rights depend upon state court adjudication of state law issues.[7]

The Court's most recent plurality decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection*[8] takes up where Chief Justice Rehnquist left off and adopts a standard of independent review for state property law decisions antecedent to federal takings claims.[9] Property rights groups and legal scholars have been encouraging the Court to make this shift for some time now under a theory of "judicial takings."[10] Under a judicial takings doctrine, when a state court alters state property law in some appreciably erroneous way, it commits a "judicial" taking of property in violation of the Takings Clause of the Federal Constitution.

While the concept of a judicial taking may be relatively new at the Supreme Court,[11] the question underlying judicial takings—one brushed over by the

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6. Chief Justice Rehnquist's opinion gave an account of intra-state separation-of-powers concerns in presidential elections and articulated a role for the Supreme Court in addressing these concerns. *See id.* at 112.

7. *Id.* at 114-15 & n.1.

8. 130 S. Ct. 2592 (2010).

9. The plurality's opinion draws heavily from *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a case also cited by Chief Justice Rehnquist in *Bush*, 531 U.S. at 115 n.1.

10. Scholarly and public interest in judicial takings was sparked by Professor Barton Thompson's foundational article on the topic. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). In the decades since Professor Thompson published his article, at least fifteen parties have sought Supreme Court review of alleged judicial takings, and scholars have contributed as many additional perspectives on judicial takings. *See, e.g.*, Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1699355; David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); J. Nicholas Bunch, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747 (2005); John D. Echeverria, Stop the Beach Renourishment: *Why the Judiciary Is Different* (Vt. Law Sch. Legal Studies Research Paper No. 10-45), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652351; Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379.

11. Prior to its extraordinary ascendance in *Stop the Beach Renourishment*, the concept of judicial takings appeared in exactly one Supreme Court opinion, a short concurrence written by Justice Stewart in 1967. Hughes v. Washington, 389 U.S. 290, 294 (1967) (Stewart, J., concurring). Justice Scalia also discussed the doctrine in his dissent from denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1993) (Scalia, J., dissenting from denial of certiorari). Professor Thompson suggested that, at the time of his writing, state courts were

plurality in *Stop the Beach Renourishment*[12]—is not new. Almost from its inception, the Court has encountered state law antecedent to federal claims, and for as long, it has endeavored to structure its review of these claims around a paramount concern for state court autonomy.

Historically, the Court has applied a highly deferential predicate standard of review known as the fair support rule to antecedent state law grounds. This rule precludes the Court from disallowing state law grounds absent evidence that a state court has attempted to evade federal law.[13] The full extent of the Court's deference under this approach is clear from the relatively few instances of evasion it has found in over a century of fair support review.[14] In its

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engaging in an unprecedented attack on private property rights: "Faced by growing environmental, conservationist, and recreational demands . . . state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." Thompson, *supra* note 10, at 1451. The petitioners in *Stop the Beach Renourishment* reiterated this concern, quoting Thompson's words but offering no new evidence in support of their continued force. *See* Brief for Petitioner at 19-20, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

12. *See* 130 S. Ct. at 2608 (plurality opinion).

13. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540-44 (1930); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 22-23 (1920); Union Pac. R.R. v. Pub. Serv. Comm'n, 248 U.S. 67, 69-70 (1918); Johnson v. Risk, 137 U.S. 300, 307 (1890). The genesis of the evasion standard is generally considered to be *Chapman v. Goodnow's Administrator*, 123 U.S. 540, 548 (1887) (dictum) ("[A] right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action."). One reason for the delayed emergence of the doctrine is an indistinction between state and federal law in early Supreme Court decisions. *See* Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 954-55 n.43 (1965). The Court might overturn a state court judgment without specifying whether it was rejecting the state court's interpretation of state law or relying on some principle of the general common law. Justice Story's famous opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), exhibits such ambiguity. Nevertheless, the Court did exhibit willingness early on to reject state court judgments where it perceived only thinly veiled attempts to defeat its jurisdiction. In *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), the litigation that set the stage for *Martin*, the Court explicitly rejected what it implied was the Virginia court's self-interested interpretation of state forfeiture laws directed toward defeating a federal treaty. *See* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 785-817 (1953).

14. Almost every finding of evasion falls within one of two periods of historic tension between state and federal courts. *See infra* Section.II.A. In the first period, the Court responded to state court rebellion against the burgeoning powers of Congress under the Interstate Commerce Clause; in the second, it confronted the recalcitrance of Southern state courts

deference, the Court has granted state courts wide latitude to create and shape distinctive bodies of state law; this, in turn, has encouraged variation and experimentation among the states, and has cultivated a relationship of respect and cooperation between state and federal courts.

Despite this historical record, the plurality opinion in *Stop the Beach Renourishment* omits the fair support rule's predicate standard of deference and proceeds directly to a federal takings inquiry.[15] This Note will consider the plurality's rejection of the fair support rule – its rejection, indeed, of any standard of deference for antecedent state law – and argue that the damaging consequences of this approach outweigh any perceived benefits.

Part I provides an overview of the fair support rule and its historic role in Supreme Court review of antecedent state law. It demonstrates that, contrary to prevailing notions, in practice, the Court uses the fair support rule to screen state court decisions resting on state law grounds ("state law judgments") for evasion of federal law. Only where it suspects state courts of evading federal law will the Court disallow state law grounds and proceed to adjudicate any secondary federal questions. This high threshold helps to preserve the dignity and autonomy of state courts, but backs the Supreme Court into an uncomfortable corner from which it is forced to substantiate actual or suspected evasion. This may require attention to state law questions not clearly addressed below or engage the Court in ad hoc factfinding and speculation about unspoken factors motivating state court decisionmaking.

Part II presents evidence that the Court's historical response to these difficulties has been to rely on the social-political context in which cases arise. In social-political contexts ripe for evasion – where the level of tension between state and federal courts has provoked near systematic state court evasion of federal law – the Court has made affirmative evasion findings. Short of this systematic evasion, the Court has been generally unwilling to accuse state courts of evading federal law. Part II argues that this highly deferential

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during the civil rights movement. For academic commentary on the fair support rule during the height of the civil rights movement, see Hill, *supra* note 13; Comment, *Alabama Supreme Court Affirms Decree Ousting NAACP from State Without Reaching Merits*, 112 U. PA. L. REV. 148 (1963); Note, *Obstacles to Federal Jurisdiction: New Barriers to Non-Segregated Public Education in Old Forms*, 104 U. PA. L. REV. 974 (1956); Comment, *Supreme Court Treatment of State Procedural Grounds Relied on in State Courts To Preclude Decision of Federal Questions*, 61 COLUM. L. REV. 255 (1961); and Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).

15. *See* 130 S. Ct. at 2608.

standard places an important check on the Court's scrutiny of state courts and state law.

Although the fair support rule's evasion inquiry has served the Supreme Court well in this capacity for over a century, the plurality's opinion in *Stop the Beach Renourishment* calls into question its continued place in the Court's canon. Part III argues that the plurality should have applied the fair support rule or some other predicate standard of deference to antecedent state law before proceeding to a federal takings inquiry, and suggests that had it done so, it would have found no reason to doubt the state court or its decision.

Part IV acknowledges that there may be some cases in which the fair support rule's evasion inquiry nonetheless provides insufficient protection for property rights. It suggests an additional check in the form of procedural due process for particularly egregious state property law decisions that may slip through the Court's evasion review. Procedural due process provides a clear, practicable alternative for policing truly erratic state property law decisions without exercising independent review over state property law more generally.

Together, the fair support rule and procedural due process provide sufficient protection for property rights. The approach adopted by the plurality in *Stop the Beach Renourishment* defies a century of deference and poses a serious threat to the development of state property law. The Court should reaffirm its respect for state courts and its commitment to the fair support rule's deferential standard of review of antecedent state law.

I. SUPREME COURT REVIEW OF STATE LAW JUDGMENTS

Historically, the Supreme Court has been a reluctant arbiter of state law questions.[16] The practical difficulties of judging an unfamiliar legal system contribute to a policy of self-restraint here. For example, the Court has held that the Due Process Clause does not guarantee—at least not through recourse to the federal judiciary—error-free state court decisionmaking.[17] The federal

16. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590 (1874).

17. Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that 'a mere error of state law' is not a denial of due process." (quoting Gryger v. Burke, 334 U.S. 728, 731 (1948))). The Due Process Clause "does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable [the Court] to revise the decisions of the state courts upon questions of state law." Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 272-73 (1927) (quoting Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 166 (1917)); *see also Engle*, 456 U.S. at 121 n.21 ("If the contrary were

courts are not meant to serve as merely a last stop for the adjudication of state law questions.[18] In a similar vein, state court constructions of state law sources are typically authoritative in federal courts.

Very early on, the Court devised a rule for avoiding review of state law judgments entirely whenever they rested on competent state law grounds.[19] This rule evolved into the Court's modern independent-and-adequate-state-grounds doctrine. Under the Court's current approach, where a state court decision relies on or is sufficiently intertwined with federal law, the Court takes jurisdiction of the federal issue. *Michigan v. Long*[20] provides the primary sorting mechanism. Where a state court decision appears to be based primarily on or interwoven with federal law, absent a statement to the contrary the Court will presume that "the state court decided the case the way it did because it believed that federal law required it to do so."[21] Where, on the other hand, a state court decision rests on independent and adequate grounds—in short, where a different decision on the federal issue would not change the outcome—the Court will forgo further review.[22]

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true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" (quoting Gryger, 334 U.S. at 731)); Beck v. Washington, 369 U.S. 541, 555 (1962).

18. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 166 (1961); Hebert v. Louisiana, 272 U.S. 312 (1926). There are some extraordinary exceptions to this rule. In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), a majority of the Court, over the strong objections of several dissenters, interpreted the West Virginia Constitution differently than West Virginia's Supreme Court of Appeals had. The state court had given its constitution a construction that prohibited West Virginia from participating in an interstate compact to which the state had already bound itself and that Congress had already approved in legislation. *See id.* at 24-26.

19. *Murdock*, 87 U.S. at 635 (articulating a role of reversal for erroneously decided federal questions whenever they are outcome determinative in state cases but otherwise cautioning restraint).

20. 463 U.S. 1032 (1983).

21. *Id.* at 1041. The independent-and-adequate-state-grounds doctrine has evolved into a plain-statement rule. In *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam), the Court encountered a state supreme court opinion that cited both state and federal cases but did not clearly delineate which among these supported the judgment. The Court declined to find the judgment independent of federal law, noting that the opinion did not contain "a 'plain statement' sufficient to tell us 'the federal cases [were] being used only for the purpose of guidance and d[id] not themselves compel the result.'" *Id.* at 941 (alterations in original) (quoting *Michigan v. Long*, 463 U.S. at 1041).

22. *Michigan v. Long*, 463 U.S. at 1038-39.

The independent-and-adequate-state-grounds doctrine is a jurisdictional bar to Supreme Court review of state court determinations of state law sufficiently independent of federal law and adequate to support the state court judgment.[23] The Court has explained that resolution of any federal question effectively ancillary to the state court's judgment "could not affect the judgment and would therefore be advisory."[24] Thus, even where a state court has decided a case on both state and federal grounds, where the judgment can rest on the state grounds alone, the Court will not take jurisdiction of the case.

Yet with the knowledge that the Supreme Court may review and overturn decisions sufficiently entangled with federal law, state courts may artificially eschew federal claims or invent new state law grounds to maintain their judgments.[25] On federal appeal, these may appear as cases in which federal rights were claimed but the state court included no analysis of federal law, or cases in which the state court ostensibly rejected federal grounds as decisive. In either scenario, upon closer analysis, the Court may find the federal ground controlling and the judgment thus not truly independent of federal law. Similarly, in order to avoid controlling federal precedent, a state court may manipulate antecedent state law to frustrate the federal rule. This tactic may be procedural in nature or may involve disingenuous interpretations of state substantive law. The independent-and-adequate-state-grounds doctrine thus requires some tool for testing both the independence of asserted state grounds[26] as well as their competence to support the judgment. The following

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23. *Id.* at 1040-41 ("The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on 'the limitations of our own jurisdiction.'" (quoting Herb v. Pitcairn, 324 U.S. 117, 125 (1945))).

24. Coleman v. Thompson, 501 U.S. 722, 729 (1991) (instructing federal district courts to review the lawfulness of a federal habeas corpus petitioner's custody using the independent-and-adequate-grounds doctrine); *see Herb*, 324 U.S. at 125-26 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

25. *See* Patricia Fahlbusch & Daniel Gonzalez, Case Comment, Michigan v. Long*: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 188-98 (1987) (surveying state court reactions to *Michigan v. Long*).

26. For some discussion of the various techniques employed by the Court to test the independence of state grounds from federal law, see *Michigan v. Long*, 463 U.S. at 1038-39. *See also* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 388 (1986) ("[If] state law implicates an underlying question of federal law . . . the state law is not an independent and adequate state ground supporting the judgment."); Norris v. Alabama, 294 U.S. 587, 590 (1935) ("[W]henever a conclusion of law of a state court as to a federal right and findings of

Sections consider various approaches employed by the Court to test the adequacy of state law grounds.

A. Inadequate State Grounds

In some instances, a state law judgment may directly violate a controlling federal rule. In the simplest example of this, a state court decision, although exclusively decided on state law grounds, may be contrary to an established rule of federal law.[27] Where, for example, a state court has construed its laws to permit a state tax on federal bond income, the Court has struck down the decision without concern for the usual measure of deference accorded to state court determinations of state law.[28] In another iteration of this principle, a state statute prohibiting fighting words may not be construed by state courts to prohibit constitutionally protected speech activity.[29] The Supreme Court has developed an exhaustive body of substantive federal rules governing the exercise of First Amendment rights which permits of little variation among state practices.[30] In these and similar cases, because the state rule is contrary to a paramount federal rule, the state rule must fail, and no deference to the state court is necessary. This may be true when the state court has confronted the federal question, but it can also be true in cases where federal law was not thought by anyone to bear on the decision.[31]

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fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.").

27. *See* New Orleans & Ne. R.R. v. Harris, 247 U.S. 367 (1918); *see also, e.g.*, Cent. Vt. Ry. Co. v. White, 238 U.S. 507 (1915).

28. *See* Missouri *ex rel.* Mo. Ins. Co. v. Gehner, 281 U.S. 313 (1930).

29. *See* Speiser v. Randall, 357 U.S. 513 (1958); Stromberg v. California, 283 U.S. 359, 368-69 (1931).

30. In addition to articulating a substantive body of law governing who may speak when and where, *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (articulating the federal standard for libel of public officials), the Court has promulgated additional guidelines for state courts regulating the permissible scope of laws affecting speech, *see, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973), the specificity with which such laws must be articulated, *see, e.g.*, Smith v. Goguen, 415 U.S. 566 (1974); Gooding v. Wilson, 405 U.S. 518 (1972), and the government purposes that may animate such laws, *see, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968). State action affecting speech must overcome these hurdles prior to even coming under the Court's scrutiny at a substantive level.

31. This is typically the case when a state court resolves the issues in an unexpected way and the complaining party then raises the federal objection for the first time on a petition for rehearing. *See, e.g., Mo. Ins. Co.*, 281 U.S. at 320; Saunders v. Shaw, 244 U.S. 317 (1917).

In a very different scenario, state law *antecedent* to a federal claim may be resolved by the state court against the federal claim. Antecedent state law includes any determination of state law predicate to the assertion of a secondary federal claim. For example, where a party seeking to assert her First Amendment rights in state court fails to follow proper local procedure, her federal claim may be disallowed by the state court not withstanding its merit. State substantive law may also serve as a barrier to federal claims in areas in which state law definitions provide the underlying content for the vindication of federal rights.[32] State law, for example, governs the creation and interpretation of contracts, while the Contract Clause prohibits the "impairment" of contracts.[33] State law also creates and defines property, while the Constitution prohibits the taking of property without just compensation or due process of law.[34] In the classic antecedent contract law dispute, a party may challenge state legislation as an unconstitutional impairment of an existing contract; but on review, the state court may find that the party never had a contract under state law in the first place.[35]

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32. The Federal Constitution contains certain protections for entitlements, the existence and scope of which are nevertheless governed by state law. The Contracts Clause, which prohibits the States from passing any law "impairing the Obligation of Contracts," U.S. CONST. art. I, § 10; the Due Process Clauses, which forbid the government from depriving persons of "property" without "due process of law," *id.* amends. V, XIV; and the Takings Clause, which provides that "private property [shall not] be taken for public use without just compensation," *id.* amend. V, all look to "independent source[s] such as state law" to determine whether entitlements have been created by state law. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). Federal law then controls how these entitlements should be characterized for purposes of federal constitutional analysis. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000). Professor Merrill notes that the Court has, in several cases, endorsed a limited "federal definition of constitutional property." *Id.* at 911 (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)); *see also* Hodel v. Irving, 481 U.S. 704, 716-18 (1987) (finding that the total eradication of both descent and devise of property may constitute a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-28 (1982) (holding that permanent physical invasion constitutes a taking); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that interest accruing on an interpleader fund is properly the property of the depositor). Professor Merrill advocates a federal "patterning definition" of property to integrate the state and federal definitional elements of property. Merrill, *supra* at 893.

33. U.S. CONST. art. I, § 10.

34. *Id.* amends. V, XIV.

35. The Court's various opinions in *Bush v. Gore*, 531 U.S. 98 (2000), provide a breakdown of the different ways in which the Court may review a state court judgment maintained exclusively on state law grounds. Each opinion characterized the Florida Supreme Court's

Both the Contract Clause and the Takings Clause—as construed by the Supreme Court—are dependent for their effect on antecedent state substantive law. Their limited scopes forestall the creation of a general federal law of contract or property. The Due Process Clause, similarly, has not been construed to replace state procedural rules with a generally applicable federal set. The Supreme Court thus has accorded a wide degree of latitude to state courts to establish and shape antecedent state law, even where that law affects federal rights. Federalism values and a long tradition of comity between state and federal courts guide the Court's doctrine in this sensitive area[36]—in addition to other more practical considerations such as the Court's lack of exposure to and familiarity with state law.[37]

Nonetheless, in order to enforce the basic guarantees of these constitutional provisions, the Supreme Court must have some device for testing the adequacy of antecedent state law grounds. Professor Wechsler characterized this task as the "exercise [of] an ancillary jurisdiction to consider the state question," wherever "the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law."[38] The Court plainly has this

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decision differently. The Court found that the state supreme court's decision directly violated federal law—in this case, the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 103 (per curiam). Chief Justice Rehnquist's concurring opinion additionally advocated for an independent standard of Supreme Court review of state court determinations of state law in certain critical areas, such as the election context, where intrastate separation-of-powers concerns are at a high. *Id.* at 112-15 (Rehnquist, C.J., concurring). Chief Justice Rehnquist cited cases from the Court's historical Fair Support jurisprudence in his opinion but presented a very different account of Supreme Court jurisdiction over state court judgments on state law than does the rule. *See id.* (citing Mullaney v. Wilbur, 421 U.S. 684 (1975); Bouie v. City of Columbia, 378 U.S. 347 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)). Finally, the dissenting opinions, particularly Justice Ginsburg's, argued that the Court should have employed the deferential approach to state law grounds that it typically employs in Fair Support cases. *See id.* at 139-40 (Ginsburg, J., dissenting).

36. The Court has demonstrated its commitment to deference to state court determinations of state law in a host of other contexts. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. 590 (1874).

37. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties.").

38. Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977).

ancillary jurisdiction.[39] It has held in other contexts, for example, that federal courts may exercise jurisdiction to determine the proper scope of their jurisdiction, or may make preliminary substantive inquiries in the service of testing jurisdiction. Where this testing probes the adequacy of antecedent state law grounds, the important question is whether the Court should proceed with deference to state court determinations of state law. More directly, what standard of review should the Court use to evaluate the adequacy of antecedent state law grounds?

B. The Fair Support Rule

From a practical standpoint, regardless of the standard employed, the Court has only a handful of techniques it can use to gauge the adequacy of state law grounds, each of which presents its own set of difficulties.[40] First, the Court can conduct an independent survey of prior state judicial opinions in an attempt to discern whether a state court has been faithful to its own precedents.[41] This inquiry can be made independently or with substantial deference to state court determinations of state law. Regardless of the Court's

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39. *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 291 (1947) (reiterating that federal courts have jurisdiction to determine the scope of their own jurisdiction).

40. The Court's options for reviewing state court judgments issued without opinions are, of course, even more limited. Consider the Court's discussion of the problem in *Ellis v. Dixon*, 349 U.S. 458 (1955). In *Ellis*, the New York Court of Appeals had denied the petitioner's motion for leave to appeal without comment. *Id.* at 459. The petitioner had raised a First Amendment claim in state court and raised it again in his petition for certiorari. *Id.* "In these circumstances," the Supreme Court wrote, "we must ascertain whether that court's decision 'might' have rested on a nonfederal ground, for if it did we must decline to take jurisdiction." *Id.* After a survey of New York appellate procedure, and a good deal of speculation, the Court decided that "the most reasonable inference" from the Court of Appeals' silence was that "the petitioner had followed the wrong appellate route," *id.* at 462, and dismissed the writ as improvidently granted, *id.* at 464. The Court admitted, however, that even were it to assume jurisdiction over the case, it could not decide the constitutional issues presented "on this vague and empty record." *Id.*

41. This type of survey is conducted more easily in the procedural context than in the substantive lawmaking context. *Compare* James v. Kentucky, 466 U.S. 341, 348-49 (1984) (surveying prior cases and concluding that "Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"), *with* Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975) (declining to conduct the same analysis for a substantive rule of law). Where violation of some state procedural rule constitutes a potential jurisdictional bar, the Court can survey previous state law contexts in which the rule was employed.

standard of review, however, this "internal consistency" test places a heavy emphasis on adherence to the status quo. It also requires significant outside research by the Supreme Court into antecedent state law and for this reason has been generally disavowed by the Court. In *Michigan v. Long*, for example, the Court declared that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties."[42]

Alternatively, the Court can compare a state rule with a federal or general common law norm.[43] By relying on such norms, the Court is freed somewhat from the difficulties of scrutinizing state law. This method, however, replaces state law with federal standards at significant cost to states seeking to establish and enforce their own legal norms.

Finally, the Court can search for evidence of a purpose to evade federal rights. This latter inquiry, somewhat surprisingly, turns out to be the lesser of three evils. It redresses the most egregious state court manipulations of antecedent state law, while otherwise preserving state court autonomy to create and develop state law.

This highly deferential approach to judging the adequacy of antecedent state law grounds is known as the fair support rule, and the Court has relied on its method of inquiry for the last 120 years. Under the rule, in cases in which there is no direct violation of a federal rule but in which the adequacy of state law grounds predicate to some federal claim is nonetheless in doubt, the Court will examine the record for evidence of a purpose to evade federal law. Where there is no evidence of evasion, the inquiry is at an end. Where, however, the record reveals a purpose to evade, the Court may reject the state law grounds and decide the secondary federal question. The Court has remained remarkably faithful to this approach, applying it in a long line of cases covering all manner of subjects.[44]

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42. 463 U.S. at 1039.

43. Since *Erie*, the Court, of course, has been more reluctant to rely on substantive federal or general common law rules.

44. *See* Lee v. Kemna, 534 U.S. 362, 376 (2002); Howlett v. Rose, 496 U.S. 356, 365-66 (1990); *James*, 466 U.S. at 348-49; Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); *Mullaney*, 421 U.S. at 690-91 & n.11; Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969); Henry v. Mississippi, 379 U.S. 443, 447 (1965); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 n.4, 265 (1964); Wright v. Georgia, 373 U.S. 284, 289 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); Demorest v. City Bank Farmers

There is nonetheless a great deal of confusion about the rule. This is due in part to the opacity with which it has been deployed. Although evasion review is a highly deferential inquiry, the Court has not always been forthcoming about its operation. Because evasion review implicates the personal motives of state court judges, it has the potential to place significant strain on federal-state court relations. Rarely, even upon finding outright evasion, has the Court called the wrong by its proper name. Instead, the Court resorts to such terms as "fair support" and "fair or substantial basis." Conventional wisdom has it that in cases where state courts reject federal claims on substantive or procedural state law grounds—or where they merely decline to address properly raised federal rights[45]—the Court may look beyond the asserted state law rationale to inquire whether the state court decision rests upon a "fair or substantial basis."[46] Where a decision has "fair support" in the state's law, the Court will not inquire further into the state court's rejection of a federal claim.

"Fair support" is generally considered to stand for a variety of standards of review, including evasion, arbitrariness, and egregious error.[47] But careful excavation of the Court's methodology in fair support cases reveals that the Court has deployed the fair support rule exclusively to combat state court evasion of federal rights. This conception goes against prevailing notions of the rule. In what little scholarly treatment it has received,[48] the rule often has been

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Trust Co., 321 U.S. 36, 42-43 (1944); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 654 (1942); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540-44 (1930); Fox River Paper Co. v. R.R. Comm'n, 274 U.S. 651, 656-57 (1927); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 22-23 (1920); Union Pac. R.R. v. Pub. Serv. Comm'n, 248 U.S. 67, 69-70 (1918); Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 163-65 (1917); Vandalia R.R. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907); Terre Haute & Indianapolis R.R. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904); Johnson v. Risk, 137 U.S. 300, 307 (1890); *see also* Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887) (noting, in dictum, that a federal right may be denied by evasion of federal law).

45. *Cf.* Leathe v. Thomas, 207 U.S. 93, 99 (1907) (dictum) ("[T]here might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved whether mentioned or not.").

46. *Broad River Power Co.*, 281 U.S. at 540.

47. *See* Hill, *supra* note 13, at 953-64.

48. A handful of studies consider the rule in the context of the Court's jurisprudence for the adequacy of state law grounds more generally. The focus of these pieces is mostly on the jurisdictional bases for the rule. In 1965, Harvard Law School professor Alfred Hill wrote a foundational article on the rule describing it as one of a collection of standards employed by the Court to review the "adequacy" of state law judgments. Professor Hill wrote that state law grounds may be inadequate where they themselves transgress federal law, *id.* at 944-48;

conceptualized as a "hodge podge" of different standards and principles without any unifying theme.[49] Indeed, most of the scholars who have written about the rule have recommended its reform into a uniform standard.

In her 2002 article, for example, Professor Laura Fitzgerald proposes a "proven mistrust rule," under which the Court would reverse state law judgments "only where it can 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."[50] Professor Fitzgerald adheres to the view—widely held by scholars—that the rule is essentially a collection of standards and ad hoc rules that the Court applies at its own convenience.[51] The following Part contests this conception of the rule. It presents evidence, contrary to the prevailing notion, that regardless of what the Court purports to be doing under the rule, it consistently screens state law judgments based on whether or not it suspects the state court evaded federal law.

The rule's standard is thus extraordinarily deferential to state courts in theory and in practice. The following Part will show that this deference has evolved both to protect state court autonomy in a federalist legal system and as a response to the significant difficulties inherent in Supreme Court review of state law grounds. These important functions recommend the Court's continued adherence to the rule and draw into question the Court's recent

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where they impose burdensome state procedural rules, *id.* at 951-53; where they constitute a "willful evasion" of federal law; *id.* at 957-58; are arbitrary, *id.*; "egregiously wrong," *id.* at 963; or violate the Due Process Clause, *id.* at 959-62. *Cf.* Note, *The Untenable Nonfederal Ground in the Supreme Court*, *supra* note 14.

49. *See, e.g.*, Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 88-89 (2002).

50. *Id.* at 89. Although Fitzgerald's proposed rule would force the Court to be open and notorious about what it was doing in fair support cases, it would require extra-record antics beyond the capacity of even the most resourceful Justice. Application of the fair support rule already strains the institutional resources of the Court: claims of state court evasion are often impossible to substantiate on the record provided. The Court may resort to original factfinding—often little more than speculation about unspoken factors motivating state court decisionmaking—to complete the rule's inquiry. Requiring the Court to point further to specific evasive acts might strain this process to the breaking point.

51. *Id.* at 88-89; *see* Hill, *supra* note 13, at 953-64; Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167 (2007); Monaghan, *supra* note 10; Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural rules*, 103 COLUM. L. REV. 243 (2003).

rejection of the rule in *Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection*.[52]

II. THE FAIR SUPPORT RULE'S EVASION INQUIRY

The fair support rule has historically served as a rule of self-governance for the Supreme Court. The rationales for its operation run along both constitutional and prudential lines. On the one hand, the Court's review of state courts in this context poses a unique set of problems for federalism; on the other hand, federal review of state law grounds presents numerous practical problems. By setting a high threshold of *in*adequacy that state judicial process must meet to invoke federal scrutiny, the fair support rule addresses these concerns. Only where it suspects state courts of evading federal law or deliberately impeding federal claims will the Court disallow state law grounds and decide the secondary federal question.[53] Absent this compelling cause, the Court has been unwilling to intrude upon state court autonomy.

The fair support rule's evasion inquiry does not screen for unacknowledged or implicit federal law rulings; it searches for some degree of misconduct by the state court. Conduct that runs afoul of the rule has been characterized at various points by the Court as "an obvious subterfuge to evade consideration of a federal issue,"[54] "unforeseeable and unsupported,"[55] "an attempt to forestall our review of the constitutional question,"[56] "a mere device to prevent the review of a decision upon the federal question,"[57] and simply, as "evasion."[58] Regardless of the language used, cases applying the fair support rule

52. 130 S. Ct. 2592 (2010).

53. *See* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 541 (1930); *cf. Stop the Beach Renourishment*, 130 S. Ct. at 2608 ("To assure that there is no 'evasion' of our authority to review federal questions, we insist that the nonfederal ground of decision have 'fair support.'" (quoting *Broad River Power Co.*, 281 U.S. at 540)).

54. Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975) (citing *Radio Station WOW*, 326 U.S. at 129).

55. Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

56. Fox River Paper Co. v. R.R. Comm'n, 274 U.S. 651, 657 (1927).

57. McCoy v. Shaw, 277 U.S. 302, 303 (1928).

58. *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313, 329 (1958); *Broad River Power Co.*, 281 U.S. at 540; *Fox River Paper Co.*, 274 U.S. at 655; Davis v. Wechsler, 263 U.S. 22, 24 (1923); Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Leathe v. Thomas, 207 U.S. 93, 99 (1907) (dictum); Rogers v. Alabama, 192 U.S. 226, 231 (1904).

consistently employ a threshold of evasion. Multiple opinions have declined to scrutinize state law grounds where there did not appear to be any evasion.[59]

Thus, where it suspects a state court of evading federal rights, the Court may take jurisdiction of the federal issue. The Court has never outlined any particular factors that might raise its suspicion: a wide net would threaten to swallow the limiting value of the rule. Most frequently, where it does not suspect evasion, the Court will simply pass over the inquiry without mention and bind itself to state court rulings on issues of state law.[60]

Despite the high threshold set by the fair support rule's evasion inquiry, detecting evasion can be an extraordinarily difficult task. Although the record may point to a certain amount of judicial maneuvering, typically the Court must look outside the record for evidence of evasion. A claim of state court evasion is generally raised on a motion for rehearing after the state court has issued judgment. These are often denied without comment.[61] Thus, in order to substantiate suspected evasion, whether the Court seeks proof of specific intent or merely attempts to infer intent from a grossly unfair or unsubstantiated alteration of state law, it must search outside the scope of the proceedings below and draw inferences about factors not apparent on the face of the record before it.

A. The Court's Historical Approach

Patterns in the historical application of the fair support rule indicate that the Court has responded to these difficulties by consistently relying on a proxy for evasion. Instead of looking to the record for subtle hints that the state court may have acted on a purpose to evade, the Court has used the surrounding

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59. *See Radio Station WOW*, 326 U.S. at 129 ("But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue."); Vandalia R.R. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907) (dictum) ("[T]here is nothing to justify a suspicion that there was any intent to avoid the Federal questions.").

60. *See, e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (finding the application by the Florida Supreme Court of its local laws controlling); Sutter Butte Canal Co. v. R.R. Comm'n, 279 U.S. 125 (1929) (finding that the decision of a state supreme court as to the interpretation of an order of a state railroad commission was conclusive).

61. A claimant alleging misconduct by a state trial court could conceivably raise an evasion claim before a state appellate court; typically, however, evasion claims are raised (and summarily dismissed) on a petition for rehearing in the state high court. *See, e.g.*, Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

social-political context of the case to flag possible evasion. Historically, the single best predictor of a positive finding of evasion is the social-political context in which the case arose: almost every evasion case falls within one of two periods of historic tension between state and federal courts. In the first period, the Court responded to outright defiance by state courts to burgeoning federal power under the Interstate Commerce Clause; in the second, the Court confronted the recalcitrance of Southern state courts during the civil rights movement. Together, these two periods can claim almost every finding of evasion in the rule's history.[62] This pattern indicates that, in general, the Court wants to be sure there is evasion. Only the most open and notorious hostility to federal law will prompt it to set aside the normal deference recitation. The following Subsections conduct a systematic study of the Courts' application of the fair support rule and document this pattern.

1. The Commerce Cases

The early twentieth century witnessed a sharp rise in the reach of the federal commerce power.[63] The Court met with the heavy fallout from this new dynamic in the form of varied state court antics designed to protect state government functions and local businesses from the power of the Interstate Commerce Commission. State courts became especially protective of local interests in tax and tariff disputes.

In this context, the Court confronted a stream of disingenuous characterizations of fact under state law. It responded by formalizing a concept that had been lurking in past decisions, but never employed: state court evasion of federal law. In an 1887 case, the Court had suggested in dictum that, "a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by

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62. The Court has also made findings of evasion under the Contracts Clause of the Federal Constitution; these cases are analyzed *infra* Subsection II.A.3.

63. *See* Hepburn Act of 1906 § 4, Pub. L. No. 59-337, 34 Stat. 584, 589-90 (codified as amended in scattered sections of 49 U.S.C.) (amending the Interstate Commerce Act of 1887, ch. 104, § 15, 24 Stat. 379, 384) (removing the cumbersome requirement that the Interstate Commerce Commission apply to a federal court for enforcement of any order and providing for orders of the Commission to be self-executing thereafter). For a historical overview of the era and the vigorous conflict it produced between states and the federal government, see generally 2 I.L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1931).

positive action."[64] A handful of cases touched on this same idea in the ensuing decade,[65] and the Court began to apply the concept in earnest in the early twentieth century.

Many of the cases decided during this period involved unlawful state tax levies on interstate commerce, for which states had formulated creative "voluntary" payment arguments. In one egregious case, the Union Pacific Railroad Company, seeking to secure a bond issue with its 3500-mile-long contiguous interstate railroad, applied state by state for permission to include each state's segment of track.[66] The Missouri Public Service Commission charged the company almost $11,000 for permission to mortgage the Missouri track, a stretch of approximately one-half mile.[67] The company paid the fee under protest, citing federal prohibitions against unlawful interference with interstate commerce.[68] The Missouri Supreme Court avoided the interstate commerce problem by finding that the company's payment had been voluntary.[69]

On an independent examination of the facts, the U.S. Supreme Court reversed, finding that the railroad's remittance of the state fee had not been made "voluntarily" but under duress.[70] Similar inquiries were made by the Court in *North Pacific Railway Co. v. North Dakota*,[71] and *Gaar, Scott & Co. v. Shannon*.[72] These early cases scrutinized the facts relied upon by state courts with particular care.

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64. Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887).

65. *See, e.g.*, Johnson v. Risk, 137 U.S. 300, 307 (1890) ("Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable.").

66. Union Pac. R.R. v. Pub. Serv. Comm'n, 248 U.S. 67, 68 (1918).

67. *Id.* at 68-69.

68. *Id.* at 68.

69. *Id.* at 69.

70. *Id.* at 70.

71. 236 U.S. 585, 593 (1915) (providing for review "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it").

72. 223 U.S. 468, 470 (1912) (finding, after independent review, that the record did "afford[] a basis" for the state court's finding that payment by foreign corporation of state franchise tax was voluntary).

The Court extended this approach to cases denying federal rights protected by the Indian Commerce Clause with the same level of scrutiny. In *Ward v. Board of County Commissioners*,[73] for example, an Oklahoma county threatened to confiscate lands granted by Congress to an Indian tribe unless the tribe paid an illegal local tax.[74] The Oklahoma Supreme Court held that the tribe had paid the taxes "voluntarily" and had thus forfeited any refund under state law.[75] At the U.S. Supreme Court, the county argued that the state court had rested its "judgment entirely on independent non-federal grounds which were broad enough to sustain the judgment."[76] The Court rejected the state court's disingenuous factual finding, and held that it could inquire not only whether a federal right was denied by a state court "in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."[77]

In similar disputes, the Court rejected obstinate reliance by state courts on local rules of procedure to defeat various federal regulations designed to promote interstate commerce. For example, in *American Railway Express Co. v. Levee*,[78] the Louisiana courts had imposed liability on American Railway Express under a special rule of state procedure, overriding a contract expressly limiting the company's liability for lost goods.[79] Contracts limiting the liability of interstate carriers were routinely approved by the Interstate Commerce Commission and proved to be a source of great tension between the states—which sought to impose on carriers state liability rules for lost, stolen, or damaged goods—and Congress, which was intent on promoting the growth of interstate commerce. The Court expressly upheld Congress's power in this context and continued to be wary of attempts by state courts to circumvent

73. 253 U.S. 17 (1920).

74. *Ward* is sometimes considered to be the first formulation of the modern fair support rule; although, as illustrated by the cases discussed above, the concept of state court "evasion" arose much earlier. *Ward*'s "fair or substantial support" language drew conceptually from these earlier cases. *See* 253 U.S. at 22 (citing *Union Pac. R.R.*, 248 U.S. 67; Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Vandalia R.R. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907); Leathe v. Thomas, 207 U.S. 93, 99 (1907)).

75. 253 U.S. at 21.

76. *Id.*

77. *Id.* at 22.

78. 263 U.S. 19 (1923).

79. *Id.* at 20.

federal power.[80] Justice Holmes, writing for the Court in *American Railway Express Co.*, emphasized that "[t]he law of the United States cannot be evaded by the forms of local practice."[81]

Additional opinions confirmed that the Court was particularly concerned about burdens on interstate commerce.[82] In *Davis v. Wechsler*,[83] the Court rejected the state court holding that the defendant railroad had failed to comply with state procedural rules. The Court found the applicable rules ambiguous, and the defendant's efforts to plead their defense in reasonable conformance with past state practice. In one of the most often repeated passages in the fair support context, Justice Holmes wrote for the Court: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."[84] In *Michigan Central Railroad v. Mix*,[85] the Court held that the state court had deprived the defendant railroad of any meaningful opportunity to preserve its federal claim. The Court reiterated that "[n]o local rule of practice can prevent the carrier from laying the appropriate foundation for the enforcement of its constitutional right by making a seasonable motion."[86]

The highly charged social-political context in which these cases arose sparked a high number of evasion findings. Yet as the twentieth century wore on and states grew more accustomed to the new reach of the Federal Constitution, the Court's evasion rulings petered out.[87] Only with the onset of

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80. *See, e.g.*, Adams Express Co. v. Croninger, 226 U.S. 491, 500 (1913).

81. 263 U.S. at 21.

82. *See, e.g.*, N.Y. Cent. R.R. v. N.Y. & Pa. Co., 271 U.S. 124, 126 (1926); Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin, 241 U.S. 319, 328 (1916); Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); Vandalia R.R. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907); Wabash R.R. v. Pearce, 192 U.S. 179, 185-86 (1904).

83. 263 U.S. 22 (1923).

84. *Id.* at 24.

85. 278 U.S. 492 (1929).

86. *Id.* at 496.

87. *Cf.* Brown v. W. Ry., 338 U.S. 294 (1949). *Brown* concerned a negligence suit brought by a plaintiff against his employer under the Federal Employers' Liability Act (FELA). The Georgia Court of Appeals had rejected his negligence claims under a local rule that required courts to construe pleadings "most strongly against the pleader." *Id.* at 295. The U.S. Supreme Court reversed, noting that states may not use local rules to impose "unnecessary burdens" on federal rights. *Id.* at 298. Although *Brown* invokes the language of the Fair Support Rule, *id.* at 298-99, its holding might be conceived of more properly as striking

the civil rights movement—and a new wave of state court defiance—would the Court resume its position of wariness.

2. *The Civil Rights Cases*

The Court became particularly wary of ostensibly neutral procedural rules manipulated by state courts to circumvent federal law in the commerce context. This concept of the disingenuous state procedural bar would be taken up again by the Court to enforce civil rights. In a prelude to the civil rights movement, the Court encountered a handful of race-based juror exclusion cases at the turn of the century. The Civil War provided a sufficiently glaring cue that Southern state courts might be reluctant to enforce new federal civil rights. These early cases typically involved creative efforts by state courts to forestall the integration of juror service.[88] In *Carter v. Texas*,[89] for example, the defendant had moved to show that "persons of the African race were excluded, because of their race and color, from the grand jury."[90] The state court refused to hear any evidence from the defendant upon the subject but subsequently held that the defendant had presented no evidence in support of his motion.[91] The Court independently assessed the situation and found the defendant's federal claim not barred.

Carter and several other juror exclusion cases decided around the same time foreshadowed the civil rights war between the Supreme Court and state courts that was to come. At the height of the civil rights movement, the Court handed down reprimands of evasion on a semi-regular basis.[92] The open tension between the Supreme Court and Southern states in this context seemed to

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down a higher burden of proof set by the state for proving negligence under FELA than had been set by Congress. *Brown*'s holding, moreover, was not followed by the Court in subsequent cases. *See* Hill, *supra* note 13, at 971-74.

88. *See, e.g.*, Pierre v. Louisiana, 306 U.S. 354 (1939); Hale v. Kentucky, 303 U.S. 613 (1938); Rogers v. Alabama, 192 U.S. 226 (1904).

89. 177 U.S. 442 (1900).

90. *Id.* at 448-49.

91. *Id.*

92. *See, e.g.*, Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (holding that a defendant's failure to use "transcript paper" for his petition for review of his criminal conviction is an inadequate bar to federal review), *rev'g* 149 So. 2d 923 (Ala. 1962). The Court issued a line of First Amendment cases emphatically affirming the procedural evasion doctrine. *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313, 319 (1958); Terminiello v. Chicago, 337 U.S. 1 (1949).

dampen the Court's usual concern for the dignity and autonomy of state courts.

In a succession of cases, the Court rejected procedural requirements newly concocted by state courts to bar federal civil rights claims. In *NAACP v. Alabama ex rel. Flowers*,[93] the Court rejected the Alabama Supreme Court's ruling that because "at least one of the assignments of error contained in each of the five numbered subdivisions of the 'Argument' section of the brief was without merit," it would "not consider the merit of any of the other assignments."[94] In another case out of the Alabama Supreme Court,[95] the Court rejected what it considered to be a novel procedural requirement designed to thwart federal review after comparing the state court's procedural ruling against rulings in past cases. It stated, "we can discover nothing in the prior state cases which suggests that mandamus is the *exclusive* remedy for reviewing court orders after disobedience of them has led to contempt judgments."[96] Similarly, in *Sullivan v. Little Hunting Park, Inc.*,[97] the Court held that a rarely applied Virginia rule of procedure requiring certain notice processes did not bar its jurisdiction: "[past] decisions do not enable us to say that the Virginia court has so consistently applied its notice requirement as to" divest it of the power to entertain the federal claim presented there.[98]

The Court developed several doctrinal tools to expose state court procedural rulings as evasive during this period. Foremost among these was the tedious technique of comparing the challenged procedural bar to previous contexts in which that same bar had been used—or ignored. This technique could potentially uncover anomalous applications of state procedural rules and could enable the Court to prove to its own satisfaction whether a state court sought to evade federal law.[99] The depth to which the Court had to delve into

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93. 377 U.S. 288 (1964).

94. *Id.* at 293-302.

95. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

96. *Id.* at 457.

97. 396 U.S. 229 (1969).

98. *Id.* at 233-34. The Court held that where a rule may "more properly [be] deemed discretionary than jurisdictional," jurisdiction may not be barred on certiorari. *Id.* at 234.

99. In *James v. Kentucky*, for example, the Court noted: "The question is whether counsel's passing reference to an 'admonition' is a fatal procedural default under Kentucky law adequate to support the result below." 466 U.S. 341, 348 (1984). After a survey of the Kentucky court's procedural practices, the Court held that it was not: "Kentucky's distinction between admonitions and instructions is not the sort of firmly established and

state practices varied widely. In *Barr v. City of Columbia*,[100] for example, the South Carolina Supreme Court had found the defendant's objection to his conviction for breach of the peace "too general to be considered."[101] A quick inquiry into the past procedural practices of the South Carolina Supreme Court produced three cases decided in the three months preceding *Barr* in which the state court had taken the opposite view of such general objections.[102] In contrast, in *NAACP v. Alabama ex rel. Patterson*,[103] after an exhaustive analysis of Alabama cases[104] the Court concluded that it was "unable to reconcile the procedural holding of the Alabama Supreme Court" with past cases.[105]

As the civil rights movement wore on and state court recalcitrance continued, the Court exhibited increasing willingness to go to great lengths to strike down state procedural bars to federal rights claims. In *Henry v. Mississippi*,[106] the Court went so far as to demand that state application of procedural default rules against federal rights serve "legitimate state interest[s]."[107] Thereafter, this holding was quietly dropped,[108] but it sheds light on the Court's concerns: that purposeful evasion of federal law was rampant among state courts seeking to evade civil rights and that its eradication called for extraordinary measures.

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regularly followed state practice that can prevent implementation of federal constitutional rights." *Id.* at 348-49.

100. 378 U.S. 146 (1964).

101. *Id.* at 149.

102. *Id.*

103. 357 U.S. 449 (1958).

104. *See id.* at 456-58.

105. *Id.* at 456.

106. 379 U.S. 443 (1965).

107. *Id.* at 447.

108. In *Douglas v. Alabama*, 380 U.S. 415, 420-23 (1965), decided the same year as *Henry*, the Court employed a similar rationale but did not mention that case. Later cases also failed to cite *Henry*. *See* Parrot v. City of Tallahassee, 381 U.S. 129 (1965); *cf.* James v. Kentucky, 466 U.S. 341, 348-49 (1984) (citing *Henry* but employing a lesser standard). *But see* Michigan v. Tyler, 436 U.S. 499 (1978) (citing *Henry* for the legitimate-state-interest rationale).

After the peak of the civil rights movement, evasion rulings gradually declined, petering out once more to almost nothing.[109] A few cases have cropped up where the Court has deployed the fair support rule's evasion inquiry,[110] but these have been few and far between compared to the flood of rulings issued during the turn of the century's commerce cases and during the civil rights movement.

3. *The Contracts Clause Cases*

The Court has not settled on a consistent standard of review for antecedent state law grounds under the Contracts Clause of the Federal Constitution, and the Court's contracts cases do not fall within the general social-political context pattern characterizing its review of other antecedent state law grounds. The Court does, however, frequently apply the fair support rule to contracts cases.

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109. In 1982, the Court reiterated that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) (quoting Barr v. City of Columbia, 378 U.S. 146, 149 (1964)). It reasoned that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Id.* at 263. The Court has fashioned something like a federal rule for consistency governing state procedural bars to federal claims. *See* Johnson v. Mississippi, 486 U.S. 578, 587 (1988) ("[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" (quoting *Barr*, 378 U.S. at 149)). Although the language is drawn from the civil rights evasion cases, the Court seems to have removed the evasion requirement and cleared the way for some federal baseline against which state procedural bars of federal claims will be measured. *See* Lee v. Kemna, 534 U.S. 362, 376 (2002) ("[E]xorbitant application of a generally sound rule [may] render[] the state ground inadequate to stop consideration of a federal question."); *see also* Cone v. Bell, 129 S. Ct. 1769, 1782 (2009); Ford v. Georgia, 498 U.S. 411 (1991).

110. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 366 (1990) (applying the fair support rule where the Court suspected that a Florida court was "evading federal law and discriminating against federal causes of action"). One theme in these modern cases is the Court's interest in keeping state courts open for the litigation of germane federal claims. *Cf.* Haywood v. Drown, 129 S. Ct. 2108 (2009); Johnson v. Fankell, 520 U.S. 911 (1997); Felder v. Casey, 487 U.S. 131 (1988). In this sense, state court conduct in these cases may also be viewed as running afoul of the Supremacy Clause. *See Howlett*, 496 U.S. at 375. The Court has a separate but related line of cases ensuring state court compliance with the Supremacy Clause. Although a state court may refuse to take jurisdiction over a federal claim because of "a neutral state rule regarding the administration of the courts," the Court has emphasized that a "disagree[ment] with the content of federal law" is not a neutral reason. *Id.* at 372, 379. A state court cannot employ a jurisdictional rule "to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source," *id.* at 371, and neither may it "relieve congestion in its courts by declaring a whole category of federal claims to be frivolous," *id.* at 380.

Depending on the extent to which state law is implicated in and bears on a disputed contract, the Court may be more or less deferential to the state court's construction.[111] Where the Court, for example, has previously interpreted a specific contract, a state court may not place a different construction on that contract.[112] Most often, the Court leans toward a measure of deference to the state law ground. In *Hale v. State Board of Assessment and Review*, for example, the Court held that while "[t]he power is ours" under the Contract Clause to determine, "the effect and meaning of the contract as well as its existence . . . we lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong."[113] In *Phelps v. Board of Education*, the Court similarly reiterated that an antecedent state law ground must prevail unless "palpably erroneous."[114]

However, where the Court suspects evasion of the Contract Clause's prohibition on impairment of contracts, the Court conducts an independent review of the state law governing the creation of the contract. In *Terre Haute & Indianapolis Railroad v. Indiana ex rel. Ketcham*,[115] a case falling within the interstate commerce clash described in a previous Subsection, the Court rejected a state court's construction of a contract as an impermissible burden on interstate commerce. The Court explained: "We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the

111. *Compare* Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (holding that "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis," as to which the Court will exercise independent judgment), *with* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934) ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."), *and* Louisiana v. Pilsbury, 105 U.S. 278, 294 (1881) ("Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned.").

112. *See, e.g.*, Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443 (1861).

113. 302 U.S. 95, 101 (1937).

114. 300 U.S. 319, 323 (1937); *cf.* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) ("On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.").

115. 194 U.S. 579 (1904).

decision of a state court upon state laws."[116] It rejected the state court's interpretation of the contract as an "adequate" state ground for the reason that the construction was "untenable" and an attempt to evade obligations under the Interstate Commerce Clause.[117] Similarly, in *Memphis Natural Gas Co. v. Beeler*,[118] where the petitioner's constitutional challenge to a state tax turned on a particular interpretation of a contract, the Court applied the fair support rule: "The meaning and effect of the contract" are questions of state law, and so "[w]e examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue."[119]

The Court's failure to adhere consistently to the fair support rule—even if it frequently adheres to the rule—in the contracts context is significant because contracts constitute a large category of substantive antecedent state law. Contracts are, however, unique among antecedent state law grounds. The Court's review of a state court decision defining or construing a contract is often limited to the contract in question. Should the Court disagree with a state court's construction, its disagreement is confined to litigation concerning that specific contract. No federal rule of general applicability is created either intentionally or as a byproduct of the Court's decision. Federalism concerns, therefore, are at a low ebb in contracts cases. Moreover, because these cases revolve around a single document the Court has greater access to relevant information for deciding the case.

B. The Advantages of the Historical Approach

The unusual pattern of application of the fair support rule's evasion inquiry—concentrated in the extreme around two historical periods—reveals the Court's heavy reliance on social-political context cues.[120] But why use these

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116. *Id.* at 587.

117. *Id.* at 588; *see also* Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); *Brand*, 303 U.S. at 100; *Hale*, 302 U.S. at 101.

118. 315 U.S. 649 (1942).

119. *Id.* at 654.

120. *Cf.* Bush v. Gore, 531 U.S. 98, 139-40 (2000) (Ginsburg, J., dissenting) ("Rarely has this Court rejected outright an interpretation of state law by a state high court . . . . [The three such cases] cited by the Chief Justice are three such rare instances [and] are embedded in historical contexts hardly comparable to the situation here." (citing Bouie v. City of

social-political context cues at all? One reason is that it is just too difficult to detect evasion in any other way. An evasion inquiry is, in effect, a collateral inquiry into the motives of state court judges. Very rarely can the Court find overt indicators of evasion on the face of the record made in state court. Absent some direct confession by a state court judge that he or she seeks to evade federal law, the Court can only speculate as to the motives behind any judicial action. In some cases, the Court can make extra-record excursions, inquiring into local controversies and other factors that may have influenced the outcome, but without proper factfinding, basing a decision on such factors would be extraordinary and might violate the Due Process Clause.

Alternatively, the Court may survey prior state law rulings, and where a state court has departed wildly from precedent in a way that just so happens to defeat a federal claim, the Court may infer some purpose to evade federal law. Where this point of departure is a procedural ruling, the Court's comparative task is straightforward, if tedious, but where the state court has changed substantive law, comparative analysis becomes much more difficult.

For procedural bars, the Court may compare a state procedural ruling with previous contexts in which that same rule has been employed. However, this must typically be done without a record on point. Parties to the case may brief the issue for the Court, or the Justices may locate past proceedings though their own independent research. But this is a difficult endeavor even in the procedural context, where the Court can search for application of a finite, concrete rule, often by its name. Comparing state substantive law, particularly state common law, with state precedents – for consistency or other qualities – is considerably more challenging. The Court must delve into the substantive law of an unfamiliar legal system. The Court will have little grounding in the particular history, traditions, and policy considerations that shape the law of a particular state. On direct review, it will lack a suitable means of obtaining this important knowledge. The record will be of little help unless the particular issue was briefed, and the litigants may present only their own outcome-oriented views on the topic.

In *Michigan v. Long*,[121] the Court noted the difficulties of this approach where it is merely trying to sort out whether the state court relied on state or federal law to support its judgment: "The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are

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Columbia, 378 U.S. 347 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813))).

121. 463 U.S. 1032 (1983).

generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties."[122] Using this process to compare state law rulings within the state system is even more difficult, and the Court has generally avoided it. In *Mullaney v. Wilbur*,[123] for example, the Court refused an invitation from a state defendant to overturn "a radical departure from prior law [that] leads to internally inconsistent results."[124] The controversy concerned the Maine Supreme Court's substantive interpretation of a criminal law. The defendant in the case argued that the Maine court's construction of the state law "should not be deemed binding on this Court" since it so radically altered prior law.[125] The Court rejected the defendant's argument, noting that "state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here."[126] These "extreme circumstances," the Court noted, might exist where a state court sought to evade federal law.[127]

Unsurprisingly, in the few cases where the Court has attempted a comparative analysis of substantive state law, it has quickly abandoned the analysis and resorted to a general common law baseline against which to assess state law.[128] Ultimately, these methods are unsatisfactory. They strain the Court's institutional capacities and resources and produce unreliable outcomes.

Social-context cues provide the Court with an alternative to extensive outside research. But these cues must be sufficiently notorious to be apparent without outside research. The Court requires something like systematic evasion of federal law before it will make an evasion finding. State court evasion of federal law during the rise of Congress's commerce power was near systematic, and evasion by Southern state courts during the civil rights

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122. *Id.* at 1039.

123. 421 U.S. 684 (1975).

124. *Id.* at 690-91 (footnote omitted).

125. *Id.* at 690.

126. *Id.* at 691 (citations omitted) (citing Winters v. New York, 333 U.S. 507 (1948); Murdock v. City of Memphis, 87 U.S. 590 (1875)).

127. *Id.* at 691 n.11 (citing Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17 (1920); Terre Haute & Indianapolis R.R. v. Indiana *ex rel.* Ketcham, 194 U.S. 579 (1904)) (noting that these extreme circumstance might exist where "a state-court interpretation of state law . . . appears to be an 'obvious subterfuge' to evade consideration of a federal issue").

128. *Stop the Beach Renourishment* is one of the only cases in which this has been attempted, and the plurality indeed creates a new rule against which to evaluate the state court judgment. For more on the sources of law from which this rule draws, see *infra* Section III.C.

movement was unquestionably systematic. Practically speaking, the Justices did not need to look outside the record to recognize that they should be wary of state law judgments rejecting federal claims in these contexts.

The Court's "systematic" evasion standard mirrors the standard it employs in other state law contexts. For example, under Section 5 of the Fourteenth Amendment, the Court has required Congress to show a "pattern of unconstitutional discrimination" before it may abrogate state sovereign immunity and subject states to discrimination suits in federal court.[129] The Court has also held that Congress may not expose unconsenting states to private suits for damages in state courts absent "evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."[130] In these contexts, the Court has been "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[131] The Court's evasion inquiry under the fair support rule is wholly consistent with its approach in these other contexts.

The evasion inquiry also serves to safeguard constitutional federalism. By placing faith in state court adjudication of federal claims, the Court helps to preserve the dignity and autonomy of state courts. The Court has recognized the importance of these values in other contexts. In *Younger v. Harris*,[132] for example, the Court prohibited lower federal courts from enjoining pending state adjudication of federal rights absent such exceptional circumstances as "bad faith" or "official lawlessness" in a statute's enforcement.[133] In that case,

129. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 372 (2001) (finding that "half a dozen examples" of irrational discrimination against the disabled "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000) (holding that Congress had failed to demonstrate the pattern of age-based discrimination necessary to justify abrogation of state sovereign immunity under the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 520, 531 (1997) (establishing the "congruence and proportionality" test for § 5 legislation and invalidating the Religious Freedom Restoration Act under this test after finding that Congress had uncovered only "anecdotal evidence" and had failed to reveal a "widespread pattern of religious discrimination").

130. Alden v. Maine, 527 U.S. 706, 758 (1999).

131. *Id.* at 755.

132. 401 U.S. 37 (1971).

133. *Id.* at 56 (Stewart, J., concurring).

the Court stressed the importance of "a proper respect" for the state judicial function.[134]

The fair support rule's evasion inquiry is thus practicable, reliable, and consistent with the Court's approach to state-federal relations in other contexts. Additionally, it helps to preserve important federalism values. It has served the Court in this capacity well for over 120 years and—*Stop the Beach Renourishment* notwithstanding—in all likelihood will continue to serve the Court in the future.

III. *STOP THE BEACH RENOURISHMENT*

Despite its history and precedence, the fair support rule is notably absent from the recent Supreme Court decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[135] Although the case reviews a state court judgment maintained by antecedent state law grounds, the plurality's opinion mentions the rule only at the parties' behest and rejects the rule's test as conceptually relevant to its analysis of antecedent state law. In fact, the plurality's opinion rejects any notion of deference to state law and conducts an independent review of antecedent state law grounds. Perhaps more remarkable than the appearance of independent review in an area historically laden with deference to state courts is that the plurality fails to even account for its departure from precedent and practice.

Stop the Beach Renourishment places the Court in uncharted territory with respect to review of state court determinations of state law. By disregarding the rule entirely, and not merely carving out an exception, the Court throws aside its own hundred-year-old rule of decision and leaves little in the way of a new rule for state courts. What explains the Court's turnabout? One possible answer lies in the confusion surrounding the fair support rule's standard of review; any answer requires some understanding of the background facts in the case. The next Section begins with these.

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134. *Id.* at 44.

135. 130 S. Ct. 2592 (2010).

A. Background

Stop the Beach Renourishment began with the Florida state legislature's solution to one of the great modern problems facing coastal cities and states: rapidly eroding beaches. In response to what it characterized as a "menace" of "emergency proportions,"[136] the Florida state legislature passed the Beach and Shore Preservation Act to provide a process for restoring critically eroded beaches.[137] In its amended form, this Act authorizes a joint effort between state administrative agencies and affected localities to restore eroded beaches by depositing new sand onto eroded shorelines.[138]

In 2003, Walton County and the City of Destin applied for a permit to restore several miles of beach that had been critically eroded by three hurricanes that struck during the previous decade.[139] After receiving the necessary permits, the county initiated the process for restoring affected beaches. Six beachfront property owners, unhappy with the turn of events, formed Stop the Beach Renourishment, a nonprofit corporation, in order to challenge the project in court.

Under Florida law, the mean high water line (MHWL), or the average height of the high tide over a nineteen-year period[140] is the traditional boundary demarcating where private beachfront ownership ends and government property begins. Associated with this boundary are several property "interests" that accrue to upland owners.[141] These include the right of access to the water, the right to an unobstructed view of the water, and the

136. FLA. STAT. ANN. § 161.088 (West 2006).

137. 1961 Fla. Laws 436.

138. *See* Beach and Shore Preservation Act, FLA. STAT. ANN. §§ 161.011, 161.088. The Act defines "[b]each restoration" as "the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties." *Id.* § 161.021(4). For more on the Act and the circumstances surrounding its enactment, see Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STETSON L. REV. 353 (1995).

139. *See* Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d. 1102, 1106 & n.4 (Fla. 2008).

140. FLA. STAT. ANN. §§ 177.27(14)-(15).

141. Note that this term lies at the heart of the dispute in *Stop the Beach Renourishment*. The property owners argued that these "interests" were in fact vested property rights, the taking of which amounted to eminent domain; the Florida Supreme Court characterized them as "future contingent interests." Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1112-20 (Fla. 2008).

right to any accretions and relictions.[142] The Act's Restoration program replaces the MHWL with an "erosion control line,"[143] a fixed line, which thereafter provides a point of reference for further maintenance of the beach.[144] Any sand added to the coastline seaward of the erosion control line becomes government property.[145] Thus, while set with reference to the MHWL,[146] a new erosion control line may nonetheless terminate the property's contact with the water and, by extension, the various property interests inherent in this contact, such as the right to accretions and relictions.[147]

Faced with this prospect, Stop the Beach Renourishment filed suit in state court alleging that the property interests associated with the original MHWL were vested property rights and that the legal changes effected by the Act thus amounted to an uncompensated taking of riparian rights under Florida constitutional law.[148] Stop the Beach Renourishment did not raise any federal claims in state court but rested its argument on an interpretation of prior Florida case law and on the Florida Constitution, which prohibits the taking of private property "except for a public purpose and with full compensation therefor paid to each owner."[149] The Florida Supreme Court rejected the group's theory, describing the property interests associated with the MHWL as future contingent interests.[150] Federal law also did not factor into the Florida Supreme Court's analysis.[151]

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142. *See, e.g.*, Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Ass'n, 512 So. 2d 934, 936 (Fla. 1987).

143. 1961 Fla. Laws 436 (codified as amended at FLA. STAT. ANN. §§ 161.161(3)-(5)).

144. Where future erosion occurs upland of the erosion control line, the board may direct the responsible agency to restore the beach to its fixed line. *Id.* § 161.211(3).

145. *Id.* § 161.161(1).

146. The Act directs the administrative board charged with setting the erosion control line to "be guided by the existing line of mean high water." *Id.* § 161.161(5).

147. Assuming ongoing erosion, it is to be expected that the actual water line will eventually return to its former place.

148. For the full procedural history of this complex case, see Brief of Petitioner at 13-15, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).

149. FLA. CONST. art. X, § 6.

150. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1112-20 (Fla. 2008).

151. *Id.*

After losing, Stop the Beach Renourishment filed a Motion for Rehearing with the Florida Supreme Court advancing a new argument.[152] It argued that the court, in upholding the Florida statutory scheme, had suddenly and dramatically changed Florida property law, an act tantamount to an uncompensated "judicial taking" of property in violation of the Takings Clause of the U.S. Constitution. The Florida Supreme Court denied the motion without comment, and Stop the Beach Renourishment filed a petition for a writ of certiorari in the U.S. Supreme Court.

B. The Judicial Takings Claim

The concept of "judicial takings" lay in utter obscurity for the first two hundred years of American legal history.[153] In the last two decades, however, the concept has been making a rather late debut. In 1990, in what was the first comprehensive treatment of the topic,[154] Stanford Law School professor Barton

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152. For the full text of this motion, see Petitioner's Appendix at 138-70, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

153. It was mentioned in exactly one Supreme Court opinion during that period: a concurrence by Justice Stewart in *Hughes v. Washington*, a case with a fact pattern somewhat similar to that of *Stop the Beach Renourishment*. *See* Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

154. Thompson, *supra* note 10. Prior to Professor Thompson's article, the concept of judicial takings had received very little attention from legal scholars. *See, e.g.*, FRANK H. STEPHEN, THE ECONOMICS OF THE LAW 114-18 (1988) (mentioning the concept); Warren J. Samuels, Commentary, *An Economic Perspective on the Compensation Problem*, *in* LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE 188, 193-94 (W. Samuels & A. Allan Schmid eds., 1981) (same); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 51-52 (1964) (same); *see also* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 n.10 (1986) (noting that "it is well accepted that no right to compensation exists" where a court changes common law definitions of property). When Professor Thompson published his article, two recent takings cases in Hawaii sparked new interest in the subject, *see* Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) (holding that the Hawaii Supreme Court could not divest vested property rights by dramatically changing state water law without just compensation), *vacated*, 477 U.S. 902 (1986); Sotomura v. Cnty. of Haw., 460 F. Supp. 473 (D. Haw. 1978) (holding that the Hawaii Supreme Court offended the Federal Takings Clause by changing the seaward boundary of private beachfront property from the MHWL to the vegetation line), but theretofore scholars had been skeptical of the cases' outcomes, *see* Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi*: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57, 90-91 (1979); Bradford H. Lamb, Robinson v. Ariyoshi*: A Federal Intrusion upon State Water Law*, 17 ENVTL. L. 325, 353 (1987).

Thompson strongly endorsed the doctrine[155] and proposed a deceptively simple definition: "[A] judicial taking is any judicial *change* in property rights that would be a taking if undertaken by the legislative or executive branch of government."[156]

As Professor Thompson noted, however, this definition collapses when assessed against the Supreme Court's longstanding view that the Constitution does not define property in constitutional terms but looks to statutory and common law definitions to provide the underlying content for the vindication of federal constitutional claims.[157] At stake in federal challenges to state law under the Federal Takings Clause, the Due Process Clause, and the Contracts Clause are entitlements created and governed by state law. Except for the lightest sketch of an outer bound for state practice,[158] the Court has expressly

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155. The premise behind Professor Thompson's push for a judicial takings doctrine was a perceived judicial attack on private property rights: "Faced by growing enviro[n]mental, conservationist, and recreational demands . . . state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." Thompson, *supra* note 10, at 1451; *accord* Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). Professor Thompson admits, however, that "[j]udicial reshaping of property rights is nothing new." Thompson, *supra* note 10, at 1451 n.8 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 31-66, 101-08 (1977)); *accord* Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002). He supports his premise with only a handful of cases. Thompson, *supra* note 10, at 1451 nn.10-13. A quick survey of these cases does not reveal any extraordinary property rulings: several involved opinions that can be more properly analyzed under the First Amendment, as free speech determinations by state courts permitting their citizens to engage in political petitioning in private commercial shopping malls; several others involved the use of the public trust doctrine to allocate water rights in western states, which was certainly nothing new. *See, e.g.*, City of L.A. v. Pomeroy, 57 P. 585, 600-01 (Cal. 1899). Whatever objections may be admitted as to the merit of these decisions, it cannot be said that they are revolutionary *takings* decisions. Ultimately, Professor Thompson seems less troubled by these decisions than by the notion that federal law places no apparent limits on judicial alteration of property rights. Thompson, *supra* note 10, at 1452-53.

156. Thompson, *supra* note 10, at 1455.

157. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); Demorest v. City Bank Farmers Trust, 321 U.S. 36, 42 (1944); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) (holding that the right of property arises from and is subject to positive law).

158. The Court recognizes a handful of what might be called general common law principles that confine state practice, including the right to exclude, *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044 (1992) ("[T]he right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting Kaiser Aetna

rejected the notion that the Constitution protects some normative, federal concept of property against which state practice must be measured.[159]

The evolving nature of statutory and common law property definitions makes it difficult for federal courts to pinpoint exactly when some state revision has crossed a constitutional line—particularly difficult, as the Court has refused to conceptualize this line-crossing in qualitative terms. Proponents of judicial takings doctrine have thus gravitated toward a standard that defines judicial takings in quantitative terms.[160] Although the Constitution may not protect specific substantive rights—such as the right of beachfront property owners to have an unobstructed view of the ocean—it may protect the rights of property owners from some quantum of change. When a state court "dramatically" changes state property law, for example, it may run afoul of federal takings protections. The Constitution might also be thought to prevent "sudden" or "unpredictable" changes in property rights.[161] Justice Stewart elected this approach in *Hughes v. Washington*, in which he suggested that "a sudden change in state law, unpredictable in terms of relevant precedents," might constitute a judicial taking.[162]

Since Professor Thompson published his article, judicial takings doctrine has gained a significant following. Its advocates include prominent legal scholars[163] and enthusiastic litigants, who have been quite persistent in seeking Supreme Court review of their claims—and quite unsuccessful until last

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v. United States, 444 U.S. 164, 176 (1979)); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-28 (1982) (holding that permanent physical invasion constitutes a taking), and the right to transfer ownership upon death, *see* Hodel v. Irving, 481 U.S. 704, 716-18 (1987) (finding that the total eradication of both descent and devise of property may constitute a taking). These principles trace their own roots, however, to centuries of state common law practices.

159. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) ("[T]he Constitution protects rather than creates property interests . . . . ").

160. *See* Monaghan, *supra* note 10, at 1925 ("[J]urisdiction most clearly exists when the federal petitioner asserts that the applicable constitutional provision imposes a duty of fidelity to state law at a given point in time in the past (t_1), and the petitioner claims that at some later point in time (t_2) that duty was materially and impermissibly breached.").

161. This idea incorporates concepts of due process as well as an expectational concept of property. For important work on the role expectations should play in takings analysis, see Frank Michelman's celebrated article, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

162. 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

163. *See supra* note 10 and accompanying text.

year.[164] In a miraculous turn of events for the members of Stop the Beach Renourishment, the U.S. Supreme Court granted its first judicial takings case in the summer of 2009.

At the Court, Stop the Beach Renourishment heralded a new day for judicial takings. It advanced a standard mirroring the one suggested half a century earlier by Justice Stewart in *Hughes v. Washington*[165]: a court commits a judicial "takings" where it suddenly and unpredictably changes state property law—as measured against prior understandings of that law.[166] Ultimately, the group's efforts on behalf of the judicial takings doctrine captured the favor of a plurality of the Court, but the organization failed to win a single vote for its claim that the Florida Supreme Court had in fact committed a judicial taking. A plurality of the Court joined an opinion strongly endorsing a doctrine of judicial takings[167] while the remaining four split over two concurrences, each declining to adopt a doctrine of judicial takings on the facts presented.[168] All eight Justices, however, agreed that the Florida Supreme Court should be affirmed.

C. *The Plurality's Opinion*

The plurality advocated a definition of judicial takings that largely tracks the definition proposed by Professor Barton Thompson in his foundational article on the topic: "[A] judicial taking is any judicial *change* in property rights that would be a taking if undertaken by the legislative or executive branch of government."[169] However, the plurality rejected the petitioners' sudden change standard and proposed a test for detecting judicial takings that entails an independent assessment of the entrenchment of the particular right asserted:

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164. The Court denied certiorari for at least fifteen petitions between Justice Scalia's dissent from denial of certiorari in *Stevens* and its grant in *Stop the Beach Renourishment*. *See* Elisabeth Oppenheimer, *Will the Court Take On Judicial Takings?*, SCOTUSBLOG (Nov. 19, 2009, 3:27 PM), http://www.scotusblog.com/2009/11/will-the-court-take-on-judicial-takings/.

165. *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). Justice Stewart would have carved out a special federal question from more general deference to state court determinations of state law as to whether the state decision "worked an unpredictable change in state law." *Id.* at 297.

166. Brief of Petitioner at 17-19, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).

167. 130 S. Ct. 2592 (2010).

168. *Id.* at 2613 (Kennedy, J., concurring); *id.* at 2618 (Breyer, J., concurring).

169. Thompson, *supra* note 10, at 1455.

"What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established."[170] Although the plurality does not define "established," it elaborates on the standard it would employ: "A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court."[171]

The fair support rule is conspicuously absent from the plurality's opinion. Despite the rule's established role in the jurisdictional inquiry made on review of any state law judgment, the plurality mentions it only in passing and, if anything, appears to misunderstand—or disregard—its operation. At respondents' suggestion that the Court adopt a "fair support" standard of review, the plurality replies that the standard "is not obviously appropriate for determining whether there has been a taking of property."[172] The plurality then reasons that the standard "must mean . . . that there is a 'fair and substantial basis' for believing that petitioner's Members did not have a property right to future accretions which the Act would take away."[173] "This is no different," the plurality concluded, "from our requirement that petitioners' members prove the elimination of an established property right."[174]

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170. *Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion).

171. *Id.* at 2608 n.9.

172. *Id.* at 2608.

173. *Id.*

174. *Id.* One possible explanation for the plurality's approach is that the petitioners' "sudden and dramatic change" standard is a jurisdictional-type inquiry. Petitioners borrowed this standard from Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290 (1967). In that opinion, Justice Stewart reasoned that whether a "sudden change in state law, unpredictable in terms of the relevant precedents" could constitute an uncompensated federal taking "inevitably presents a federal question." *Id.* at 296-97. Under this logic, judicial takings claimants seemingly bypass the normal state-law-grounds inquiry undertaken by the Court to assess state law judgments, but the claimants nevertheless focus on an untenable state court construction of state law. This bears similarity to the Court's evasion inquiry employed under the fair support rule. The similarity of Justice Stewart's standard to a procedural due process inquiry is, moreover, notable. The Court, in searching for "sudden" and "unpredictable" changes in state law, may conduct an inquiry marginally similar to the notice-and-opportunity-for-hearing inquiry conducted under a procedural due process case. Procedural due process has at least some recognizable parameters. The advantages of Justice Stewart's rule, however, cannot avail the plurality because they do not adopt it.

The plurality's standard of review accords no deference to state court interpretations of antecedent state property law; instead, it conducts an independent assessment of state law. The fair support rule, of course, affords state court determinations of state law the highest measure of deference. The rule operates as a check on the U.S. Supreme Court—one that ensures that the Court does not unduly intrude into state court autonomy over state law. To do this, it sets a very high threshold of inadequacy that state court determinations of state law must exhibit to trigger federal opprobrium—evasion of federal law or its equivalent. The plurality's approach removes any predicate standard of review (deferential or otherwise) for state court determinations of state law and proceeds directly to the secondary federal takings inquiry. Its test is thus fundamentally dissimilar from the fair support inquiry, which examines the validity of state law grounds on their own terms prior to any assessment of the secondary federal question.

The plurality seems to assume, without actually saying, that no deference is necessary when reviewing state property law determinations antecedent to a federal takings claim. To this extent, the plurality must be either conceptualizing a judicial takings claim as implicating a direct violation of federal law, or articulating a standard of independent review for antecedent state law grounds.

The plurality's citation to the judicial takings claim presented in petitioners' motion for rehearing in the Florida Supreme Court provides some evidence that it analogizes the state court decision to a direct violation of federal law. It observes in a footnote that while the Court ordinarily does "not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it . . . where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim will not bar our review."[175] The contexts in which the Court has

175. *Stop the Beach Renourishmnent*, 130 S. Ct. at 2601 n.4 (citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930), for the exception). See *Adams v. Robertson*, 520 U.S. 83 (1997), for the rule: "With very rare exceptions . . . we have adhered to the rule in reviewing state-court judgments . . . that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Id.* at 86. Specifically, the Court noted that it has "generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89 n.3 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549-50 (1987); Hanson v. Denckla, 357 U.S. 235, 244 n.4 (1958); Radio Station WOW, Inc. v. Johnson,326 U.S. 120, 128 (1945)); *accord* Yee v. City of Escondido, 503 U.S. 519, 533 (1992); *see also* 28 U.S.C. § 1257(a) (2006) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be

previously followed this exception, however, are limited to unanticipated state court decisions that directly violate some federal rule of decision. For example, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,[176] the case that the plurality cites in support of its point, the Court held that a state court decision that had overruled a consistent line of procedural decisions, thereby retroactively denying a claimant a hearing in a pending case, had deprived the claimant of due process of law.[177]

A state court's interpretation of state law antecedent to a federal claim does not directly violate a federal rule of decision, however, unless the misinterpretation rises to the level of a due process violation. Where, for example, a state court's unanticipated construction of a state trespass statute unforeseeably broadens the scope of the statute thereby depriving a defendant of fair notice and hearing, the construction may directly violate the Due Process Clause.[178] In all other cases, absent a controlling federal rule, antecedent state law grounds must be evaluated in their own right before the secondary federal claim can be evaluated. In any event, the plurality in *Stop the Beach Renourishment* expressly disclaims any reliance on the Due Process Clause.[179] It is thus more likely that the plurality conceptualizes judicial takings claims as implicating antecedent state law grounds, which should be subject to independent review at the Supreme Court.

In either case, the plurality's "established rights" test cannot be characterized as anything but a federal rule of decision, to which state law must

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had, may be reviewed by the Supreme Court . . . where any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States."); SUP. CT. R. 14.1(g)(i) (requiring "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts"); *cf.* Howell v. Mississippi, 543 U.S. 440, 443 (2005) (per curiam) (noting that the Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision").

176. 281 U.S. 673 (1930).

177. *Id.* at 682; *see also* Saunders v. Shaw, 244 U.S. 317, 320 (1917) (finding a federal procedural due process claim arose from the disposition of the case at the close of proceedings in the state supreme court where the disposition was based on facts that were ruled immaterial at the trial court).

178. *See* Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

179. 130 S. Ct. at 2605-08.

conform.[180] The test is in the service of the secondary federal takings inquiry and bypasses any predicate review of or deference to state law. In contrast, under the fair support rule, when the Court confronts state court determinations of state law implicating federal rights, it first determines whether it should intrude upon the judicial methodology of the state court. This inquiry is conducted independent of the federal right to be vindicated. Absent indicia of evasion of federal law, the Court stops short of the secondary federal issue. The plurality's standard requires state courts to conform to a new federal standard.[181]

D. Problems with the Plurality's Approach

The plurality does not acknowledge that its approach is in conflict with the fair support tradition. An opinion adhering to the rule would have inquired into whether, in explicating Florida law, the Florida Supreme Court had deliberately modified state law so as to evade the just compensation requirement of the Takings Clause. On this inquiry, no evasion, systematic or otherwise, is apparent in *Stop the Beach Renourishment*. None of the parties attributed any evasion to the Florida Supreme Court, nor do the facts suggest evasion. Notably, had the Court employed the fair support rule in *Stop the Beach Renourishment*, it would have reached the same outcome.

In every case in which the Supreme Court has confronted claims that a state court property law decision violates the Takings and Due Process Clauses,

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180. Further evidence of this fact, can be found in a footnote to the Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, the Court noted that the state could defend a regulatory taking "only if an *objectively reasonable application* of relevant precedents [by its courts] would exclude . . . beneficial uses in the circumstances in which the land is presently found." *Id.* at 1032 n.18. This language plants a seed for the plurality's new rule of decision, and the plurality draws heavily from the Court's reasoning in *Lucas*. *See Stop the Beach Renourishment*, 130 S. Ct. at 2601, 2609, 2612.

It is worth noting that the petitioners' "sudden-change" standard is different in kind from the standard adopted by the plurality. Although the petitioners argued that a state court's sudden change in well-established property law constitutes a violation of the Takings Clause, the actual violation asserted lies in an improper construction of state law. This is an indirect way of challenging the state judicial process below. The plurality's approach takes the additional step of setting a federal baseline.

181. The plurality might have categorically excepted its approach from the fair support rule by adopting the petitioners' sudden-change standard. Although state property law would still provide the underlying substantive content for vindication of federal constitutional rights, state courts would be bound by a federal standard of change.

the Court has employed the fair support rule and, upon finding no evasion, has refrained from addressing the secondary federal question of takings. In *Broad River Power Co. v. South Carolina ex rel. Daniel*,[182] for example, the Court reviewed a state court's interpretation of a local charter requiring an electrical company to operate at a loss.[183] The Court employed the fair support rule: "if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule,"[184] and, finding no evasion, deferred to the state court's interpretation of its own laws.[185] Similarly, in *Fox River Paper Co. v. Railroad Commission*,[186] the Court deferred to the state court absent any evidence of evasion, reasoning that "[i]t is for the state court in cases such as this to define rights in land located within the state and the Fourteenth Amendment in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."[187]

The plurality does not use the fair support rule or any other rubric of deference to review the state law judgment. Whether it conceives of a special Takings Clause exception to the fair support rule[188] or whether it rejects the

182. 281 U.S. 537 (1930).

183. Whether the electrical company would or would not actually operate at a loss under the terms of the charter was a fact in dispute. *Id.* at 540.

184. *Id.* at 540-41 (citations omitted) (citing Fox River Paper Co. v. R.R. Comm'n, 274 U.S. 651, 655 (1927); Nickel v. Cole, 256 U.S. 222, 225 (1921); Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 22 (1920); Enter. Irrigation Dist. v. Canal Co., 243 U.S. 157, 164 (1917); Vandalia R.R. v., 207 U.S. 359, 367 (1907); Leathe v. Thomas, 207 U.S. 93 (1907); Sauer v. City of N.Y., 206 U.S. 536 (1907)).

185. 281 U.S. at 543-44 ("[W]e cannot say that this interpretation of statutes of the State of South Carolina, by its highest court, so departs from established principles as to be without Indiana *ex rel.* City of South Bend substantial basis . . . . "). In conclusion, the Court held, "the judgment below is supported by a state ground which we may rightly accept as substantial." *Id.* at 548.

186. 274 U.S. 651 (1927).

187. *Id.* at 657; *see also* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-43 (1944) (affirming the state court's interpretation of state property law as not having established certain rights where the decision had a "fair and substantial basis").

188. As previously noted in Subsection II.A.3, the Court recognizes something akin to a Contracts Clause exception to the fair support rule. The Court may be less deferential to state court construction of contracts when construing a contract within the meaning of the Contract Clause. *See, e.g.*, Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (holding

limiting principles of the rule entirely—hoping to usher in a new era of independent review of antecedent state law grounds[189]—it bypasses any notion of predicate deference to state courts. This approach enlarges the Court's powers of review over state law judgments from their historic proportion. The following Subsections detail some of the problems that may arise from this change.

1. Reversion to General Common Law

One of the chief problems with expanded Supreme Court review of state law judgments is that it tends to revert to general common law norms out of ease and, sometimes, necessity.[190] By relying on these norms, which are more easily accessible to the Court than are state law norms, the Court is freed from having to scrutinize state law. The Court's general common law baseline, however, tends to federalize what were formerly substantive state rules. The plurality's "established rights" test in *Stop the Beach Renourishment* follows this approach—and carries it a step further. The plurality not only adopts a new federal "established rights" test, it invents a new state rule to meet its test.

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that "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis," as to which the Court "cannot surrender the duty to exercise its own judgment"); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) ("On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."). The Court is more deferential where state law is implicated in and bears on the disputed contract; however, where it suspects evasion of the Contract Clause's prohibition on impairment of contracts or some other federal right, the Court relies on its own general common law of contract construction. *See* Terre Haute & Indianapolis R.R. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904) (rejecting the state court's "untenable construction" of the contract as an attempt to evade obligations under the Interstate Commerce Clause). As also noted previously, contracts are somewhat exceptional as antecedent state law grounds.

189. *Cf.* Monaghan, *supra* note 10, at 1925 (arguing that jurisdiction "exists when [a] federal petitioner asserts that the applicable constitutional provision imposes 'a duty of fidelity' to state law . . . and . . . that duty was materially and impermissibly breached").

190. *See, e.g.*, Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246, 262-63 (1912) (holding that enforcement of a state court injunction would violate the most "elementary principles of equity"); *see also* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000).

Instead of affirming the state law grounds relied on by the Florida Supreme Court, the plurality relies on legal concepts that the state court did not mention. Extrapolating from a state case decided in 1927,[191] the plurality determines that state-created avulsions are (or should be) treated no differently from other avulsions under Florida law.[192] Not only did the Florida Supreme Court decide the case on entirely different state law grounds—it held that the petitioner's asserted property rights were merely a contingent, future interest[193]—but the court did not even cite the 1927 case relied on by the plurality.[194]

This approach presents various problems for state courts. Were the Court to simply survey state cases and find "nothing inconsistent" with the state law judgment, its holding, while binding within the litigation, would not create a binding rule of substantive law. This methodology might be described as reading or interpreting state law. But it is difficult to characterize what the plurality did as mere interpretation of state law. After surveying Florida law, the plurality extrapolated a new rule for artificial avulsions and concluded that this rule was not inconsistent with past state decisions and supported the state court's judgment.

The precedential effect such a rule would have is unclear. The plurality seems to draw from general state common law sources, not from federal sources. Where the Court rests its decision on some discrete rule of federal or general common law, the rule would presumably bind state courts. Whether a new state rule binds state courts—not to mention whether the Supreme Court has authority to articulate one—is less clear. Had the plurality garnered the vote of the Court, Florida might very well be bound by the plurality's rule, at least until it provided for a statutory or common law override.[195]

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191. Martin v. Busch, 112 So. 274 (Fla. 1927).

192. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2612 (2010) (plurality opinion).

193. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1112, 1119-20 (Fla. 2008).

194. 130 S. Ct. at 2612 (noting the Florida Supreme Court did not cite *Martin*).

195. Although it cannot well be argued that the plurality's rule would bind states other than Florida, at least one state has already taken up the plurality's rule. *See* City of Long Branch v. Jui Yung Liu, 4 A.3d 542 (2010).

2. New Factual Questions

Ultimately, the plurality's artificial avulsion rule led it far beyond the scope of the Florida court's opinion and the state court record. Although it based its decision on a new rule of state law, and not on new facts, the problem of new factual questions is a serious one for expanded Supreme Court review of state law judgments. In his dissent from denial of certiorari in *Stevens v. City of Cannon Beach*,[196] Justice Scalia encountered this problem. In *Stevens*, Justice Scalia argued that the Oregon Supreme Court had arrived at opposite results using contradictory legal rules in two cases that each involved disputed ownership of the dry sand portion of Oregon's beaches.[197] The losing party in the later of these cases petitioned the Court for a writ of certiorari to the Oregon Supreme Court alleging a taking of property that required payment of just compensation. In his dissent from denial of certiorari, Justice Scalia admitted that the validity of petitioners' judicial takings claim that the state court's "new-found 'doctrine of custom' is a fiction" turned upon certain critical "facts regarding public entry" to Oregon's beaches not addressed by the state courts below.[198] In other words, the Court would have needed to discern whether the beach in question had been customarily used by the public. Justice Scalia noted that it was beyond the Court's power "to evaluate petitioners' takings claim" under the circumstances.[199]

Ad hoc factfinding would bring even greater uncertainty to Supreme Court review of state law judgments. Under the fair support rule's evasion inquiry, the Supreme Court may search outside the scope of the record for factual evidence of evasion, but as discussed in Part III, the Court typically employs certain reliable cues to aid it in this difficult endeavor—in particular, the social context in which a case arose. The Court would not benefit from similar cues in answering technical or substantive factual questions under an independent standard of review.

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196. 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

197. *See id.* at 1207-13 (comparing *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989), with *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), and noting the decisions arrived at opposite results using contradictory rules of law).

198. *Id.* at 1212 & n.5, 1213.

199. *Id.* at 1213.

In his dissent from denial of certiorari in *Stevens v. City of Cannon Beach*, Justice Scalia noted that under the doctrine of constitutional fact review,[200] "'[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'"[201] However, this doctrine is of no help where the Court must actually engage in new factfinding. Aside from direction to a special master, this type of factfinding on appeal is impossible for the Court. As Justice Scalia admits in *Stevens*, "It is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioners' takings claim."[202]

While Justice Scalia saw new factfinding as critical in *Stevens*, the plurality seemed to consider the issue in *Stop the Beach Renourishment* to be limited to one of consistency in the application of state law. However, judicial takings questions—particularly regarding beachfront property—frequently may turn on questions of custom similar to the question at issue in *Stevens*.[203]

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200. The doctrine of constitutional fact review requires appellate courts to review determinations of certain adjudicative facts bearing on constitutional claims de novo. It extends to determinations made by state courts, lower federal courts, and administrative agencies. Although rarely invoked, the modern significance of constitutional fact review lies in three limited substantive rights contexts: procedural due process, *see, e.g.*, Agosto v. INS, 436 U.S. 748 (1978) (interpreting the Immigration and Naturalization Act to require de novo factfinding before an Article III court whenever there is a genuine issue of material fact as to citizenship); Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922) (requiring independent judicial review of agency adjudicative determination of noncitizenship required to support deportation), involuntary confessions, *see, e.g.*, Williams v. Taylor, 529 U.S. 362, 384-85 (2000) (examining constitutional fact review in the context of involuntary confessions); Miller v. Fenton, 474 U.S. 104, 115 (1985) (announcing three justifications for plenary review of state court determinations of the voluntariness of confessions: the likelihood of bias on the part of the factfinder below, stare decisis values, and "the nature of the inquiry itself"), and traditional First Amendment cases, *see, e.g.*, Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 567 (1995) (observing the "constitutional duty to conduct an independent examination of the record as a whole"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) (requiring federal courts to independently review findings of actual malice in defamation suits). For the main treatment of the doctrine, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

201. *Stevens*, 510 U.S. at 1213 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

202. *Id.*

203. *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

3. Problems for State Courts

The plurality's approach also poses problems for judicial process in state courts. On the presumption that the Supreme Court may review and overturn any ruling that departs too far from past decisions, state courts may be more likely to favor the status quo over traditional forms of common-lawmaking and statutory interpretation. Alternatively, state courts may endeavor to secure their state law rulings with supporting federal law references—resorting to parallel federal law citations for each state law principle asserted, or relying on federal law entirely. Both of these approaches ultimately detract from the development of state law.

In the former approach, state courts may decline to extend or recognize new rights or may simply decline to update laws to meet changed circumstances. These decisions would be difficult to detect and trace to the plurality's approach in *Stop the Beach Renourishment*. In contrast, parallel citations to federal law, or exclusive reliance on federal standards by state courts, are quite easy to trace and have begun to appear already.

By citing federal standards and finding federal law support for their decisions, state courts may seek to deter Supreme Court review—or at least to insulate their decisions from reversal. After *Stop the Beach Renourishment*, this might mean citing to the plurality's federal common law definition of "well-established."

Several recent state supreme court decisions have done just this. In September 2010, the New Jersey Supreme Court held that a beach replenishment program similar to the Florida renourishment program at issue in *Stop the Beach Renourishment* constituted a common law "avulsion."[204] The state court repeatedly cited the legal terms created by the plurality in *Stop the Beach Renourishment* and relied on the plurality's legal conclusions.[205]

It is instructive to compare the New Jersey case with two recent state supreme court cases decided just before the Court's disposition of *Stop the Beach Renourishment*: a water rights case in Montana,[206] and a Hawaii beachfront property case that had a fact pattern similar to that of *Stop the Beach Renourishment*.[207] The courts in these cases disposed of the issues by relying

204. City of Long Branch v. Jui Yung Liu, 4 A.3d 542 (2010).

205. *Id.* at 12-15.

206. PPL Mont., LLC v. State, 229 P.3d 421 (Mont. 2010).

207. Maunalua Bay Beach Ohana 28 v. State, 222 P.3d 441 (Haw. Ct. App. 2009).

almost exclusively on state law and made no effort to cite federal law terms or rules. In contrast, the petitions for writs of certiorari in each of these cases challenge the state court opinions under the test articulated by the plurality in *Stop the Beach Renourishment*.[208]

IV. AN ALTERNATIVE TO JUDICIAL TAKINGS DOCTRINE

The fair support rule's long tradition of deference to state court determinations of state law cautions against the independent standard of review adopted by the plurality in *Stop the Beach Renourishment*. It instead recommends a deferential assessment of state court determinations: unless the Court suspects evasion of the federal rights guaranteed by the Takings or Due Process Clauses, the Court should not reach through state law grounds to the secondary federal question.

There are, however, good reasons for the Supreme Court to impose some limits on the powers of state courts to reshape state property law at will. Professor Thompson notes some of these in his 1990 article on judicial takings, and scholars have persuasively documented many others since.[209] The Court has emphasized that the Takings Clause protects, among other things, the reasonable investment-backed expectations of property holders.[210] Judicial upset of expectations may violate the settled expectations of property owners as much as any legislative or executive taking. Judicial decisions, moreover, unlike those of the legislative and executive branches, are not made with democratic input, and property owners affected by adverse substantive changes in state property law may have little recourse where those changes are made by courts.[211]

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208. *See* Petition for Writ of Certiorari, PPL Mont., LLC v. Montana, No. 10-218 (Aug. 12, 2010); Petition for Writ of Certiorari, Maunalua Bay Beach Ohana 28 v. Hawaii, No. 10-331 (Sept. 7, 2010).

209. *See* Thompson, *supra* note 10.

210. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 715 (1987) (protecting distinct "investment-backed expectations"); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (same); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (same); *cf.* Michelman, *supra* note 161 at 1216 (criticizing prevailing theories of just compensation and arguing that any rule of compensation should incorporate the important subjective component of takings).

211. Although, judges in many states are elected. According to the American Judicature Society, eighty-seven percent of all state court judges face elections, and thirty-nine states elect at least some of their judges. *See Judicial Selection in the States*, AM. JUDICATURE SOC'Y,

Should the Court consider the fair support rule to provide insufficient protections for property rights, the Court can turn to a well-established alternative. In 1765, William Blackstone wrote that it is "essential to a free people" that judicial determinations of liberty and property be "published and adhered to."[212] The Framers incorporated this concept into the U.S. Constitution's Due Process Clause,[213] and it has since become a tenet of the Supreme Court's procedural due process jurisprudence.

A. Procedural Due Process Alternative

An alternative to a judicial takings claim is a due process challenge filed either in the Supreme Court on petition for a writ of certiorari or as a collateral attack on the state judgment in federal district court under 42 U.S.C. § 1983 by an affected third party.[214] Justice Kennedy notes the appeal of a due process claim in his partial concurrence in *Stop the Beach Renourishment* and observes that "[t]he 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."[215] The "central limitation" that due process places "upon the

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http://www.judicialselection.us/ (last visited Nov. 30, 2010). This fact may provide an independent check on "judicial takings" in states where judges face popular elections. Notably, in Florida, "[a]ppellate judges are chosen through a merit selection and retention process" and do not face popular election. *Id.*

212. 3 WILLIAM BLACKSTONE, COMMENTARIES *135.

213. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

214. *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). This would not constitute an "appeal" of the state supreme court decision but rather a collateral action. *Cf.* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) (confining the *Rooker-Feldman* doctrine to proceedings where state court litigants seek "review and rejection" of judgments of state courts in federal district court).

215. 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring) (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005); Perry v. Sindermann, 408 U.S. 593, 601 (1972)). Justice Kennedy similarly advocated a due process approach in his concurrence in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998), which struck down the Coal Industry Retiree Health Benefit Act of 1992. There, he noted that "[r]etroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Id.* (citation omitted) (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

exercise of judicial power"[216] would, like a judicial takings doctrine, prevent states from doing "'by judicial decree what the Takings Clause forbids it to do by legislative fiat.'"[217]

In this context, courts could recognize either procedural or substantive due process claims.[218] A substantive due process doctrine would be quite broad—but, where courts employed rationality review, would result in very few state court reversals. Procedural due process would give rise to a very narrow doctrine, ensuring that state courts adhered to minimum procedural requirements. This Section urges a procedural approach because it offers federal courts well-defined bounds within which to evaluate state law.[219]

Procedural due process has many benefits over a judicial takings doctrine, including that it requires the Court to focus narrowly on particular aspects of the state court's decisionmaking. In procedural due process challenges, the Court typically looks for discrete infractions, such as a violation of proper notice requirements, retroactivity problems, or the application of vague or judicially unmanageable standards.[220]

Traditionally, the Court has been hesitant to review state court determinations of state law under the Due Process Clause.[221] This hesitancy is

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216. 130 S. Ct. at 2614.

217. *Id.* at 2615 (quoting *id.* at 2601 (plurality opinion)).

218. Because the Takings Clause of the Fifth Amendment is applied to the states through the Fourteenth Amendment's Due Process Clause, *see* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897), any due process claim enforced against a state is a "substantive due process" claim in the most technical sense.

219. *Cf.* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

220. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) ("'[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988))); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) ("[Retroactivity] is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law."); Bouie v. City of Columbia, 378 U.S. 347 (1964) (holding that preexisting South Carolina law gave defendants no notice that a statute prohibiting entry on lands of another would be construed by the state court as prohibiting the act of remaining on premises after being asked to leave).

221. *See* Murdock v. City of Memphis, 87 U.S. 590 (1874). The Court defers, for example, to state court determinations of state law even where a state court has allegedly decided a

due to the same concerns that animate the Court's Fair Support jurisprudence: a respect for state court decisionmaking on matters of purely state law. The Court has held, for example, that the Due Process Clause "'does not take up the laws of the several states, and make all questions pertaining to them constitutional questions, nor does it enable [the Court] to revise the decisions of the state courts upon questions of state law.'"[222]

The Court nonetheless has entertained numerous due process challenges to state court determinations of state law.[223] In the criminal context, for example,

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question of state law in error. *See* Dugger v. Adams, 489 U.S. 401, 410 (1989) ("'[M]ere errors of state law are not the concern of this Court . . . .'" (quoting Barclay v. Florida, 463 U.S. 939, 957-58 (1983))); *Murdock*, 87 U.S. at 635; *see also* Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process." (quoting Gryger v. Burke, 334 U.S. 728, 731 (1948))); Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 273 (1927) ("It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." (citing McDonald v. Or. R.R. & Navigation, 233 U.S. 665, 669 (1914); Bonner v. Gorman, 213 U.S. 86, 91 (1909); Tracy v. Ginzberg, 205 U.S 170, 177 (1907); Iowa Cent. Ry. Co. v. Iowa, 160 U.S. 389, 393 (1896); Arrowsmith v. Harmoning, 118 U.S. 194, 195 (1886))).

222. *Am. Ry. Express Co.*, 273 U.S. at 272-73 (quoting Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 165-66 (1917)). Were it otherwise, the Court has said, "every alleged misapplication of state law would constitute a federal constitutional question." Beck v. Washington, 369 U.S. 541, 555 (1962); *see also Engle*, 456 U.S. at 121 n.21 ("If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" (alteration in original) (quoting *Gryger*, 334 U.S. at 731)).

223. *See, e.g.*, Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam) (affirming a criminal conviction on a different ground from the trial court decision violates due process); *Bouie*, 378 U.S. 347 (holding that South Carolina's interpretation of a state trespass statute violated federal due process guarantees by changing the law in effect at the time the defendant committed an offense); Cole v. Arkansas, 333 U.S. 196 (1948) (rejecting a state supreme court's affirmance of a state criminal conviction on a different statute from that relied upon at trial because doing so violated due process); Missouri *ex rel.* Mo. Ins. Co. v. Gehner, 281 U.S. 313 (1930) (finding a federal claim not forfeited through procedural default when an unpredictable application of state law created the federal claim); Saunders v. Shaw, 244 U.S. 317 (1917) (holding that basing a state appellate court decision on factfinding that the lower court held to be irrelevant violates due process); *see also* BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (finding that a state court's award of extraordinary punitive damages violates due process).

Several of these decisions have been in the context of property rights. *See* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) (finding that states have a duty under the Due Process Clause not to use unprecedented interpretations of state procedural law to defeat the right to challenge an administrative action in court); Fairfax's Devisee v. Hunter's

the Court has held that "[t]he due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice."[224] Under this standard, state court determinations of state law that fail "to observe that fundamental fairness essential to the very concept of justice" may be reviewed and overturned by federal courts.[225]

In the civil context, the Court has specifically used the Due Process Clause to reverse state court decisions that have dramatically and unpredictably changed state law. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,[226] for example, the Court held that state courts may not erratically change state law with the effect of denying a litigant any forum in which to press a federal claim.[227] Similarly, in *Saunders v. Shaw*[228] and *Missouri ex rel. Missouri Insurance Co. v. Gehner*,[229] the Court held that unanticipated dispositions at the close of state court proceedings permitted federal review for potential violations of the Due Process Clause. In *Bouie v. City of Columbia*,[230] the Court held that a state supreme court's interpretation of a state statute "unforeseeably" broadened its scope beyond a fair reading, in violation of federal due process requirements.

The Court has cabined federal "interfere[nce]" with allegedly erroneous state law decisions on due process grounds to those judgments that "amount[] to mere arbitrary or capricious exercise[s] of power," or are "in clear conflict with those fundamental 'principles which have been established in our systems

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Lessee, 11 U.S. (7 Cranch) 603 (1813) (finding that a state supreme court misconstrued its forfeiture laws in confiscating the land of a British subject).

224. Buchalter v. New York, 319 U.S. 427, 429 (1943).

225. *See* Lisenba v. California, 314 U.S. 219, 236 (1941). This is limited to decisions that "violated some right which was guaranteed to the defendant by the Fourteenth Amendment" and does not extend to decisions that federal courts find merely "undesirable, erroneous, or even 'universally condemned.'" Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)); *see* Chambers v. Florida, 309 U.S. 227 (1940) (finding the procedural protections in a state criminal trial so deficient as to deprive a party of fundamental guarantees under the Due Process Clause); *cf. Brinkerhoff-Faris*, 281 U.S. at 681-82 (holding that denial of a forum to enforce a federal right raises a federal question).

226. 281 U.S. 673.

227. *Id.* at 678 ("It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.").

228. 44 U.S. at 320.

229. 281 U.S. 313, 320 (1930).

230. 378 U.S. 347 (1964).

of jurisprudence for the protection and enforcement of private rights.'"[231] However, as Justice Kennedy notes in his concurring opinion in *Stop the Beach Renourishment*, a judicial decision that erratically changes established property rights may very well meet this standard.[232]

In their resort to a federal due process claim, litigants challenging erratic state property decisions may nevertheless encounter problems. There are two primary avenues for federal due process review. Litigants may either petition for direct review in the Supreme Court or file an action in federal district court pursuant to 42 U.S.C. § 1983. The primary problem with direct Supreme Court review of due process claims in lieu of judicial takings claims is a practical one. The Court hears, on average, seventy-five to eighty-five cases a year;[233] a renewed line of due process inquiry into substantive state court decisionmaking could flood the Court with cases. Any actual review would promise to be rare, if not sporadic, and, to this degree, might also fail to provide meaningful standards for state judges.[234]

In contrast, many of the obstacles to federal district court review of state judicial takings are jurisdictional. Federal law, under 28 U.S.C. § 1257, confers exclusive jurisdiction upon the U.S. Supreme Court to review final judgments rendered by the highest court of a state. In *Rooker v. Fidelity Trust Co.*,[235] the Court held that § 1257 inferentially bars the federal district courts from exercising the same jurisdiction.[236] The *Rooker-Feldman* doctrine continues to prohibit federal district courts from exercising subject matter jurisdiction over

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231. Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 273 (1927) (quoting Pennoyer v. Neff, 95 U.S. 714, 733 (1877)); *see also* Honda Motor Co. v. Oberg, 512 U.S. 415, 434 (1994) (stating that the Due Process Clause's "whole purpose is to prevent" "arbitrary deprivations of liberty or property"); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))).

232. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring).

233. *See* J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67 (2010), http://yalelawjournal.org/images/pdfs/840.pdf.

234. *See* Thompson, *supra* note 10, at 1511-12.

235. 263 U.S. 413 (1923).

236. *Rooker* affirmed a federal district court's dismissal for lack of jurisdiction over a suit challenging the federal constitutionality of a state court ruling.

judgments issued by the highest court of a state.[237] Many due process challenges to state property law decisions would originate out of decisions made by state high courts. There are, however, certain exceptions to the *Rooker-Feldman* doctrine, and challenges to state courts alterations of state law that are so dramatic as to violate the Due Process Clause may fall under these exceptions.[238]

Another problem is preclusion. In 1980, the Court extended its § 1738 preclusion jurisprudence to actions brought under 42 U.S.C. § 1983.[239] The Court explained: "[I]n cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override section 1738 or the common-law rules of collateral estoppel and res judicata."[240] Thus, only when state court proceedings fail to provide litigants with a "full and fair opportunity" to litigate their federal claims may federal courts assume jurisdiction of those claims.[241] Where due process challenges are based on state law claims already litigated in state court, federal district courts may be hesitant to review them.

A final barrier to district court review is met in federal abstention principles. In *Railroad Commission v. Pullman Co.*,[242] the Supreme Court committed the federal courts to abstaining from deciding federal constitutional claims where a state court clarification of—or decision on—a point of state law may resolve the case. Since 1941, the Court has extended *Pullman* abstention to actions brought under § 1983.[243] Although there has not been a Supreme Court decision applying *Pullman* abstention in several decades,[244] lower courts

237. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005) (suggesting that the federal district court had jurisdiction under the *Rooker-Feldman* doctrine); *see also* Reynolds v. Georgia, 640 F.2d 702, 706-07 (5th Cir. Unit B Mar. 1981).

238. *See* Sotomura v. Cnty. of Haw., 460 F. Supp. 473 (D. Haw. 1978); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd in part and rev'd in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, 477 U.S. 902 (1986). These cases reviewed the equivalent of a judicial takings claim against the State of Hawaii.

239. Allen v. McCurry, 449 U.S. 90 (1980).

240. *Id.* at 99.

241. *Id.* at 101.

242. 312 U.S. 496 (1941).

243. *See* Harrison v. NAACP, 360 U.S. 167 (1959).

244. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979).

continue to apply the doctrine.[245] Under *Pullman* abstention, where a federal district court remits a case back to the state courts and the parties elect to adjudicate both their federal and state law claims in state court, the parties are thereafter bound by the state court determinations—even if they choose to return to federal court.[246] In practice, even when parties seek to preserve their federal law claims, where their federal claims are "functionally identical" to their state claims resolution of the state claims carries full, preclusive effect.[247]

The Court's somewhat obscure *Burford* abstention doctrine may also present problems. In *Burford v. Sun Oil Co.*,[248] the Court held that federal courts should abstain from becoming embroiled in state law conflicts over complex, administrative schemes. *Burford*'s fact pattern mirrors that of *Stop the Beach Renourishment*: the petitioners claimed that a state administrative action had effected a taking of their property in violation of the Federal Constitution. The Supreme Court overturned the federal appellate court's decision and emphasized that federal courts should consider abstaining in complex state administrative cases in order to avoid "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy."[249] Although *Burford* abstention is rarely applied in the federal courts, beach renourishment programs, which frequently entail complex intra-state agency partnerships and which are a popular target for judicial takings claims, may provoke its application.

Based on these hurdles to filing in district court, litigants seeking to challenge erratic property law decisions under the Due Process Clause may fare better in the Supreme Court. Justice Kennedy's concurring opinion in *Stop the Beach Renourishment* paves the way for these challenges.

B. Due Process for Stop the Beach Renourishment

A procedural due process inquiry for judicial takings claims would provide better guidelines for both the Supreme Court and state courts. Although the inquiry is an imprecise science, procedural due process would nonetheless give

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245. *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4242 (2d ed. 1988).

246. *See* NAACP v. Button, 371 U.S. 415 (1963).

247. *See* San Remo Hotel v. City & Cnty. of S.F., 545 U.S. 324, 339 (2005).

248. 319 U.S. 315 (1943).

249. *Id.* at 327.

the Court a familiar framework to apply—and would confine the Court's analysis to factors discernable from the record below.[250]

Ultimately, the Florida Supreme Court's opinion in *Walton County v. Stop the Beach Renourishment* does not present legally cognizable problems under procedural due process. As the plurality ultimately acknowledges, the opinion is neither controversial nor unexpected under recent Florida law.[251] Previous Florida law is consistent with the court's holding and suffices to satisfy the notice requirements of procedural due process. In contrast, the Oregon Supreme Court's set of opinions leading up to *Stevens v. City of Cannon Beach*,[252] might appear to violate well-accepted notions of notice and retroactivity. In his dissent to the Court's denial of certiorari, Justice Scalia argued that the Oregon Court oscillated wildly between two polar opposite holdings without any explanation and without mention of one another. Although the Court denied certiorari in that case, procedural due process remains an open avenue for Supreme Court review of dubious state court determinations of state law.

CONCLUSION

Of the many objections to judicial takings doctrine raised in recent scholarship and by the Justices concurring in the plurality's opinion in *Stop the Beach Renourishment*, none has yet focused on the blow that opinion deals to state courts. The plurality's standard of independent review for state court property law decisions antecedent to federal takings claims cuts against over a century's worth of deference in this area. This deference has not been without purpose; it has served to check the Court's own power over state court

250. The traditional benchmarks of procedural due process include notice, retroactivity, and judicially manageable standards. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 546-47 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-37 (1991); Bouie v. City of Columbia, 378 U.S. 347 (1964); *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (Melville M. Bigelow, ed., William S. Hein & Co. 1994) (1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.").

251. The Florida Supreme Court found that the "right to contact with the water exists to preserve the upland owner's core littoral right of access to the water." Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d. 1102, 1119 (Fla. 2008).

252. 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

decisionmaking and, in doing this, has freed state courts to develop their own distinctive bodies of law responsive to local needs and histories.

Federal law has a role to play in state court determinations of state property law, but it is a role that at the very least, should be colored by some measure of deference to state courts. Independent review goes too far.

For over a hundred years, the Supreme Court has reviewed state court determinations of antecedent state law with the highest degree of deference. Concluding its opinion without so much as a nod to this history of deference, or to any image of state court autonomy, the plurality sets a new course for the Court. This Note has argued that it is the wrong course. As new judicial takings petitions begin to arrive on the Court's doorstep, it should view them with all the respect that it historically has accorded state court determinations of antecedent state law.