Suing Courts

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This Article argues for a new and unexpected mechanism of judicial accountability: suing courts. Current models of court accountability focus almost entirely on correcting legal errors. A suit against the court would concentrate on something different—on providing transition relief, by way of legal remedy, to those bearing the heaviest burdens of desirable legal change. These suits may at first appear impossible. But suing courts is conceptually rational and mechanically reasonable, a tool that eases legal transitions while navigating the many hurdles modern doctrine puts in the way. This Article sets out the first complete account of how, where, and why suing courts might work—both in the context of judicial takings and perhaps outside it, too. It shows how suing courts can simultaneously discipline judges and liberate them. And it outlines a surprising promise for all involved—a narrow hope for impacted parties and a new kind of accountability for law-changing courts.

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INTRODUCTION

Courts change the law. In ways big and small, understated and bold, courts modify legal standards and amend legal rules.

This Article is about accountability for those changes. It studies how we manage, mitigate, and moderate judicial alterations of the law. Many of those alterations involve unintended legal errors—gaps left or gaffes made by even the most careful courts. Here old models of court accountability apply. Appeal, mandamus, and habeas corpus are all meant to keep courts from getting things too far wrong.[1] But accountability is not always about error. It can also be about easing the costs of transitions while preserving flexibility for important legal change. Yet here old models falter, for there is no gap to fill and no gaffe to correct. We thus argue for something different: suing courts.

Suing courts may well seem impossible. Absolute immunity protects both judge and judiciary from civil action, shielding courts from almost precisely this form of legal reprisal.[2] But we will argue that judicial immunity is surprisingly inapplicable to the suits we envision, and we will show that its hardest edges have already started to fray. Even more, we will claim that the curious possibility of suing courts is not about constraining judicial conduct. It is about providing transition relief for court-made legal change, an unexpected sort of remedy that does as much to preserve judicial flexibility as to undercut it. The example of judicial takings claims shows how.

The Takings Clause of the Fifth Amendment prohibits the taking of private property "for public use, without just

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1 See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J Legal Stud 379, 381–87 (1995).

2 See *Butz v Economou*, 438 US 478, 511–12 (1978); *Bradley v Fisher*, 80 US 335, 351 (1871).

compensation."[3] This limit has long been understood to apply to legislatures and executives. But it has not applied to courts. In fact, the idea that courts could take property has always seemed somehow fantastic—occasional loose language, dissenting opinions, and speculative scholarly accounts aside.[4] Yet in 2010 a plurality of the Supreme Court opened the door to judicial takings. It argued, in *Stop the Beach Renourishment, Inc v Florida Department of Environmental Protection*,[5] that the Takings Clause applies to courts no less than to legislatures and executives. And it concluded that, when judicial interpretations of state property law generate independent takings claims, those interpretations are either invalid or require compensation.[6]

Reactions to *Stop the Beach* have been swift and largely critical. Some have argued that it is nonsensical, even perverse, to hold courts liable for interpreting state law.[7] Others have noted that judicial takings claims hinge on controversial normative commitments about the sources and content of property rights.[8] We share many of these concerns. But here we offer a salutary twist: claims against the court may actually smooth legal transitions, mitigating the harshest effects of legal alterations while still permitting the change to occur. The government may still act, that is, but it then must compensate those who bear a new law's most unreasonable burdens.

One aim of this Article is thus to link suing courts to appeals, mandamus, and habeas corpus—to show, for the first time, how the old models of court accountability may and may not fit with the new. Yet to understand this novel accountability (mis)fit, it is important to make better sense of what judicial takings claims (and claims like them) actually are. A related goal of this Article is thus to dissect these peculiar lawsuits, detailing for the first time what this curious legal invention may and may not do.

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3 US Const Amend V (limiting the federal power of eminent domain).

4 For an early scholarly account, see Barton H. Thompson Jr, *Judicial Takings*, 76 Va L Rev 1449, 1453, 1462–72, 1541–44 (1990). For opinions discussing the possibility of judicial takings, see *Hughes v Washington*, 389 US 290, 296–98 (1967) (Stewart concurring); *Hawaii v Zimring*, 566 P2d 725, 756 (Hawaii 1977) (Vitousek dissenting).

5 130 S Ct 2592 (2010).

6 See id at 2601–02 (plurality).

7 See, for example, John D. Echeverria, Stop the Beach Renourishment*: Why the Judiciary Is Different*, 35 Vt L Rev 475, 486–93 (2010).

8 See generally William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 Duke J Const L & Pub Poly 1 (2011). Consider also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 886–92, 922–26, 934–42 (2000).

Our detailing will reveal serious doubt. It will show that claims against the court are almost insolubly clumsy, riddled with hard questions about remedies and *Erie Railroad Co v Tompkins*,[9] preclusion and *Rooker-Feldman*,[10] timing and (again) immunity. Yet when viewed as a form of transition relief—as a kind of protection, that is, from the occasionally high costs of court-made legal change—these claims also hold an unappreciated promise: they may provide accountability where it would otherwise be lacking, not for lamentable legal error, but for the harshest effects of desirable legal change. A final aim of this Article is to show how suing courts may do just that, how it may both liberate and discipline judges.

Our proposal, then, is for civil suits against the courts when the costs of legal change are too high. Specifically, we argue that anyone affected by particular kinds of adverse legal rulings, whether a party to the primary litigation or not, should be able to sue courts for the effects of the decision, with compensation to be provided by the state. These suits are not about correcting judicial errors. They are instead about just the opposite—about providing a novel kind of remedy for beneficial but costly changes to the law. Some court-made changes have the potential to benefit many while unduly impairing a select few. But courts have only limited responses to these situations. They can reject the changes entirely, ossifying the law and blocking legal improvement. Or they can accept the changes wholesale, saddling some unlucky individuals with a disproportionate share of the costs. Our proposal adds a new and nimbler alternative, charting a way for courts to help allay the most inequitable individual burdens while still permitting valuable changes to the law. This kind of transition relief has its clearest doctrinal anchor in the Takings Clause, so much of our study of suing courts will focus there. But our proposal offers a novel way of viewing other claims as well, and we will briefly consider them, too.

Part I of this Article sets the judicial-accountability anchor. It considers appeals, mandamus, and habeas corpus—the law's most familiar, error-focused accountability forms.[11] This survey is meant to

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9 304 US 64 (1938).

10 This doctrine, named after *District of Columbia Court of Appeals v Feldman*, 460 US 462 (1983), and *Rooker v Fidelity Trust Co*, 263 US 413 (1923), expresses the seemingly innocuous idea that Congress has conferred appellate jurisdiction over state court judgments only upon the Supreme Court of the United States.

11 We do not claim these are the only models. Constitutional and congressional overrides can accomplish much the same thing. See, for example, US Const Amend XI, abrogating *Chisholm v Georgia*, 2 US (2 Dall) 419 (1793) (finding that Article III destroyed state sovereign immunity and allowed the federal courts to hear disputes involving states and

be careful, condensed, and largely uncontroversial. But still it serves a critical and original end: it outlines the law's current accountability options, showing how they favor inflexible all-or-nothing rules. And it provides a comparative legal baseline, as well as a set of useful counterpoints, for our unexpected proposal: civil suits against the courts.

Part II situates those suits in a new accountability model. It begins with the curious case of judicial takings—those seemingly hopeless claims recently endorsed by at least four members of the Court. It then links those claims to a broader and bolder accountability story, arguing that suing courts should be seen not as a foolish distraction but as an innovative means of transition relief. This idea is sure to invite controversy. Judicial takings claims alone have been called incoherent practically and bankrupt conceptually—a contrivance rooted in a normative vision of property that positivists and even modest realists should reject.[12] But this Part explains suing courts in a way both unanticipated and new. It argues, carefully and counterintuitively, that some suits against the court may do more than discipline judges. They may preserve legal flexibility and promote legal change. In a narrow range of cases, that is, suing courts may help both courts and those parties most affected by legal progress, creating space for legal transitions while crafting a mechanism for transition relief. And it can do so, even more, while avoiding floodgates and political economy problems. This Part thus ties judicial accountability, legal transitions, and suing courts together, making a creative case for permitting claims against courts.

Part III turns to mechanics. It considers how, when, and where those claims might actually work. Any claim against the court will confront a host of practical questions—about plaintiffs and defendants, immunity and timing, forum and remedy. This Part tackles these questions directly, offering a detailed account of the process and potential pitfalls of suing courts. In the end, this Part will show that the mechanics of suing courts are especially well suited to—and the complications most sufficiently allayed in—property cases, so it will argue that such suits fit best there. But Part III will also consider, sensibly and skeptically, if they might fit anywhere else.

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citizens of other states); Lilly Ledbetter Fair Pay Act of 2009, Pub L No 111-2, 123 Stat 5, codified as amended at 42 USC § 2000e and 29 USC § 626, abrogating *Ledbetter v Goodyear Tire & Rubber Co*, 550 US 618 (2007).

12 See, for example, Echeverria, 35 Vt L Rev at 488–90 (cited in note 7).

A short conclusion then brings this Article to a close. It returns briefly to the notion of court-made legal change. It recounts judicial accountability's important link to legal transitions. And it recalls the idea that both accountability and flexibility may benefit if there is some space, however narrow, for suing courts.

I. OLD MODELS OF ACCOUNTABILITY

Old models of court accountability begin and end with error. They create no new causes of action and impose no new forms of liability. They merely remedy—or aim to remedy—court-made mistakes. This Part examines the most familiar of those models. It studies appeals, mandamus, and habeas corpus—three devices focused, in one way or other, on finding and fixing judicial blunders.[13]

This Part also begins to join the old with the new. It introduces the surprising and novel accountability alternative of suits against the court. This alternative may seem at once daft and doomed to failure—because it misconstrues the role of courts in our political system and because it runs headlong into the screen of judicial immunity. But this Part contends that such suits are neither necessarily imprudent nor inevitably ill-fated, in part by assessing what kind of accountability they may offer, and in part by recounting what they have in common with older models.

A. Appeals

Appeals are now common in American courts. Today's parties regularly ask superior courts to review and reverse lower court decisions. Almost sixty thousand federal appeals were filed in 2010 alone.[14]

These numbers are not high because appellants have great chances of winning. Modern appellate practice provides at most targeted legal oversight: Parties are permitted to appeal only in particular places at particular times in particular ways.[15] Appellate

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13 See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex L Rev 1433, 1487–1500 (2000).

14 We draw these numbers from the *Judicial Business of the United States Courts* in the *2010 Annual Report of the Director* (published jointly with *Reports of the Proceeding of the Judicial Conference of the United States*). See Administrative Office of the US Courts, *2010 Annual Report of the Director: Judicial Business of the United States Courts* 12–26 (2010), online at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (visited Dec 27, 2011) (reporting the aggregate caseload data for the US courts of appeal and the US district courts).

15 See, for example, FRAP 4.

courts are allowed not to rehear all cases but to remedy errors—and only "harmful" errors at that.[16] It is no surprise, then, that most appeals are unsuccessful and most trial court decisions are affirmed.[17]

Today's error-focused appellate model has deep and surprising origins. It started, not with common law writs of error, but with something from the Church: a procedural device, called an "appeal," rooted in English ecclesiastical law.[18] This canon-law invention offered something more than error correction. It offered a platform on which higher courts could rehear entire cases—a kind of unfettered review by superior courts.[19]

Over time this freewheeling "appeal" merged with more familiar modern forms. Writs of error and certiorari rose to appellate prominence. Higher courts started looking only for what lower courts had gotten wrong.[20] This shift did not leave lower courts unaccountable, since layers of judicial review still reduced the risk that mistakes would go unnoticed, and since the threat of reversal still offered ample motivation to get things right. But it did limit what appellate courts could do: They could affirm a lower court's decision, either adopting the lower court's reasoning or substituting their own. Or they could reverse a lower court's decision, invalidating the initial outcome and requiring (on occasion) the lower court to retry things from the start. Most modern appellate courts still choose between the two.

In some cases, of course, the appellate court's options are not quite so stark. Some appeals present a kind of middle-region misstep, a lower court error that does not demand reversal. Here harmless error controls: appellate courts may spot, and even scold, a lower court blunder—but still affirm because that blunder did not affect the outcome. Harmless error thus charts a course different from outright affirmance or reversal. It may even offer, in some

16 See 28 USC § 2111; *McDonough Power Equipment, Inc v Greenwood*, 464 US 548, 553–54 (1984).

17 See Administrative Office of the US Courts, *Judicial Business* at 111 table B-5 (cited in note 14).

18 See Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 Hastings L J 913, 928–40 (1997).

19 See id at 914 (describing the differences between the current understanding of appeals and the early American understanding). In retelling this story, Mary Bilder revises the more conventional, common-law-based version told by Julius Goebel and Roscoe Pound. See id at 916–18, 967 (explaining and criticizing the Roscoe-Goebel view of the history of appeals). See also Roscoe Pound, *Appellate Procedure in Civil Cases* 72–73, 105 (Little, Brown 1941) (arguing that the appellate process in the United States grew out of a crude and confused adoption of English "common-law methods" during the colonial period).

20 Bilder, 48 Hastings L J at 915 (cited in note 18).

cases, a kind of subtle compromise, allowing courts to clarify the law without affecting particular parties' rights. Yet elsewhere harmless error may impede the law's development, screening off the hardest questions and inhibiting the law's progress.[21]

Our claim for suing courts promises something different, as the pages ahead will show. Like harmless-error analysis, suing courts can allow judges to update and integrate the law while still easing the party-borne burden of some forms of legal change. Yet our proposal is not about harmless errors. It is about the opposite—what might be called harmful improvements. And our proposal is not a substitute for appeals as they now operate. Appeals today function largely as up-or-down appraisals, binary decisions about whether to accept or reject a lower court decision wholesale. Suing courts offers something new and different, a novel model that upholds legal change while easing transitions. Old forms of judicial accountability cannot do this—not appeals, and certainly not mandamus.

B. Mandamus

Mandamus first appeared outside the courts. It started on the throne, where English kings used the mandamus power to compel faithful compliance with sovereign will.[22] Only when the king acted as judge did that power move inside the courtroom. So only when the king presided over the Court of King's Bench did the judicial writ of mandamus begin to take form.[23]

Early mandamus actions set a difficult standard. Writs were not issued merely to guide independent judgment or to channel official discretion. They were issued to enforce unambiguous duties and to implement clear legislative commands.[24] Officials who made dubious, even suspect, decisions would not face mandamus action. Officials who flouted their plain obligations would.

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21 See Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 NYU L Rev 1167, 1182 (1995). See also Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Georgetown L J 1509, 1554 (2009) (noting that harmless error, in its most extreme form, may invite courts to "ignore[] constitutional values other than accuracy in the determination of guilt") (quotation marks omitted).

22 See James L. High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition* ch 1 § 2 at 5–6 (Callaghan 3d ed 1896).

23 See id at ch 1 § 3 at 6–7 (cited in note 22); Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, As It Obtains Both in England, and in Ireland* ch 2 at 4 & n (a) (William Benning 1848).

24 See Tapping, *Writ of Mandamus* at ch 1 at 3 (cited in note 23).

Today's mandamus doctrine sets a comparable hurdle. It does not permit casual use of this "most potent" legal "weapon[]."[25] It allows courts to issue the writ only in "really extraordinary" circumstances: where the writ seeker has "no other adequate means" of relief, where her right to the writ is "clear and indisputable," and where the issuing court is otherwise convinced "the writ is appropriate."[26] This is true when mandamus is sought against government officials—like scofflaw sheriffs and unruly IRS agents.[27] It is also true when mandamus is sought against judges and courts.

The use of mandamus against courts now has a statutory source. The All Writs Act[28] empowers federal courts to deploy "all writs necessary or appropriate in aid of their respective jurisdictions"[29]—a phrase the Supreme Court has read to reach only clear abuses of discretion and "usurpation[s]" of court authority.[30] Mandamus has thus been used, for example, to stop improper exercises of personal jurisdiction and to correct baseless refusals to conduct jury trials.[31] Yet at the heart of mandamus is still the shadow of appeal. Current mandamus practice functions much like an appellate end run: it allows a party to seek immediate review of a lower court's decision—and to ask for an immediate error correction—before the lower court is finished. Mandamus and appeal are thus similar in focus and in function, since they both concentrate on fixing errors another court has made. But mandamus and appeal are very different in timing and in frequency. And they are also different in style and in form: mandamus is fashioned, not as a typical appeal, but as a separate legal action—and the defendant is sometimes listed as the judge or the court.[32]

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25 *Cheney v United States District Court for the District of Columbia*, 542 US 367, 380 (2004).

26 Id at 380–81. Federal Rule of Civil Procedure 81 actually "abolishe[s]" mandamus from federal civil actions, advising parties to seek relief via "motion under [other federal] rules." See FRCP 81(b). But the writ endures, there and elsewhere, nonetheless. See, for example, *Cheney*, 542 US at 390–92.

27 See, for example, *Ilkhani v Lamberti*, 50 S3d 1180, 1181 (Fla App 2010) (reversing a mandamus denial where it appeared that a sheriff was "required to deliver a certificate to the department showing the dates [petitioner] was at liberty on bond").

28 Act of March 3, 1911, 36 Stat 1156, 1162, codified as amended at 28 USC § 1651.

29 28 USC § 1651(a).

30 *Cheney*, 542 US at 390, quoting *Will v United States*, 389 US 90, 95 (1967).

31 For the assertion of personal jurisdiction, see *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 289–91 (1980). For the use of mandamus to compel a jury trial, see *Beacon Theatres, Inc v Westover*, 359 US 500, 511 (1959).

32 Judge Charles Woodson was the state trial court judge in *World-Wide Volkswagen*, 444 US at 286. Judge Harry Westover was the federal trial court judge in *Beacon Theatres*, 359 US at 500.

On the surface, then, mandamus actions may look much like the suits we envision. If nothing else, they prove that suits against the courts are sometimes permissible. But if our case captions are superficially similar, our core purpose remains importantly different. Mandamus is meant to be blunt and unusual, governed by another binary choice: cure an egregious error by "extraordinary remedy," or do nothing at all. The writ of habeas corpus is similar.

C. Habeas Corpus

Habeas corpus started much where mandamus did. It began with the king, who turned to the power of his "prerogative writs" when conciliar jurisdiction ended and the Star Chamber closed.[33] Like their certiorari and *quo warranto* siblings, habeas and mandamus once had much in common: an association with royal authority, an attention to remedial adequacy, and an adjudication by summary proceedings enforceable through the power of contempt. But mandamus and habeas were always importantly different. Mandamus compelled inferior courts and administrative officials to take action that the law clearly required. Habeas corpus forced a jailer to produce the "body" of an inmate so that a court could assess the legality of his confinement.[34]

The first uses of habeas corpus filled a gap in appellate practice. They aimed to supervise lower courts "in the absence of appellate proceedings."[35] But today's habeas is less a substitute for an appeal than a supplement to one: it permits those in custody to contest the validity of their detention even after the normal appellate process is done.[36] Habeas is thus an error-focused form of collateral attack, a backdoor challenge—by separate civil action—to decisions imposing confinement. It is also a fertile ground for ideological battle—about

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33 Much of this happened in the troubled years of the seventeenth century. In those decades, as tensions pushed toward the Glorious Revolution, King James II attempted to establish separate ecclesiastical (that is, conciliar) courts—tribunals that both Parliament and the common law courts disliked. James II eventually abdicated the throne; William and Mary established a constitutional monarchy, and the English Bill of Rights in time prohibited all ecclesiastical courts. But James II's attempts to deploy "prerogative writs" to aggrandize his power—much like the notorious Star Chamber—still left an indelible mark, nowhere more so than through habeas corpus. See Pfander, 78 Tex L Rev at 1442–43 (cited in note 13) (recounting the early history of the prerogative writs as devices used by the King's Bench to control and direct inferior institutions).

34 See id at 1443–45.

35 Note, *Developments in the Law: Remedies against the United States and Its Officials*, 70 Harv L Rev 827, 864 (1957).

36 See id. Note that this writ reaches only persons in some sort of custody. The writ of *coram nobis* covers those who have already completed their punishment terms.

federal supervision of state judiciaries, about the preclusive effect of state-court judgments, and about the epistemological myth of perfect outcomes.[37]

In the middle of the last century, federal courts charted an assertive habeas course. The Warren Court's "great trilogy of habeas corpus decisions"[38]—like *Brown v Allen*[39] before them—blazed a path for expansive court intervention and demanding habeas review.[40] Habeas courts could assess the merits of other courts' decisions largely de novo. Prisoners could submit petitions for the writ often, repeatedly, and long after their convictions. And judges could find either legal or factual error—and, once found, order a prisoner's immediate release. Habeas was not, in this vision, merely the "Great Writ" of legal process. It was almost an "omnipotent writ of error."[41]

But this omnipotence was not to last.[42] Through the 1970s and 1980s the Supreme Court slowly chipped away at the writ's once-grand promise.[43] And by 1996 habeas review had been seriously deflated, as the Antiterrorism and Effective Death Penalty Act[44] (AEDPA) changed many of its rules.[45] One AEDPA section

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37 See Frederic M. Bloom, *State Courts Unbound*, 93 Cornell L Rev 501, 536–40 (2008). These battles take unsurprising forms. The first pits advocates of state prerogative against defenders of federal authority. The second asks why habeas actions, which function largely like appeals, are not precluded by Act of June 25, 1948, 62 Stat 947 (1948), codified at 28 USC § 1738, the full faith and credit statute. And the third notes that, at least in hard cases, more review may not bring courts closer to "right" results. See Bloom, 93 Cornell L Rev at 536–40 (cited in note 37). See also Frederic M. Bloom, *Unconstitutional Courses*, 83 Wash U L Q 1679, 1704 (2005); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441, 447–49 (1963).

38 Bloom, 83 Wash U L Q at 1705 (cited at 37) (quotation marks and citations omitted).

39 344 US 443 (1953).

40 See Larry W. Yackle, *The Habeas Hagioscope*, 66 S Cal L Rev 2331, 2348–49 (1993) (arguing that the Warren Court treated habeas as the "federal machinery for bringing new constitutional values to bear in concrete cases").

41 Roger Berkowitz, *Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings*, 64 La L Rev 477, 482 (2004).

42 As Kent Scheidegger once noted, Congress has come "tantalizingly close to abrogating the *Brown* rule" several times. Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum L Rev 888, 890 (1998). The Powell Committee steered perhaps the most prominent of these efforts. For a full text of the Powell Committee's report, see *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases*, 101st Cong, 1st Sess (1989), reprinted in 135 Cong Rec 24694.

43 See, for example, *Teague v Lane*, 489 US 288, 316 (1989) (O'Connor) (plurality) (narrowing retroactivity in habeas settings); *Stone v Powell*, 428 US 465, 493–96 (1976) (prohibiting habeas review of already litigated Fourth Amendment claims).

44 Pub L No 104-132, 110 Stat 1214 (1996).

45 See AEDPA §§ 101–08, 110 Stat at 1217–26, codified at 28 USC §§ 2244, 2253–55, 2261–66, 21 USC § 848.

established new exhaustion requirements;[46] another erected more demanding standards for successive petitions.[47] One section set a less generous statute of limitations;[48] still another truncated the review process in certain capital cases.[49]

And one AEDPA section modified how habeas tribunals were to review decisions made by other courts.[50] This key section—§ 2254(d)—did not alter the form of habeas petitions or eliminate the power of federal courts to consider the substance of state court decisions.[51] Nor did it undo habeas's noteworthy, if still formally dubious, exemption from ordinary preclusion doctrine and the full faith and credit statute.[52] But it did severely curtail the ability of courts to grant the writ, limiting its use to cases in which state court decisions were "contrary to" or an "unreasonable application" of clearly established federal law—to state court decisions, that is, that were somehow worse than wrong.[53] After AEDPA, then, state courts could commit some legal errors without fear of habeas reversal. And after AEDPA, a meager accountability replaced the writ's old omnipotence.

Suits against the court may prove similarly restricted, as the pages ahead will show. They may also mimic habeas in the way they raise hard questions about federal-state interaction, appear incompatible with old rules of preclusion, and open space for state courts to assert new visions of longstanding law—habeas because some "wrong" decisions will be ratified as "reasonable," suits against the courts because dramatic change will carry some measure of transition relief. But the analogy to habeas is still far from perfect.

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46 See AEDPA § 104(1), 110 Stat at 1218–19, codified at 28 USC § 2254(b).

47 See AEDPA § 106, 110 Stat at 1220–21, codified at 28 USC § 2244(a)–(b).

48 See AEDPA § 105, 110 Stat at 1220, codified at 28 USC § 2255(f).

49 See AEDPA § 107, 110 Stat at 1223–26, codified at 28 USC §§ 2264–66.

50 See AEDPA § 104, 110 Stat 1219, codified at 28 USC § 2254(d).

51 This is no small thing. Whether courts may review is itself an important question—and not one with uniformly easy answers. See, for example, *Immigration and Naturalization Service v St. Cyr*, 533 US 289, 298–314 (2001).

52 See 28 USC § 2254(d).

53 28 USC § 2254(d). See also *Williams v Taylor*, 529 US 362, 404 (2000). These two clauses have distinct meaning. To fit the "contrary to" standard, a state court decision must either follow the wrong rule or blatantly misread the facts. Id at 405–07. To satisfy the "unreasonable application" standard, by contrast, a state court decision need not follow the wrong governing rule, but simply apply the right rule "unreasonably to the facts." Id at 407–09. What "unreasonable" means remains unclear. But what is clear is what it does *not* mean: "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Id at 410 (emphasis omitted). Wrong is not enough. To fit § 2254(d)'s "unreasonable application" clause, a state court decision must be wrong and unreasonable—that is, unreasonably wrong. See Bloom, 93 Cornell L Rev at 540 (cited in note 37).

For one, the flexibility habeas offers is about legal lapses, court-made blunders that are now, like harmless errors, left largely in place. For another, the foundation habeas builds from is forever rooted in an error-centric, binary choice: fix another court's misstep by releasing the prisoner's body, or leave the decision alone. Suits against the court offer a different kind of flexibility and build from a different kind of foundation. And they promise a novel kind of judicial discipline, a liability-based form of accountability in a world mostly governed by blunter, property-type rules.[54]

D. A Peek at the New

Suing courts is new in more fundamental ways, too. We propose to permit suits against courts, not for egregious legal errors or shocking judicial abuses, but for decisions that appropriately, even beneficially, change the law. Parts of our proposal thus reach back to older models—to the wide-open beginnings of ecclesiastical "appeals," to the court-naming captions of petitions for mandamus, and to the federalist tensions of habeas corpus. Other parts recall those old models' more modern quirks—the middle-ground potential of harmless error, for example, and the wiggle room AEDPA offers to state courts applying imprecise law. But the core of our idea is new by every measure. We offer a novel model of judicial accountability—one that infuses discipline with flexibility, substitutes a new focus on harmful improvements for an old fixation on legal error, and supplements traditional property-like remedy options with new liability-like rules.

How we should make sense of these suits is the subject of the Part that follows. There, with judicial takings claims as our focus, we consider both doctrine and theory—modern takings case law, modes of judicial accountability, and mechanisms of transition relief. We then turn to how these suits might work, practically and procedurally, in the Part after that. But here, even at this early stage, it is important to address something different, a preliminary matter of institutional competence and the role of common law courts.

Common law courts make a great deal of law—in tort and in contract, in procedure and in remedies. Suing courts in many of

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54 For a discussion of the differences between property rules and liability rules, see Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1092 (1972). Like the distinction between property and liability rules, we propose expanding the possible remedies for judicial accountability, moving beyond binary, up-or-down choices toward more nuanced, middle-ground forms.

those settings presents no particular comparative concern. No one credibly claims, for example, that courts should refrain altogether from making law in contract or in tort. But in property, some say, things should be different. Property should be treated as legally "exceptional," dominated by state legislatures and placed largely outside the purview of common law courts.[55]

Our suits envision a much less marginal judiciary. They place courts at the center, not on the sideline, of some essential legal change—property and otherwise—and then ensure accountability for it. Our goal, to be clear, is not to invite or endorse rash judicial lawmaking. The many forms of judicial accountability, from the old to the new, will surely discipline judges, ensuring that few will stray from the common law's model of "cautious, incremental" change.[56] But we start from two premises that may distance us from "property exceptionalists":[57] one is that courts are as competent in the property realm as they are outside it; the other is that courts will persist in making law in property and elsewhere, regardless of their relative competence.

The second of these premises is a simple nod to reality. Courts make law. In torts, for example, courts have outlined new forms of causation and articulated new formulas for assigning liability.[58] In property, they have changed public trust doctrine,[59] introduced the implied warranty of habitability in residential leases,[60] and taken the lead (in some states) in restricting the definition of "public use" under state constitutional law[61]—all in the last thirty years. This lawmaking will surely continue.[62] Suing courts, then, is not an answer to a fleeting question. It is a calculated response to an inevitable feature of American law.

Suing courts also accepts the notion that judges are competent and credible lawmakers. Legislatures may well be preferable by some measures—as deliberative bodies directly accountable to the

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55 See Hanoch Dagan, *Judges and Property*, in Shyam Balganesh, ed, *Intellectual Property and the Common Law* *4–9 (Cambridge forthcoming 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1841725 (visited Dec 28, 2011).

56 Id at *7.

57 Id at *4.

58 See, for example, *Palsgraf v Long Island Railroad Co*, 162 NE 99, 99 (NY 1928).

59 See, for example, *Matthews v Bay Head Improvement Association*, 471 A2d 355, 365–66 (NJ 1984).

60 See, for example, *Hilder v St. Peter*, 478 A2d 202, 208 (Vt 1984).

61 See Ilya Somin, *The Judicial Reaction to* Kelo, 4 Albany Gov L Rev 1, 7–9 (2011).

62 The academic response to *Stop the Beach* includes a veritable catalog of the ways in which courts do, and can be expected to, change the content of state property law. See, for example, Echeverria, 35 Vt L Rev at 490 (cited in note 7).

electorate or as fact-gathering entities equipped to filter massive piles of information and to sift through many frequencies of noise. But courts remain appropriate agents of legal change. They are typically careful and conscientious in changing law and resolving cases. They permit, and often promote, participation from diverse parties.[63] And they have "daily and unmediated access to actual human situations"—a rooting in reality that both "checks [judicial] reveries in theory" and helps tailor judicial solutions to real life.[64] Legislatures may still be comparatively better in some contexts. But in terms of expected performance and democratic legitimacy, courts are at least adequate.[65]

The fact that they are adequate, of course, does not mean they should go unmonitored. Appeal, mandamus, and habeas corpus do much to constrain today's judges, holding them accountable for legal errors of many types. But these old models of accountability have a deliberately narrow focus and take a decidedly narrow approach. They look for harmful errors through mostly property-rule-like lenses and leave all other concerns aside. Accountability by other means for other things thus calls for something new and different. It calls for what we have just sketched briefly: suits against the courts. A more detailed study of these suits, starting with their firmest doctrinal anchor, follows.

II. A NEW MODEL: SUING COURTS TO SAVE THE LAW

Less than two years ago, suing courts found an unlikely ally: a plurality of the Supreme Court. In *Stop the Beach*, four justices argued that a state court's interpretation of its own law could effect a taking of property and thus give rise to a suit against the court.[66] The idea was not entirely new. Barton Thompson, in a prescient 1990 article, reasoned that courts were as constrained by the Takings Clause as any other government actor[67]—and both text and property reality seemed to offer support. The Takings Clause's text says only that "private property [shall not] be taken for public use, without just compensation," leaving the identity of the "taker" up for grabs.[68]

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63 See generally Frederic M. Bloom, *Information Lost & Found*, 100 Cal L Rev (forthcoming 2012).

64 Dagan, *Judges and Property* at *21 (cited in note 55) (quotation marks omitted).

65 See id. We discuss these issues at greater length. See Parts II and III.

66 *Stop the Beach*, 130 S Ct at 2601–02 (plurality).

67 See Thompson, 76 Va L Rev at 1541 (cited in note 4).

68 US Const Amend V. For an example of an amendment that specifies to which branch of government it applies, see US Const Amend I ("Congress shall make . . .").

And property reality appears resistant to any formal distinction, since owners suffer the same deprivation no matter who—legislature, administrative agency, or court—took their land. By these key measures, then, suing courts might seem more than just possible. It might seem uncontroversial.

But by other measures, the idea remains quite contentious. Should liability really reach courts for interpreting the content of state law? Who defines "property" if not state courts? And, perhaps most starkly, can courts really be sued just for doing their jobs? *Stop the Beach* barely hints at these hard questions, but this Part supplies what the opinion does not. It begins with a brief review of the Supreme Court's splintered and speculative *Stop the Beach* opinion. It then argues that judicial takings claims provide a blueprint for a new model of judicial accountability.

A. An Opinion and a Trap

Stop the Beach is already an infamous decision. In just over a year, the opinion has received significant academic attention[69]—so much so that the case's details are now fairly well known. We do not wish to rehash these familiar facts, nor do we want to get bogged down in the countless and (for our purposes) unnecessary complexities of Florida's coastline law. We thus introduce *Stop the Beach* in a way that sets our particular stage—a stage built for exploring how the Court understands the problem of suing courts and for examining the Takings Clause's role in creating a new model of judicial accountability.

In 2007, Florida amended the Beach and Shore Preservation Act[70] to address the problem of beach erosion. Among its many provisions, the Act redefined the "mean high-water line"—a notional line, running parallel to the shore, that ordinarily sets the boundary between public and private property.[71] An actual mean high-water line can move over time. It shifts with the gradual erosion or slow accretion of sand, sediment, and other deposits to the beach. Owners of property abutting the water typically hold rights to accretions, so these littoral owners generally hold property that can

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69 See, for example, Echeverria, 35 Vt L Rev at 476–79 (cited in note 7); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U Richmond L Rev 903, 913–16 (2011); See also generally Symposium, *Judicial Takings: Exploring the Boundaries of the Fifth Amendment*, 6 Duke J Const L & Pub Poly 1 (2011).

70 1961 Fla Laws ch 61–246, amended by 2007 Fla Laws ch 2007–99, codified at Fla Stat §§ 161.011 to 161.45.

71 *Stop the Beach*, 130 S Ct at 2599.

grow. But Florida's Act changed this. It essentially replaced the fluctuating mean high-water line with a fixed "erosion control line"—a line that held firm no matter how much sand piled up or washed away.[72] One consequence of this change was to eliminate the right of littoral owners to the expansion of their property through slow accretion. And another consequence was to create a potential property chasm, a strip of land between the actual and the legal mean high-water marks that could displace the littoral owners' right to own all the way to the water. Yet the Act was noncommittal about the government's obligation to compensate property owners for these changes. It merely provided for compensation as directed by Florida's courts.[73]

Plaintiff in *Stop the Beach*, a nonprofit corporation formed by littoral property owners, filed suit in state court after losing an administrative challenge.[74] The suit alleged that the Act fundamentally reconfigured littoral owners' rights in a way that amounted to an unconstitutional taking. An intermediate state appellate court agreed, but the Florida Supreme Court did not, holding that the Act effected no taking because littoral owners had no right to own all the way to the water's edge.[75] Plaintiff then filed a petition for writ of certiorari to the United States Supreme Court, though here with an unusual twist: it alleged a new taking of property, not by the Florida legislature, but by the Florida Supreme Court.[76] That state court, plaintiff argued, took the owners' property by itself changing the content of their property rights.

The Supreme Court granted cert but rejected plaintiff's claim. By unanimous vote,[77] the Court determined that the Florida Supreme Court was right on the merits: preexisting Florida property law did not provide the rights that the plaintiff claimed, so nothing had been taken by the Act or by the court.[78] But if the Supreme Court was

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72 See Fla Stat Ann § 161.191(2).

73 See Fla Stat Ann § 161.141.

74 *Save Our Beaches, Inc v Florida Department of Environmental Protection*, 27 S3d 48, 50 (Fla App 2006).

75 *Walton County v Stop the Beach Renourishment, Inc*, 998 S2d 1102, 1105 (Fla 2008).

76 Petition for Writ of Certiorari, *Stop the Beach Renourishment, Inc v Florida Department of Environmental Protection*, No 081151, *15 (filed Mar 13, 2009) (available on Westlaw at 2009 WL 698518).

77 Justice John Paul Stevens, an owner of Florida property, took no part in the decision.

78 The Supreme Court acknowledged that Florida law had previously excluded additions to littoral owners' land through avulsion. See *Stop the Beach*, 130 S Ct at 2599 (plurality) ("[W]hen a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions."). An avulsion is a "sudden or perceptible loss of or addition to

unanimous about the plaintiff's takings conclusion, it was divided on the plaintiff's key premise. A plurality of justices explicitly approved that premise, contending that a judicial decision could, on the right facts, violate the Takings Clause. Other justices disagreed, at least in part, and wrote separately on the issue.

On the first judicial takings question—whether there is such a thing at all—four justices answered yes while the others more or less demurred. Justice Antonin Scalia wrote for the first group, arguing that judicial takings should be fully recognized.[79] Nothing in the Takings Clause, he noted, targets "a specific branch" of government.[80] The clause instead targets state conduct that "recharacterizes" private property as public property, no matter what state actor does it.[81] Any distinction between courts and others would thus be baseless and "absurd," allowing a state "to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[82]

Justice Anthony Kennedy, joined by Justice Sonia Sotomayor, neither promoted nor foreclosed that distinction—or the possibility of judicial takings overall. But Justice Kennedy did argue that the plurality's move was premature, since it articulated a basis for judicial liability when the facts did not compel it.[83] He also argued that the Due Process Clause, not the Takings Clause, provides the principal bulwark against judicial decisions that interfere with property owners' legitimate expectations. Owners subject to arbitrary or irrational judicial rulings—or rulings that exceed the "incremental modifications" inherent in the common law tradition—need not resort to judicial takings.[84] They could find remedy through due process instead.[85]

Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, expressed even greater skepticism about judicial takings. His concerns were largely pragmatic. He feared that suing courts risked opening legal floodgates, invited "federal interference," and

land by the action of the water or a sudden change in the bed of a lake or the course of a stream." Id at 2598.

79 Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito joined Justice Scalia's opinion.

80 Id at 2601.

81 See id.

82 Id.

83 *Stop the Beach*, 130 S Ct at 2617–18 (Kennedy concurring) ("It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators.").

84 Id at 2615.

85 See id at 2614.

disrupted state control over "matters that are primarily the subject of state law."[86] Yet even Justice Breyer left open the possibility of judicial takings, meaning no justice expressly disclaimed them. He also left room to allay his concerns, something we attempt in the pages below.

On a second judicial takings question—what remedy should follow—the justices again splintered. Justice Scalia argued that the right remedy was straightforward and appeal-like: reversal of the state court's judgment.[87] Justice Kennedy contended that violations of the Takings Clause often require compensation in addition to (or instead of) injunctive relief—and that this rule should hold for judicial takings too, even if it prompts difficult federalism and sovereign immunity questions.[88] Justice Breyer left the remedies question unexplored.

Yet as divergent as these opinions in some ways are, they share a crucial starting point. With only one brief exception, all of the justices view judicial takings—and thus suing courts—as a kind of constraint on state court decision making. As conceived by the Court, that is, suing courts is merely a new mechanism for achieving an old goal: correcting court-made errors. By the terms of Justice Scalia's plurality opinion, in fact, the appropriate outcomes in a judicial takings claim are affirmance or reversal.[89] Suing courts, to him, is all but indistinguishable from typical appeals.

At first glance, this resemblance makes some sense. *Stop the Beach* reached the Court by way of writ of certiorari under 28 USC § 1257.[90] That provision permits the Supreme Court to overturn state court decisions that run afoul of federal law. If the Connecticut Supreme Court interpreted its state long-arm statute in a way that violated due process, for example, the Supreme Court could grant

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86 Id at 2618–19 (Breyer concurring).

87 See *Stop the Beach*, 130 S Ct at 2607 (plurality) ("If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question.").

88 See id at 2617 (Kennedy concurring):

> It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief: The Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking," and the Court subsequently held that the Takings Clause requires the availability of a suit for compensation against the States.

(internal citations omitted), citing *Ruckelshaus v Monsanto Co*, 467 US 986, 1016 (1984).

89 See *Stop the Beach*, 130 S Ct at 2607 (plurality).

90 Stop the Beach Petition for Certiorari at *2.

cert under § 1257 and reverse. If the Florida court defined "mean high-water line" in a way that violated the Fifth Amendment, in turn, the Supreme Court could do the same. Adding a judicial takings claim here would simply layer on rhetorical flourish, appending a new label to an old, error-focused accountability form.

But a second look reveals a subtle trap. The examples above—of state long-arm statutes and "mean high-water lines"—may look identical through narrow certiorari lenses. But there is a crucial difference: Due process has some meaning independent of state law.[91] Property may not.[92] The Supreme Court has long held that the substantive content of property rights comes, not from federal doctrine or some brooding omnipresence, but from state law.[93] When federal courts apply the Takings Clause, then, they must look to state law—judge-made and statutory—to define the property rights at issue. After *Erie*, there is simply no alternative—no federal property-defining doctrine, no general federal common law.[94] The highest authority on these matters is a state's highest court, supreme and infallible within its own realm. Judicial takings thus cannot be seen as a means of error correction, since authoritative state courts cannot be wrong about the content of their own law. Such is the positivist trap.[95]

Some have tried to escape this trap by searching out alternative sources for property rights. A few, like Eric Claeys, have argued that strong "natural rights" conceptions of property exist outside judicial pronouncements.[96] Others, most notably Thomas Merrill, have

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91 See *Town of Castle Rock, Colorado v Gonzales*, 545 US 748, 756–57 (2005).

92 But see Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 Wm & Mary L Rev 301, 306–07 (1993) (arguing that "property" traditionally had a "natural" meaning while "liberty" (and thus "due process") was defined purely by positive law).

93 See, for example, *Board of Regents of State Colleges v Roth*, 408 US 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

94 See *Erie*, 304 US at 78.

95 Or "conundrum." See Wayne McCormack, Lochner*, Liberty, Property, and Human Rights*, 1 NYU J L & Liberty 432, 437–38 (2005). See also Jonathan Remy Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 Tulane L Rev 691, 702 n 27 (2009) ("The trap arises because the United States Supreme Court has on numerous occasions stated that the property interests that the Constitution protects are determined by reference to state law.").

96 Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L Rev 1549, 1566–74 (2003). See also Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 Tex Rev L & Polit 25, 72–81 (2002). For a discussion of "natural rights" in a specific judicial takings setting, see generally Richard A. Epstein, *Littoral Rights under the Takings Doctrine:*

suggested that property (like due process) has independent constitutional meaning—content that can be located through "general criteria" separating constitutional property from other less sanctified forms.[97] And Justice Scalia has relied on similar "background principles" in his consideration of takings more generally.[98] His approach to "public harms" is instructive. Courts have long held that a government can prevent public harms without violating the Takings Clause.[99] The key question, then, is the antecedent one: Who gets to decide what counts as preventing a public harm? If a state legislature determines that pollution is harmful, for example, will that legislature's own environmental regulations be immunized from takings liability as a result? Can California label pollution a harm, that is, and then regulate pollution-emitting factories with impunity? Justice Scalia has answered that question in the negative—not because the state is wrong about environmental impact, but because it stretches the "harm prevention" defense too far.[100] That defense, Justice Scalia claims, is anchored stubbornly in its common-law-nuisance past, reaching only those regulations consistent with background principles of property and nuisance law.[101]

This anchor works almost identically when the question shifts to defining property. Property is defined, in this account, at least in part by something other than—and likely older than—current pronouncements by state courts. It has substantive content exclusive of state law. The Takings Clause can thus work as a tool of error correction because federal courts have some capacity to decide, even on matters of property rights, when states are wrong.

The Clash between Ius Naturale *and* Stop the Beach Renourishment, 6 Duke J Const L & Pub Poly 37 (2011).

97 Merrill, 86 Va L Rev at 893 (cited in note 8) (advocating a "patterning definition" that would allow courts, when assessing state law, to see if that law creates a "legally recognized interest that satisfies [generally shared] criteria").

98 See, for example, *Lucas v South Carolina Coastal Council*, 505 US 1003, 1029–31 (1992).

99 See, for example, *Hadacheck v Sebastian*, 239 US 394, 410 (1915); *Mugler v Kansas*, 123 US 623, 661–62 (1887). As Justice Louis Brandeis argued in his dissent in *Pennsylvania Coal Co v Mahon,* 260 US 393 (1922) (Brandeis dissenting), a government could obviously forbid a coal company from releasing fatal gas without having to provide compensation for the loss in value to the mine. Id at 418.

100 *Lucas*, 505 US at 1029 ("A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance."). We recognize that preemption and dormant commerce clause doctrine also limit state regulatory might.

101 Id.

Others are less sanguine about these efforts to delimit property. We count ourselves in this camp. In fact, we agree with what Justice Harry Blackmun wrote so bitingly about Justice Scalia's "common law nuisance" constraint:

> There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free."[102]

Like public harms, then, property rights can and should be outlined by today's state legislatures and state courts.[103] This may tumble into the positivist trap, something that elusive "natural rights" arguments and amorphous "background principles" accounts understandably labor to avoid. But these alternatives steer clear of the trap at too steep a price, relying almost invariably on arbitrary, misleading, and potentially unprincipled line drawing.

Our project does not depend on resolving this thorny puzzle here. We need only make the more moderate point that the *Stop the Beach* plurality's attempt to frame judicial takings claims as an unremarkable application of § 1257 certiorari jurisdiction works only if one deeply controversial premise holds true. It works only if property (like due process) has some independent constitutional meaning. The plurality seems to think that it does, but we are deeply skeptical—and we count *Erie*, the logic of positivism, and seventy-five years of Supreme Court precedent on our side.

But perhaps judicial takings claims are not about error correction. Perhaps these claims sketch a blueprint for a very different model of judicial accountability—and so we hope to show. This model hinges, not on accountability for court errors, but on accountability for the costs that accompany some worthwhile legal change. The ability to sue courts, that is, may allow the law to improve while providing important relief to those most adversely impacted by the transitions. Suing courts, in short, is a form of

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102 Id at 1055 (Blackmun dissenting).

103 As Frank Michelman acerbically observed, "It would be extremely surprising if the *Lucas* decision turned out to carry in its innards a disguised attack on the premises of *Erie*, which doesn't seem to be the sort of decision to be overruled sub silentio." Michelman, 35 Wm & Mary L Rev at 320 (cited in note 92).

transition relief. This is unquestionably an unorthodox view of judicial accountability and an unconventional take on judicial takings. But it is, unlike the error-correcting model, a more coherent way to understand suing courts and a more consistent gloss on the goal of the Takings Clause.

We should reiterate that this is not what the Court suggests in *Stop the Beach*. The plurality there treats judicial takings claims as just the opposite—as an impediment to legal change and as a tool to stop legal transitions, believing that courts "have no peculiar need of flexibility."[104] Even the more skeptical justices, like Justice Kennedy, think that "[t]he evident reason for recognizing a judicial takings doctrine would be to constrain the power of the judicial branch."[105] But Justice Kennedy also hints, perhaps inadvertently, at an alternative. He explicitly notes the possibility that judicial takings claims could actually increase, rather than diminish, judicial flexibility—not because judges will forever shrink behind the screen of judicial immunity, but because judicial takings might "give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid."[106] Justice Kennedy views this "new assurance" as a reason to reject judicial takings. We view it differently. We think that this kind of transition relief might be judicial takings' most salutary feature—a way past old error-correction models and a key to unlock new forms of judicial accountability.

B. Suing Courts as Transition Relief

The Takings Clause is unique in the Bill of Rights because it does not protect an individual right against government incursion. It provides only that compensation is required if the government takes private property. Yet determining what qualifies as a taking has proven anything but easy, and the doctrine here remains doggedly opaque. *Penn Central*'s[107] ad hoc balancing test, which anchors takings doctrine, considers three factors—(1) the character of the government action, (2) the resulting diminution in value, and (3) the extent of its interference with the property owner's distinct

104 *Stop the Beach*, 130 S Ct at 2609 (plurality).

105 Id at 2615 (Kennedy concurring).

106 Id at 2616.

107 *Penn Central Transportation Co v New York City*, 438 US 104 (1978).

investment-backed expectations—and there is persistent debate about the content of all three.[108]

There is also a serious question about the goal of the inquiry. One prominent vision of the Takings Clause holds that the clause constrains government actors and corrects regulatory mistakes. This view, rooted in standard economic thinking, sees the compensation requirement as a way to force the government to internalize the costs of its actions, thereby preventing fiscal illusion and ensuring that government actions create more benefit than harm.[109] Another prominent vision holds that the Takings Clause shields property owners from excessive government burdens. This view, articulated by the Court most notably in *Lingle v Chevron USA Inc*,[110] sees the takings test as "focuse[d] directly upon the severity of the burden that government imposes upon private property rights."[111] These two visions are sometimes conflated, at least for regulatory takings, but they stand importantly apart. They read the purpose of the clause very differently, and they can generate conflicting prescriptions.[112]

They also function very differently when the actor taking property is a judge. Put simply, the error-correction view has little if any place in judicial takings. In the context of regulatory takings, there is already significant debate about the effect of compensation on government incentives. Public choice theorists in particular have attacked the idea that takings liability creates efficient regulatory incentives, noting that governments and private actors internalize costs in different ways. Private actors internalize these costs more or

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108 Id at 123–24, 134–38. For this reason, takings law has been nominated for the "doctrine-in-most-desperate-need-of-a-principle prize." Jed Rubenfeld, *Usings*, 102 Yale L J 1077, 1081 (1993). For thoughtful accounts of *Penn Central*'s vagueness, see David A. Dana and Thomas W. Merrill, *Property: Takings* 121–68 (Foundation 2002); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L Rev 93, 190–91 (2002).

109 See Richard A. Posner, *Economic Analysis of Law* 73–74 (Aspen 8th ed 2011); Richard A. Epstein, *Bargaining with the State* 84–85 (Princeton 1993); William A. Fischel and Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J Legal Stud 269, 269–70 (1988). Mistake elimination can be accomplished by making the government compensate owners, or by performing direct review of the substance of the government's decision—an avenue seemingly opened by the Supreme Court in *Agins v City of Tiburon*, 447 US 255, 260–62 (1980), but perhaps closed in *Lingle v Chevron USA Inc*, 544 US 528, 532, 540 (2005). Even after *Lingle*, though, the opportunity for direct review of the rationality of government decision making under the Takings Clause remains possible. *Lingle*, 544 US at 547.

110 544 US 528 (2005).

111 Id at 539.

112 See Michael A. Heller and James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv L Rev 997, 1003–05 (1999) (exploring how the two rationales occasionally sit at "cross-purposes").

less directly, so compensation (in property, tort, or otherwise) can serve as a useful pricing mechanism to generate efficient incentives. But government actors internalize costs somewhat differently, as they are motivated by political capital and the chance to maximize electoral prestige. For legislators, then, converting compensation into political costs requires a difficult translation, since financial burdens may be spread across a relatively disengaged electorate.[113]

For judges this translation is even harder, if not impossible. Unless individual judges themselves bear the costs of their takings decisions—a proposal incompatible with judicial immunity and very different from our own—there is no obvious way that compensation awards against courts would constrain judicial decision making, let alone generate efficient judicial incentives. The prospect of someone else compensating those harmed by a change in common law seems unlikely to steer legal decision making in any particular direction. At best the effect of compensation will be diffuse and occluded, even as it raises questions of political economy that we address below. In the end, then, error correction has no clear place in judicial takings, since compensation will not force judges to internalize the costs of their decisions in any meaningful way. Error-focused accounts justifying compensation therefore cannot apply. The doctrine must be viewed differently—from the perspective of private rights holders and through the lens of transition relief.[114]

Through this lens, the Takings Clause serves at its core to protect property owners from the costs of legal transitions when those costs are too high. As a rule, the Takings Clause is implicated in moments of legal change[115]—when a legislature decides to downzone, say, or a court redefines ownership rights. Consider a simple example: Oscar owns unregulated wetlands and plans to build a store there in the not-so-distant future. But before he can build, a local government changes the law, enacting wetland regulations that put an end to Oscar's plans. Here the Takings Clause may require compensation, not (importantly) to prevent the legal change from

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113 See Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal L Rev 569, 620–23 (1984). For an attempt to make this translation, at least for small local governments, see Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 NYU L Rev 1624, 1628 (2006).

114 See, for example, Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* 40–42 (Chicago 2000). See generally Jonathan S. Masur and Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 NYU L Rev 391 (2010).

115 See Holly Doremus, *Takings and Transitions*, 19 J Land Use & Envir L 1, 11–12 (2003).

occurring, but to ease the costs of transitioning from unregulated to regulated wetlands.

There is good reason to protect owners' expectations in this way. Some guarantee of compensation may be necessary to induce risk-averse people to invest efficiently in property. In the absence of takings-like protection, people might underinvest in resources that could be taken by the government—either by underdeveloping land they own or by choosing not to buy in the first place. And takings-type protection may forestall other subtler but equally significant consequences, too.[116] One is lock-in: faced with the possibility of an uncompensated adverse legal change, property owners might race to develop their property simply to lock in a particular use.[117] Oscar might speed to build his store, for example, merely to establish it as a preexisting use. Or owners might engage in excessive lobbying: fearing an unwanted change in law, they might overinvest in efforts to persuade the government to forgo that change—or at least to preclude application of the change to them.[118] Oscar might overspend, for example, on lobbyists pleading his legislative cause. Both consequences are disquieting. Lock-in can undermine the core purpose of a government initiative; overlobbying can prevent beneficial changes from occurring at all. The promise of compensation, then, is more than replenished pocketbooks. It is the reduction, or even elimination, of individual incentives to engage in underinvestment, lock-in, and excessive lobbying, ultimately encouraging more efficient investments overall.[119]

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116 David Dana provides an extended treatment of this phenomenon in *Natural Preservation and the Race to Develop*, 143 U Pa L Rev 655 (1995). His discussion focuses on environmental regulations but applies equally to zoning or other prospective land use regulations. See id at 684 (observing the antiretroactivity norm in local growth controls).

117 See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 NYU L Rev 1222, 1231 (2009). Speculative investing might form a kind of converse. A clever buyer, believing that a legal change will soon force railroads to provide wider rights-of-way, may purchase otherwise useless land and then extract top-dollar from a now-pinched railroad.

118 See Dana, 143 U Pa L Rev at 688 n 96 (cited in note 116); Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const Commen 279, 284 (1992) ("Insurance would presumably decrease the incentive to lobby against the seizure of [ ] property [by the government]."); Blume and Rubinfeld, 72 Cal L Rev at 594 (cited in note 113).

119 The effect of takings protection on investment incentives can also be articulated in the vocabulary of Frank Michelman. In a seminal 1967 piece, Michelman wrote that owners should be paid when the costs of compensating are less than the costs of not compensating. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv L Rev 1165, 1215 (1967). While this seems self-evident, Michelman insightfully described settlement and demoralization as the relevant costs to consider. The former are the costs of identifying the property owners to pay and assessing the amounts to pay them. The latter reflect the demoralization that property owners will

We do not mean to paint too rosy a picture. The effect of transition relief on investment incentives is actually quite contested.[120] Louis Kaplow has argued that transition relief invites a moral hazard: it allows owners to ignore the risks of legal change and therefore overinvest in property.[121] Transition relief, in this account, acts as a form of free public insurance, protecting against the risks of legal change just as private insurance addresses the risk of fire or flood.[122] But this takings "insurance" allows property owners to be irrationally inattentive.[123] To echo Lawrence Blume and Daniel Rubinfeld: "Since it is efficient for society when individual investors take account of the risk of government action in investment

experience if the government does not compensate. This includes not just vague psychological harms but also the very real economic costs of foregone investments if property owners have to worry about government-imposed harms. Uncompensated legal changes can be demoralizing, that is, imposing harms that are greater than the costs of compensating affected property owners.

120 See, for example, Abraham Bell, *Not Just Compensation*, 13 J Contemp Legal Issues 29, 33 (2003); Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 Ohio St L J 451, 493–99 (2003); Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U Richmond L Rev 1235, 1242–43 (1994); Thomas J. Miceli and Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J Legal Stud 749, 756 (1994); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv L Rev 509, 532 n 61 (1986); Blume and Rubinfeld, 72 Cal L Rev at 624 (cited in note 113).

121 See Kaplow, 99 Harv L Rev at 531 (cited in note 120). See also Michael J. Graetz, *Retroactivity Revisited*, 98 Harv L Rev 1820, 1836–37 (1985).

122 Blume and Rubinfeld, 72 Cal L Rev at 571 (cited in note 113) (identifying the insurance rationale).

123 This opportunity for inattention depends heavily on the risk aversion of property owners. Risk-averse property owners will view the absence of compensation, and thus the risk of uncompensated legal change, as a deterrent to investment—and may therefore underinvest in property. But risk-neutral property owners will feel far less deterrence, and the presence of compensation may thus lead to inefficient overinvestment. Some people have therefore argued in favor of a kind of risk stratification in takings protection. See, for example, Serkin, 84 NYU L Rev at 1284–87 (cited in note 117). And others have argued for removing takings protection altogether, allowing private insurance markets to develop instead. See Kades, 28 U Richmond L Rev at 1244–47 (cited in note 120). But still others have pointed out that private insurance markets are unlikely to emerge where Takings Clause protection does not exist—not least because of adverse-selection problems and information asymmetries. See Fischel and Shapiro, 17 J Legal Stud at 286 (cited in note 109) ("An explanation for lack of private taking insurance . . . is adverse selection. A public planner might tip off landowners of an impending taking and encourage them to apply for insurance in order to reduce political opposition to his project."). These adverse-selection problems may be substantially mitigated in the context of judicial takings, since property owners are unlikely to be able to predict court-made legal changes better than insurance companies. But still the fact that private insurance for judicial takings did not exist prior to *Stop the Beach* suggests that insurance is either unnecessary or hindered by some other kind of impediment.

decisions, insurance can alter and distort private investment decisions."[124]

We do not need (or aim) to resolve this difficult issue here. It is enough to recognize an unobjectionably mild point: some kind of protection from some legal change is at least sometimes necessary to generate efficient investment incentives. The question for our purposes, then, is whether court-made legal change ever fits this frame—whether it raises concerns about investment incentives and thereby opens the door to suing courts as a form of transition relief. We think that door is open. Examples are easy to find. Beachfront owners might worry about judicial expansions of the public trust doctrine that would require them to permit public access to their land. Developers might worry about judge-made changes to vesting rules that would shift how far projects must progress to be protected from later changes in law. Copyright owners might worry about judicial extensions of fair use doctrine that would expose otherwise protected portions of their creative works. And banks might worry about the court-spurred growth of consumer protection doctrines that would change the way the law handles foreclosure actions. All of these worries might affect the value of property, so all of these risks might deter investment—in property or development projects, in creative works or mortgages. We are confident, then, that there is a good case for transition relief from court-made legal change. In fact, we believe that the case for transition relief from court-made legal change is even more compelling than it is for traditional regulatory takings, because transition relief here is less likely to spur strategic but inefficient conduct by owners.

One reason is awareness. More than regulatory changes, court-made changes may come as some surprise. When legislatures change the law, property owners typically know in advance, receiving formal or informal notice through a web of information networks.[125] But when courts change the law, no clear networks apply. Legal changes, if they happen, often come with relatively little notice and catch many impacted people both late and unaware. Litigants themselves may have briefed a particular issue but might still learn of a change only on the day an opinion issues. Nonparties may not receive notice,

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124 Blume and Rubinfeld, 72 Cal L Rev at 618 (cited in note 113).

125 See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 93 (Harvard 2001) (describing communication networks in local governments). For a discussion of what information behavior reveals about civil litigation, see generally Bloom, 100 Cal L Rev (cited in note 63) (discussing information systems in civil litigation).

even informally, of that opinion at all. Those most affected by a change may thus not even know of it. And they may be unable to elude it if they do.

A related reason, then, is avoidance. Court-made legal changes are typically difficult for property owners to avoid. Owners facing regulatory changes can alter their behavior—for ill or for good—in anticipation of the new rule. They can, as noted, race to develop their property, lobby against the changes (or at least for some exemption), or perhaps sell to someone who will.[126] Owners facing court-made changes have no such options. Parties to litigation are typically stuck in the status quo, since courts often freeze party assets during the course of a case—and promise to sanction parties who defy that limit.[127] And nonparties, again, may not even know of the lawsuit and thus feel no need to engage in any kind of strategic behavior. This nicely erases the lock-in and overlobbying problems that afflict regulatory takings, but it raises a concern, too: it risks saddling owners with the full costs of legal transitions, costs that they might not be able to avoid.

Even if these nonparties knew of pending litigation and feared an adverse outcome, they might still struggle to elude these costs for reasons of retroactivity. We discuss retroactivity at length in Part III, but it is important to note how it can shape investment incentives here. Most regulation is prospective only, meaning it applies only to conduct after its enactment and can encourage owners' occasional race (for example) to lock in uses. Legal decisions are prospective and retroactive, meaning they apply to some preexisting conduct and would not necessarily exempt a preexisting use. Owners subject to court-made legal change may thus feel the pinch on both the front end and the back—because they knew nothing about these changes until they happened and because the changes will apply to them regardless.

A third reason relates to moral hazard. Court-made changes generate smaller risks of moral hazard, if any such risk at all. The subtlest argument against takings protection is that compensation will discourage owners' active monitoring and vigorous participation in the political process.[128] Without compensation protection, owners will be forced to enter the political fray and protect their interests

126 See Serkin, 84 NYU L Rev at 1231 (cited in note 117).

127 See, for example, *USACO Coal Co v Carbomin Energy, Inc*, 689 F2d 94, 97–98 (6th Cir 1982) ("The power of the district court to preserve a fund or property which may be the subject of a final decree is well established.").

128 See Kaplow, 99 Harv L Rev at 571 (cited in note 120).

there. But with some protection, they can shirk or stay silent and still get reimbursed. This may be good or bad in the regulatory setting, depending on one's view of the political process.[129] But the concern all but disappears with courts: Litigants have plainly demonstrated an incentive to monitor and participate, or they would have settled or defaulted already.[130] And nonlitigants can scarcely monitor or participate in court-made legal changes, even if they would like.[131] If there is a fear of moral hazard from transition relief, then, it largely evaporates in the context of court-made change.

Providing transition relief for court-made changes thus has one clear consequence. It is likely to alter the value of investments in property—and perhaps prospective buyers' willingness to purchase property in the first place. But it is decidedly unlikely to prompt the kind of strategic (mis)behavior that attends regulatory change. The case in favor of transition relief for court-made change thus proves stronger in suits against the courts than it does elsewhere. If economic arguments against providing transition relief for takings have traction anywhere, that is, they have less traction in the judicial takings setting than in the regulatory one. What might be most surprising about suing courts, then, is not that it makes sense. It is that no one has made the case for it yet.

That case can also be made in noneconomic terms. It can be made in the language of "fairness and justice," based on a reading of the Takings Clause as an assurance that government will not "forc[e] some people alone to bear public burdens which . . . should be borne by the public as a whole."[132] Or it could be made in the progressive

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129 It may well be that transition relief's felicific effect is to mute the voices of property owners who wield disproportionate political power. See Gideon Parchomovsky and Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 Cal L Rev 75, 128–29 (2004). But there is certainly value in the most vocal political participation, and property owners should have some incentive to voice their views, at least for reasons of civic republicanism and to prevent bad legislation. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U Pa L Rev 1567, 1585 (1988); Kaplow, 99 Harv L Rev at 571 (cited in in note 120) (noting that a potential effect of private insurance against losses from takings would be to mute the opposition of property owners who would otherwise be uniquely positioned to object to harmful legislation).

130 Eduardo Peñalver and Lior Strahilevitz have argued that the availability of compensation for judicial takings might reduce parties' incentives to litigate. See Eduardo M. Peñalver and Lior Strahilevitz, *Judicial Takings or Due Process?*, 97 Cornell L Rev *1 (forthcoming 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791849 (visited Jan 5, 2012). We discuss this kind of distorted adversarialism in Part III.

131 The occasional amicus brief or intervention under Federal Rule of Civil Procedure 24 notwithstanding.

132 *Armstrong v United States*, 364 US 40, 49 (1960).

idiom of social stability and human flourishing.[133] These alternative normative anchors may not apply more powerfully to court-made transitions than to regulatory ones, but they do not apply any less powerfully either. And in all settings the key point is clear: the Takings Clause calls for a kind of transition relief. Suing state or local governments will protect property owners from the most significant burdens of regulatory transitions. Suing courts will do the same for court-made changes, easing the costs of legal transitions while insulating property owners from burdens that go too far.

We appreciate that there may be something different about court-made change. Frank Michelman once argued that utilitarian justifications for takings compensation must distinguish between regulatory risks and risks of other kinds—like "earthquake or plague."[134] Regulatory risks are different and especially demoralizing, in Michelman's view, because they threaten majoritarian abuse and permit systematic disadvantage—two features that earthquakes do not share.[135] By these measures, court-made change may seem more like an earthquake than like legislative redistribution—a quirk of uncontrollable chance too random to shape investments. But we see no reason why this would be true. The risks of systemic disadvantage exist in court proceedings as well as in the political process, although the winners and losers may be different. And court decisions seem, to us, more like the quotidian workings of proper government than like seismic natural shocks. We do not dismiss the possibility that a compelling account could yet distinguish court-made from regulatory or administrative change. But we build our model in the absence of one now.

We also appreciate that the actual content of the Takings Clause remains unsettled. Deep disagreements remain, for example, about whether it is in fact necessary to protect owners' expectations at all. But our approach to judicial accountability does not depend on any particular position in this debate. And our ideas about suing courts are not conditioned on a commitment to broad or narrow forms of transition relief—a question we intentionally elide. We claim only that suing courts can provide the same transition relief, limited or

133 For the latter, see Hanoch Dagan, *Takings and Distributive Justice*, 85 Va L Rev 741, 743–44 (1999). For the former, see Margaret Jane Radin, *Property and Personhood*, 34 Stan L Rev 957, 1014–15 (1982); Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L Rev 531, 573 (2005) ("The stability in ownership afforded by the law creates the possibility for developing new kinds of value in, and uses of, property that would otherwise be unavailable.").

134 Michelman, 80 Harv L Rev at 1216 (cited in note 119).

135 Id at 1216–17.

expansive, that the Takings Clause provides for regulatory changes. So if a particular governmental act would not warrant transition relief in a regulatory setting—whether in *Stop the Beach* or otherwise—it will not warrant transition relief in a suit against the court either.[136] But if transition relief is appropriate in the face of regulatory change, it is no less—and perhaps even more—appropriate in the face of changes by judges. And so it is here, as a means to transition relief, where it is appropriate to sue courts.

C. Worries

But suing courts, even here, raises serious concerns. Near the end of his concurring opinion in *Stop the Beach*, in fact, Justice Breyer sounds a note of important caution. Judicial takings claims are so new and uncertain, he says, that he cannot predict how well they might work. But he can already foresee something perilous. Allowing such suits, he warns, might

> invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law. Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims. And a glance at [this case] makes clear that such cases can involve state property law issues of considerable complexity. Hence, the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that

136 For example, new limitations on accretion rules would not necessarily trigger takings liability under *Penn Central*, whether enacted by a legislature or decided by a court. It is possible that such accretion rules might fall within the narrow per se test outlined in *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 426–27 (1982), by effectively allowing permanent physical occupation by the public on previously private property. But we take no position on that question here.

> federal judges would play a major role in the shaping of a matter of significant state interest—state property law.[137]

There are three fears here mixed together. The first is a matter of floodgates—the worry that accepting even a single judicial takings claim will later drown the courts in a deluge of comparable suits. The second is a question of political economy—the concern that courts (and especially federal courts) will be ill positioned structurally to craft the relevant rules. And the third is an issue of complexity—the sense that the hardest of these cases will demand expertise that courts (especially federal courts) do not necessarily possess. We address the first two of these fears below, though not exclusively on Justice Breyer's terms. We consider the third in Part III's discussion of practice and mechanics.

1. Floodgates.

Of Justice Breyer's three worries, the floodgates fear is perhaps the most familiar. First expressed in the early 1800s,[138] the worry that one case will encourage too many others has grown almost commonplace.[139] It now frequents all manner of briefs and judicial decisions[140]—and it has some initial purchase here. One successful suit could well invite many others, since law-changing decisions will always come from common law courts. Big numbers could well diminish quality, since judges could be saddled with too many cases and too little time. And courts could well prove uncommonly salient targets, since they would be required to make unpopular decisions and then stand open to retaliatory suit.[141] Like many floodgates arguments, this one is inherently speculative, made in an anxious empirical vacuum. But it may also be true.

It may be unconvincing, too. It is not unconvincing, necessarily, simply on its own terms. Others have labeled floodgates fears dubious by definition—because they violate separation-of-powers limits, disregard congressional intentions, and mask more revealing

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137 *Stop the Beach*, 130 S Ct at 2618–19 (Breyer concurring). For a critical response to these concerns, see generally Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J Const L & Pub Poly 91 (2011).

138 See *Delabigarre v Bush*, 2 Johnson Cas 490, 502 (NY Sup Ct 1807) (T.A. Emmet in reply) ("[I]nstead of preventing suits, [the proposed rule] would only serve to open wider the floodgates of litigation."); *Whitbeck v Cook*, 15 Johnson Cas 483, 491 (NY Sup Ct 1818) ("If it could succeed, a flood-gate of litigation would be opened.").

139 One could say that the first floodgate argument opened a floodgate to floodgates.

140 See, for example, *In re Lawrence*, 293 F3d 615, 621 (2d Cir 2002).

141 This tracks some of the same policy notions that inform absolute judicial immunity. See note 172 and accompanying text.

judicial concerns.[142] We do not dispute these broad objections, but we do not think they carry much weight here. The separation-of-powers complaint seems no stronger for floodgates than it does for other doctrines, like abstention and forum non conveniens, where it invariably fails.[143] The concern about Congress's intent means nothing where there is no pertinent statute. And the worry about pretext seems inapposite where the court has little to hide.[144] What makes this particular floodgates fear unconvincing, then, is something less grand and more particular. What makes it unconvincing is current law—pleading, discovery, and already-demanding substantive rules.

Modern pleading standards raise no small hurdle. In federal courts and many states, plaintiffs must now articulate "plausible" claims for legal remedy—not loose or emotional stories about how a judge somehow wronged them, but "sufficient factual matter" showing a plausible entitlement to judicial relief.[145] Those who fail this requirement lose almost before their cases get started—and well before any costly discovery. And those who fail it dramatically may lose in another way too: frivolous filings can be sanctioned, often severely, under Rule 11[146]—and professional penalties may also strike lawyers who bring vexatious suits. These screens work to keep meritless claims largely off the courts' dockets. And they will apply with particular vigor when suing courts. To plead a plausible claim for relief in a suit against the court, the plaintiff must do a great deal more than tell a tale of court-spurred legal unhappiness. She must, among other things, identify a particular court-made change in law and itemize its specific impact on her—something that, under modern pleading doctrine, very few plaintiffs will be able to do.

Some suits against courts will still navigate these hurdles. But even these seem likely to be manageable. Most will involve very little discovery, demand very little evidence, and ask fairly straightforward questions of law. A suit by a nonparty property owner, for example, will proceed on many undisputed facts—about what the property includes, who owns it, and what limits now apply. It will be clear

142 See, for example, Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U Pa J Const L 377, 379 (2003).

143 But see Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa L Rev 1147, 1148 (2006).

144 For a discussion of how pretext may be useful in the context of jurisdiction, see Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 Stan L Rev 971, 1018–25 (2009).

145 See *Ashcroft v Iqbal*, 129 S Ct 1937, 1949 (2009).

146 FRCP 11(c) (granting the court discretion to impose sanctions for presenting claims that are not warranted by law).

what evidence is necessary—surveys, deeds, photographs. And it will likewise be clear, to the property owner and the court she sues, what is (and is not) the relevant law. There may be hard questions of application, of sorting out relevant differences, and of meshing new facts with current law. But courts hearing these cases will not be swamped in big waves of unwieldy litigation.[147] And many of these cases, not least judicial takings cases, seem destined to lose.

It is not easy for owners to win takings cases. It will be no easier to win judicial takings cases, since all general defenses and other barriers to victory should apply.[148] Owners will still file takings claims, now as before. But suing courts will change the relevant numbers somewhat less than Justice Breyer suspects: Plaintiffs will often fail to establish judicial takings, as in *Stop the Beach* itself. And potential plaintiffs hoping to find encouragement in others' cases will often be disappointed, even if takings claims are all litigated as applied.[149] Our invitation to sue courts may thus seem to swing the courthouse doors wide open. But it will function—in takings claims[150] and perhaps in all others—more like a cracked side window.

States could also preempt such suits. They could change court-made rules by statute or create administrative mechanisms for resolving follow-on disputes. Courts could (re)change their rules too, an option that may seem unlikely given agency and political economy concerns. We discuss these next, asking if courts might be too quick or slow to change law when they internalize no costs. But the first fear is about floodgates. And suing courts, we think, will add a trickle, not a surge.

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147 For party-plaintiffs, in fact, the posture is often just an appeal, so there is nothing new at all.

148 See, for example, *Palazzolo v Rhode Island*, 533 US 606, 619–21 (2001) (holding that a landowner must establish that a takings claim is ripe—meaning that the governmental authority has had an opportunity to decide and explain the reach of a regulation—before he is entitled to compensation); *Penn Central*, 438 US at 124 (explaining that evaluation of a takings claim requires balancing the government's interest in the regulatory policy against the magnitude of the loss to the landowner).

149 Our fairly generous understanding of the effect of stare decisis changes little on this score.

150 It is conventional wisdom that traditional takings claims are vanishingly rare. Nevertheless, takings law still serves as a considerable constraint on government decision makers, like local land use officials, because the threat of takings litigation is often enough to win concessions. But that kind of strategic value is essentially nonexistent as applied against courts, who bear the costs of such claims very differently, if at all. See Part II.B. If anything, then, one suspects that judicial takings claims will be even less common than their traditional regulatory counterpart.

2. Agency and political economy.

Agency and political economy present more substantial concerns. In our model, courts can award transition relief to those individuals sufficiently affected by adverse judicial decisions. But courts are not required to pay for this relief themselves, nor are they (in many jurisdictions) subject to direct democratic checks. Suing courts thus raises a profound agency problem: courts can pry open a state's coffers and face little political reprisal when they do.

This is not true of legislatures, at least in theory. If a legislature enacts a regulation—say a zoning ordinance that effects a taking and thus requires compensation—the legislature bears the resulting political costs. Accountability for this ordinance may depend on imprecise political processes, and the extent of the actual costs may depend on peculiar political dynamics.[151] But these political costs, big or little, still fall on and align with the very body that caused them—and that can respond if it wants. This is largely true of acts by government agencies as well, which can (at least, again, in theory) be disciplined by the legislative or executive branches of government. But it is not necessarily true of courts, where judicial independence permits judges to impose liability but remain largely insulated from resulting political costs.

We believe this concern is real. But, as with floodgates, we think it is also easy to overstate. For one, courts are less politically insulated than they may at first appear. In jurisdictions with judicial elections, judges may be politically accountable in the most direct and immediate way—and they may internalize political costs as much as legislators do. And in jurisdictions without such elections, judges are still not politically unfettered. Substantial bodies of scholarship demonstrate that even the highest American courts respond to political pressure, suggesting that judges are unlikely to ignore the political costs of being sued.[152] Legislatures also hold an array of tools for disciplining judges—some of them formal (like withholding court funding) and some of them not (like threats to pack the bench). Courts, then, are very unlikely to ignore the costs they impose.

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151 See Serkin, 81 NYU L Rev at 1644 (cited in note 113).

152 See, for example, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus & Giroux 2009); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 13–21 (Chicago 1991).

Legislatures may also respond by changing substantive law. Say, counterfactually, that the Florida Supreme Court in *Stop the Beach* had in fact changed state law in a way that effected an unconstitutional taking and thus exposed the state to sweeping liability. One option is for the state to accept that liability and compensate the relevant owners. But another is for the Florida legislature to negate the court's decision—to undo by statute what the court did by common law—and thus erase much of the state's liability.[153] Some state legislatures may be disinclined to do this, or perhaps just too busy otherwise. Hoping for legislative response can be like waiting for Godot. But the fact that legislatures can act to limit state liability when courts change the law should mitigate the most significant political economy concerns.

So, too, should the fact that courts already open state coffers elsewhere. In educational reform litigation, tort claims against government actors, and even traditional regulatory takings litigation, state court rulings already impose significant financial liability on the government.[154] Suing courts for legal change would thus be different, not in kind, but in slight degree. Some states have consented to these other suits by waiving their sovereign immunity, and these waivers may imbue a court's decision to open state coffers with a kind of legislative assent.[155] But these waivers, even where they exist, only confirm that courts often create costs that state budgets must cover. And state courts hardly read these waivers as an invitation to raid the state fisc. If the worry is that courts will be too willing to impose liability on the state, then, the concern seems overblown.

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153 Under *First English*, 482 US at 318, the state might still be liable for compensation for the period between the decision and the new legislation, but even if liability does attach, the financial consequences are likely to be relatively minor.

154 See, for example, *Rose v Council for Better Education, Inc*, 790 SW2d 186, 203, 211 (Ky 1989) (holding that the state's constitutional guarantee of an efficient system of common schools "requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education"); *Leandro v North Carolina*, 488 SE2d 249, 254 (NC 1997) (interpreting the North Carolina constitution's assurance of "a general and uniform system of free public schools" to work as "a right to a sound basic education").

155 Many states seem to permit suits for inverse condemnation (and perhaps other things), not as a matter of statutory waiver, but as a matter of state constitutional law. See, for example, *Board of Commissioners of Logan County v Adler*, 194 P 621, 622–24 (Colo 1920) (en banc) (holding that the state constitution's just-compensation provision itself overrides sovereign immunity). See also James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments after* Seminole Tribe, 46 UCLA L Rev 161, 207 n 168 (1998) ("[S]tates often view just-compensation provisions in state constitutions as self-executing, thereby overcoming the doctrine of sovereign immunity.").

But this political economy question has a second, countervailing side. The worry here is not that courts will be too eager to impose liability, but too resistant, since suing courts might contradict courts' self-image as expositors, not creators, of law. Common law courts often craft their opinions to make them appear inevitable, predestined outgrowths of existing precedent. Legal realists debunked this pretense many decades ago, but it remains stubbornly ingrained in the language and perhaps the mindsets of many state courts.[156] Admitting legal change would upset this mindset. And if courts refuse to acknowledge transitions, there seems little room for transition relief.

But courts do change the law—and are demonstrably capable of spotting these moments of transition. Crafting opinions often requires courts to search out the common law fountainhead of a doctrine, and it is often perfectly clear which opinion set the law on some new course. Even those with divergent views about the project of judicial interpretation or the path of the law's development can generally agree about where a doctrine started and when a rule changed.

How judges will perceive these suits remains an open question.[157] But note how the two chief pressures here seem to offset. One pressure suggests that courts will be unresponsive to political costs and matters of state liability—and thus too willing to change the law. The other suggests that courts will be loyal to an old common law vision and resentful of suits against them—and thus too restrained in driving legal change. We can only speculate about which is more likely, but we take some comfort in the counterpoint. The fact that these pressures compete provides more than a modicum of assurance that courts will be neither too willing nor too reluctant to change the law and award transition relief.[158]

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156 See, for example, *Kennerly v Town of Dallas*, 2 SE2d 538, 540 (NC 1939) ("We only interpret the law as it is written."). This sentiment is prevalent in federal courts as well. See, for example, *Veprinsky v Fluor Daniel, Inc*, 87 F3d 881, 897 (7th Cir 1996) (Manion concurring in part and dissenting in part) ("We only interpret the law.").

157 It is not hard to imagine that, our model notwithstanding, suits against the court will carry some reputational cost. But if courts regard our suits as incompatible with common law decision making and detrimental to their professional status, they misread our proposal on both counts. Our suits imply that judges changed the law for the better, not worse.

158 There are other pressures, too. In any particular case, for example, judges might be motivated by naked empathy for particular parties. Or they may fall prey to the availability heuristic, assigning excessive weight to the effect of a decision on the specific parties before the court. But both of these concerns can cut multiple ways: judicial empathy could lead a judge to change an old rule that hurts a party or to sustain a rule that helps one. The parties before a court may be the best examples of the need for a particular change or the worst.

A final agency worry concerns the reach of decisions as much as their results. The existence of suits against the courts might alter judicial behavior ex ante, changing the content of opinions as much as outcomes. Without suits against the court, judges might steer clear of sweeping legal changes, fearful that big alterations will interfere with peoples' expectations. But with such suits, judges might feel emboldened to craft far-reaching decisions, confident that parties and nonparties will find avenues of redress. Even more, with such suits, a kind of skewed adversarialism may take root. In typical civil lawsuits, one party wins and the other loses—and so both have every reason to alert courts to the stakes of a case. Access to transition relief threatens to dilute that incentive, since neither party would necessarily lose. One party would receive a favorable ruling, the other some form of compensation. Parties might therefore litigate less vigorously,[159] and courts might grow less attentive to the costs they impose. Instead of creating greater accountability, then, suing courts may seem to subvert it, perversely allaying judicial responsibility by seeming to eliminate costs.

Both of these fears give us pause. And both reflect, in a way, a single concern about how courts take account of the costs they impose. But we think this worry undersells judges' fiscal attentiveness and parties' adversarial zeal. Parties in these cases will still advocate keenly for their first-choice outcomes, not merely for unlikely second-best compromises. So too will the state, which in our proposal ultimately foots the bill. And courts will still recognize that broad rulings will not be costless, but often quite the opposite for private individuals and for the state. We believe, then, that courts will be as vigilant in these suits as in others.

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159 See Peñalver and Strahilevitz, 97 Cornell L Rev at *26 (cited in note 130). We accept their worry that parties, not courts, might alter their behavior in anticipation of suing a court, at least at the margin. The possibility of such a suit could, that is, reduce the expected costs of losing a case. But we are skeptical that this reduction will be significant, and we are therefore skeptical that the possibility of suing courts will significantly distort the adversarial process or parties' incentives. Even in the most robust version of our model, the expected value of a suit against a court is certain to be exceedingly small—not least because such suits will be very hard to win. Any anticipated gain from such a suit must therefore be discounted to reflect the scant probability of success on the merits, as well as to capture the time and litigation costs associated with pursuing the claim. We think, then, that all parties will work as hard to win in the typical first case as in the challenging second. For an argument that compensation for takings may actually increase efficiency, see Blume and Rubinfeld, 72 Cal L Rev at 620–23 (cited in note 113) (arguing that compensation for regulatory takings may encourage inefficient government actions by buying off the opposition of adversely affected property owners).

Courts change the law. Many of these courts keep an eye on doing justice in future cases,[160] and many deploy forward-looking legal arguments when discussing the shape and effect of the rules they make—sometimes in the guise of slippery slopes, other times merely to call attention to the stakes of a decision.[161] We take no strong position on whether this practice is good or bad, though we believe that the law may be too sticky now—for all of these reasons identified above. Yet, in the end, our sense of the law's current stickiness is beside the point. More important is the fact that suing courts will neither inhibit nor unfetter courts too significantly. This fact eases agency and political economy worries, and it gives us hope that suing courts might facilitate useful legal change.

III. MECHANICS AND SCOPE

Our claim is thus new and unconventional in at least two ways. It rethinks the idea of judicial accountability, expanding that idea to include more than mere error correction. And it recasts the notion of suing courts, not as a way to punish judicial missteps, but as a means to discipline judges while still opening the door to positive legal change. But if we are right—if accountability can be expanded and suing courts can promote legal change—then two final questions confront us: First, what should a suit actually look like, particularly in the judicial takings setting but perhaps also beyond it? And, second, where should we allow such suits, if we allow them at all—and where can we see similar features in other places? The latter of these questions will drive Part III.B. The first and most practical question takes priority in Part III.A.

A. Mechanics

A suit against the court is in some ways like any other. It requires parties and timing limits, a forum and legal remedies. This subpart works through those conventional requirements in an unconventional setting. It considers the mechanics of plaintiffs, defendants, timing, forum, and remedies in suits against the court. Our approach here is at once confident and candid—hopeful that

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160 State supreme courts in particular make deliberate changes to the common law in order to reflect or affect societal changes. See, for example, Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L Rev 517, 525–26 (1984).

161 See, for example, *Washington v Glucksberg*, 521 US 702, 785 (1997) (Souter concurring) ("The case for the slippery slope is fairly made out here.").

our analysis will prove there is space for these novel lawsuits, but alert to the sticky issues lurking behind every choice. And though we consider suits of all types, we keep close to judicial takings, since that is where the Court has signaled its greatest willingness to entertain suing courts.

1. The plaintiff.

The plaintiff in a suit against the court would seem like a simple pick: she should be the party adversely impacted by a judicial act. The person whose liberty has been hindered, for example, should be the plaintiff in a suit about the unlawful detention—if such a suit could ever function. The property owner whose rights have been curtailed, in turn, should be the plaintiff in a judicial takings claim.

A property owner was the plaintiff in *Stop the Beach*. There the putative judicial takings claim grew out of the state court litigation in which the plaintiff was already a party—indeed was already the plaintiff.[162] So there existing appellate practice offered a clear-cut path to federal review: the plaintiff could file a petition for a writ of certiorari to the Supreme Court, which is precisely what Justice Scalia says party-plaintiffs in judicial takings claims must do.[163]

But certiorari in this setting is both more and less than it seems. It is more because it pushes party-plaintiffs' judicial takings claims mostly into the old space of error correction, less because it ignores claims held by someone else. The Supreme Court reviews state-court decisions all the time. Adding grand language about judicial takings may embellish certiorari practice semantically and inflate it conceptually, but it changes very little procedurally. At most it attaches a new claim for damages or grandfathering, as we discuss below. But the petition still operates largely like an appeal—a stubborn fact that may have guided and likely gulled the *Stop the Beach* Court.

But what if the claim is raised by someone else? A state-court decision limiting preexisting rights may well have a greater impact on nonparties than on the parties in the case. Say, for example, that the Rhode Island Supreme Court expanded its state public trust doctrine

162 See text accompanying note 76.

163 In fact, Justice Scalia's plurality opinion concludes that § 1257 is the *only* mechanism for a party in the underlying case to bring a judicial takings claim. See *Stop the Beach*, 130 S Ct at 2609 (plurality). We believe this approach may be too narrow—and that, on occasion, party-plaintiffs may be able to bring subsequent stand-alone claims. We discuss the details of these claims in the rest of Part III, though we should emphasize here that a denial of a cert petition does not amount to a rejection of a judicial takings claim on the merits.

to require "reasonable" access to the foreshore and defined "reasonable" to mean "every two hundred feet." That decision could well come in a suit involving property only one hundred feet from existing public access, meaning the original party to the litigation (and thus the potential party-plaintiff) would suffer no harm from the change and have no reason to complain. But the original party's neighbor, whose property starts just another one hundred feet down the beach, may feel quite different. She may now be subject to the state court's interpretation of the public trust doctrine. Even more, she may be required to provide public access across her land. Can she now sue the court to vindicate her property rights?

One answer is that she cannot. The idea of this nonparty bringing an independent claim for harm caused by a judicial decision—about public trust or otherwise—may seem nonsensical from the outset. Modern rules of stare decisis require that some nonparties live with (and sometimes suffer) the consequences of judicial decisions. Even more, modern takings law treats virtually every takings challenge as an as applied one. So perhaps this non-party-plaintiff could get a different, seemingly incompatible result if she brought her own traditional regulatory takings suit. A judicial takings claim against the Rhode Island court might be premature, that is, until the non-party-plaintiff became a plaintiff in her own (traditional) takings suit.

But another, potentially persuasive answer is that she should be able to sue the court.[164] It may greatly simplify the law to exclude non-party-plaintiffs—eliminating the hardest cases and treating the easier others like dressed-up appeals—but it is hard to find a principled basis for that limitation. One of the law's hard truths is that courts make rulings with clear and sometimes onerous consequences for future litigants. If the California Supreme Court reduced the statute of limitations for adverse possession from ten years to five, for example, property owners throughout the state would be affected—not just the parties in the initial case. Attempts by other parties to determine if the five-year rule applied to them would seem wasteful and unnecessary, perhaps even sanctionable. This is the point and the power of stare decisis. And this makes clear that judicial determinations will sometimes have significant adverse

164 It is worth noting that she may be able to sue even if the original decision did not effect a taking from the original plaintiff. The new common law rule may not have taken property from, say, an owner of a parcel that includes both wetland and nonwetland terrain—but it may have taken property from another owner whose parcel is pure wetlands. A new rule may apply differently to Owner A, that is, than to Owner B.

effects on people, including property owners, who were not parties to the original litigation. Those effects might even go so far as to amount to takings under traditional takings doctrine. It is no surprise, then, that the *Stop the Beach* plurality expressly contemplated non-party-plaintiffs bringing independent judicial takings claims.[165] It is no surprise, that is, that the *Stop the Beach* plurality endorsed an independent lawsuit by non-party-plaintiffs against the court.

By these measures, then, both party and non-party-plaintiffs may be plaintiffs in suits against the court—the first through the certiorari process,[166] the latter through independent suits. This answer treats impacted litigants (both present and future) equitably, and it accepts the precedential bite of modern common law. But it also raises difficult procedural concerns. Those concerns—about abstention and *Rooker-Feldman*, notice and immunity—are addressed in the pages that follow. So too is preclusion, a seemingly straightforward matter that, at least in the takings setting, proves quite hard. But first is a more pressing procedural riddle: whom to sue.

2. The defendant.

For party-plaintiffs, the whom-to-sue question is easy but largely off point. Their claims arise as a part of the certiorari process, and the captions of their cases will not change. Party-plaintiffs sue who they are already suing, raising their claims as a part of the original litigation.

But non-party-plaintiffs must do something different. Their claims arise as a part of new lawsuits, so they must pick a defendant when suing the court—either the judge or the court system, the state or perhaps the recorder of deeds.

The most straightforward of these options is the judge. Suing the judge targets the person accused of causing the relevant harm, even

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165 See *Stop the Beach*, 130 S Ct at 2609–10:

> [W]here the claimant was not a party to the original suit, he would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.

166 We assume that party-plaintiffs will also, on occasion, be able to bring stand-alone suits—when, say, the highest state court changes the law, admits as much, but the Supreme Court denies cert. In fact, these party-plaintiffs may have more filing options than others because of the knot of *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172 (1985), discussed in Part III.A.3.

in the service of improving the law. It also mirrors traditional mandamus practice, which permits appeal-like error correction through formally independent proceedings brought against a judge.[167] Yet even this straightforward choice of defendants confronts two pressing problems—one about institutional structure, the other about immunity.

The first problem concerns judicial decision making. Some judges act alone, especially at the trial court level. Those judges, in those cases, are obvious defendants in suits against the courts. But many courts are multimember bodies: appellate panels of three, Supreme Court benches of seven or nine. These courts are much more likely, we believe, to make the kind of decisions that would spur suits against the court—decisions changing the public trust doctrine, for example, or opinions redefining adverse possession. Yet these courts make picking an individual judge far less obvious. It could be the opinion's author or the presiding judge, all of the judges on a panel or the whole court itself. Any one of these options seems plausible, rational, and unlikely to alter the substance of the suit. But all of these options run squarely into one of the highest apparent hurdles for suing courts: absolute judicial immunity.[168]

This second problem is more acute. Absolute immunity protects judges from legal reprisal for anything done as a "judicial act."[169] If a judge acts "nonjudicially" (by ordering, say, the shackling of a hapless coffee vendor[170]) or in "the clear absence of all jurisdiction"[171] (by issuing, say, a remedy in a case not before the court), a suit against that judge may proceed. But our suits against the court fit neither of these exceptions. They grow out of jurisdictionally proper judicial acts by design. The simplest immunity answer may thus seem the most accurate: absolute immunity would bar our suits.

Yet a closer look at judicial immunity's spirit unsettles this firm black-letter answer. Now as before, absolute judicial immunity is justified on a variety of grounds: the need for judges to be "free to act upon [their] own conviction[s]" without fear of "personal consequence"; the "controversiality" of litigated issues and the likelihood of party retaliation; the record-keeping distortions such

167 See note 32 and accompanying text.

168 See *Bradley v Fisher*, 80 US 335, 347 (1871).

169 Id.

170 See *Zarcone v Perry*, 572 F2d 52, 53 (2d Cir 1978) ("Both [Judge] Perry and [Deputy Sheriff] Windsor thought the coffee tasted 'putrid,' and Perry told Windsor to get the coffee vendor and bring him 'in front of me in cuffs.'").

171 *Bradley*, 80 US at 351–52.

suits would introduce; the availability of alternative remedies, like appeal; and the risk of floods of "vexatious litigation."[172] Our suits are entirely compatible with many of these policies. They would "free" courts to change the law in places where judges might otherwise feel inhibited, and they would introduce some measure of accountability where the alternatives, like appeal, seem most inadequate. Even more, our suits would steer clear of judicial immunity's driving concern: judges subjected to personal liability and individualized suit. Like old mandamus petitions, our suits might put judges in the caption—but they would not force judges to pay personal money damages. And like old habeas actions, our suits might call into question judicial decisions—but the remedy would come from somewhere else. Our proposal may still seem to require a more explicit immunity exception, an acknowledgement that, in certain limited contexts, judicial immunity should yield. At the least it warrants a more nuanced discussion of remedies, a matter we address at length below. But judicial immunity may, and should, leave space for precisely the kind of suits we envision. Four justices recently implied, in *Stop the Beach*, that perhaps it would.

If judicial immunity leaves that space open, however, sovereign immunity may seem to keep it closed. By its terms, the Eleventh Amendment prevents federal courts from hearing suits against the states brought by citizens of other states or foreign ones.[173] But by its modern interpretation, the Eleventh Amendment does far more: it prevents American courts, federal or state, from hearing suits against nonconsenting states brought by individuals, foreign states, and Native American tribes.[174] There are exceptions to this broad rule—one permitting states to waive their sovereign immunity,[175] another

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172 Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 90 (Yale 1983).

173 US Const Amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

174 See Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L J 1683, 1685–86 (1997). Carlos Vázquez notes that

> the Court has made it clear that it views the Eleventh Amendment as in some way having given constitutional force, or at least recognition, to a preexisting immunity of the states. . . . It would perhaps be more accurate to refer to an immunity having its source in "postulates" lying behind the Eleventh Amendment and reaffirmed and given constitutional force by it.

Id at 1685 n 6, citing *Monaco v Mississippi*, 292 US 313, 322 (1934), and *Ex parte New York*, 256 US 490, 497 (1921).

175 *Pennhurst State School and Hospital v Halderman*, 465 US 89, 99 (1984).

letting Congress abrogate that immunity in some instances,[176] and still another allowing federal courts to issue prospective relief in suits against state actors.[177] But none of these exceptions apply easily here. No state has expressly waived sovereign immunity for suits against the court—particularly those suits outside the mandamus frame. Congress has not abrogated state immunity in these settings—though in some places, as we will show, the Constitution has. And *Ex parte Young*'s[178] prospective-only focus misses the heart of the suits we envision—in part because our suits do not accuse state actors of acting ultra vires, and in part because they seek some retrospective (legal) remedy. At first glance, then, state sovereign immunity may seem to keep the courthouse doors closed.

Changing the defendant will not unlock them. Our suits might try to mimic habeas petitions, naming as defendant the county clerk or the local sheriff or the person formally in charge of the relevant records or deeds. But this would be a distinction without a difference. All of these suits would still be, in substance, claims for damages to be paid out of state coffers—and to those suits the Eleventh Amendment clearly applies.[179]

But two other things succeed where changing defendants will fail. One is the certiorari process. A unanimous Court held not long ago that "the [Eleventh] Amendment does not circumscribe [its] appellate review of state-court judgments."[180] For party-plaintiffs using certiorari petitions as quasi-suits against the court, then, the Eleventh Amendment poses no serious problem. Appellate review will continue unhindered. The other successful key is the Constitution, which may—and sometimes does—abrogate state sovereign immunity. For judicial takings claims at least, the Fifth Amendment trumps the Eleventh, automatically piercing the immunity shield and permitting courts to order damage remedies to be paid by the states. The Supreme Court first acknowledged this fact in a footnote in *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*.[181] Scholars have almost universally

176 *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976).

177 See *Ex parte Young*, 209 US 123, 159–60 (1908); *Edelman v Jordan*, 415 US 651, 677 (1974).

178 209 US 123, 157–58 (1908).

179 See *Edelman*, 415 US at 663. If the state is a real party in interest, of course, then it is important, for reasons of fairness and adversarialism, that it be given the opportunity to appear. See Bloom, 100 Cal L Rev at *32 (cited in note 63). It is also important for reasons of agency costs and political economy, considered in Part II.C.

180 *McKesson Corp v Division of Alcoholic Beverages and Tobacco*, 496 US 18, 28 (1990).

181 482 US 304, 316 n 9 (1987).

agreed.[182] And though lower courts continue to wrestle with the issue,[183] for non-party-plaintiffs bringing stand-alone judicial takings claims, we believe the Eleventh Amendment likewise yields.[184]

Non-party-plaintiffs in other constitutional settings may face harder Eleventh Amendment problems. But judicial takings plaintiffs (at least) need not worry about immunity barring their suits—judicial immunity because its focus is entirely different, state sovereign immunity because certiorari and constitutional abrogation unlock the courthouse doors. Exactly when those doors might open is the next pressing concern.

But here we should make one thing perfectly clear: the suits we propose involve state interests and may implicate, if successful, state treasuries. Plaintiffs obtaining money judgments in suits against the courts will aim to execute those judgments against the state in ways already prescribed by state law.[185] States are thus true defendants in these cases, and state attorneys should have every opportunity available to civil defendants generally. In suits brought by non-party plaintiffs, our proposal will demand no procedural creativity—though there may be some room to innovate.[186] But in some suits

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[182] See, for example, Richard H. Fallon Jr, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U Chi L Rev 429, 485 (2002) (arguing that it is no coincidence that *First English* shields "'old property' rights generally looked on with more solicitude by conservatives than by liberals"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L J 1, 115 & nn 453–54 (1988) (rooting *First English* in the Takings Clause's "self-executing" nature); Thomas W. Merrill, Book Review, *Rent Seeking and the Compensation Principle*, 80 Nw U L Rev 1561, 1564 (1986) ("Indeed, Epstein asserts that when the framers adopted the takings clause, they in effect abolished the defense of sovereign immunity, even if no one was aware of it at the time."). See also Laurence H. Tribe, 1 *American Constitutional Law* 1273 n 18 (Foundation 3d ed 2000). But see Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand L Rev 57, 138 & n 344 (1999) (suggesting that *First English*'s supposed abrogation is "explicable on other grounds"). See also generally Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash L Rev 1067 (2001) (arguing that *First English* does not so clearly abrogate Eleventh Amendment immunity).

[183] See generally Seamon, 76 Wash L Rev 1067 (cited in note 182) (collecting cases); Josh Patashnik, Note, *Bringing a Judicial Takings Claim*, 64 Stan L Rev 255 (2012) (same).

[184] This question of immunity also implicates matters of forum, which we address at length below, in Part III.A.4. Waivers of sovereign immunity for inverse condemnation actions, for example, may have direct implications on where parties may sue.

[185] See D. Bruce La Pierre, *Enforcement of Judgments against States and Local Governments: Judicial Control over the Power to Tax*, 61 Geo Wash L Rev 299, 423–40 & n 732 (1993).

[186] *Robinson v Ariyoshi*, 441 F Supp 559 (D Hawaii 1977) (assessing an early judicial takings claim). Robinson's litigation path was both long and complicated, and it featured an interesting procedural quirk: William S. Richardson, then Hawaii's chief justice, "appeared" as the chief administrator of the state judiciary and participated by, among other things, filing

brought by party plaintiffs, state participation may require an extra dose of procedural care. In particular, in suits initially litigated between private parties—and thus with no state named in the caption—states must still be given the opportunity to appear, whether through intervention or otherwise. Whatever the mechanism, the core point remains: states must be given the chance to protect their interests, no matter when or where the suits occur.

3. Timing.

A now-familiar pattern holds when the question shifts from whom to when—to when the suit may, or must, commence. Like the defendant question before it, this timing issue proves relatively easy for party-plaintiffs and somewhat more difficult for nonparty ones. For party-plaintiffs, in fact, the when-to-sue question is resolved largely by the date a "taking" opinion issues and by standard appellate rules. As in *Stop the Beach*, party-plaintiffs will raise their claims in the context of normal appeals, and ordinary rules for filing those appeals will apply—whether thirty days or sixty, appeals by right or writs of certiorari.

But the timing issue is, again, more complex for non-party-plaintiffs. Their suits are new suits, so no appeal-based rules will govern. Their suits also raise challenging questions about the end of litigation, the awareness of harm, and the appropriate statute of limitations.

The first of those questions is familiar from appellate practice: When exactly does a case end? And the answer, it seems, is that a case may end at different times for different reasons. It could end, for example, after the Supreme Court issues a dispositive ruling. Or it could end after the trial court issues an order and no party appeals. For suits against the courts, however, the answer should be substantially less pliable, both for party and for non-party-plaintiffs. Party-plaintiffs, we believe, must exhaust the appellate process—and likely raise their claims against the courts in that setting—before the litigation is finished and any stand-alone claim could emerge. This comports with the exhaustion practice of modern habeas corpus, which requires petitioners to pursue the appellate avenues in front of them before seeking collateral review. It also avoids potential pitfalls of unripeness, abstention, *Rooker-Feldman*, and claim imperfection—all of which we consider in the pages below. Party-plaintiffs can thus

amicus briefs. See Williamson B. C. Chang, *Unraveling* Robinson v. Ariyoshi*: Can Courts "Take" Property?*, 2 U Haw L Rev 57, n * (1979).

sue the court, if at all, only after the appellate process has been fully engaged. Property owners bringing separate judicial takings claims, for example, may sue only after the last court, not the first court, issues a decision adversely affecting property rights.

Non-party-plaintiffs require a different answer. They cannot exhaust appellate options, since they are not parties to the original suit. But they can and sometimes are affected by the decisions of inferior courts. Lower courts can and do make decisions that spur the kind of lawsuit we envision—by derogating liberty, perhaps, and by taking property. Even more, in judiciaries with discretionary certiorari protocols, parties may not get supreme court review even if they want it—and, in some cases, they may not want it at all. Original parties may settle, run out of money, or simply opt not to appeal past a particular juncture. These choices can, and should, affect the parties who make them—both for suits against the court and for countless other things. But it would make little sense to turn away non-party-plaintiffs because of decisions made by other parties in other cases. It makes far more sense to permit non-party-plaintiffs to bring claims when the original litigation is objectively finished, regardless of the court level at which the suit actually ends.

It may also make sense to assume that those courts must have had binding authority over the non-party-plaintiff. The most obvious non-party-plaintiff judicial takings claim, for example, is likely one brought against a court with jurisdiction over the plaintiff's property. But this jurisdiction-based assumption may occasionally be too limited. Some judicial decisions will exert real influence on similarly situated people—like property owners—even outside the formal stare decisis reach of the rendering court. At the very least, a judicial decision may affect property, perhaps quite significantly, if there is a risk that future courts will follow a decision and that risk is capitalized into property value. It is quite easy, in fact, to imagine that a nonbinding lower court decision could result in a diminution of value so substantial that takings liability would be triggered under *Penn Central*. A trial court in a neighboring jurisdiction, for example, might be the first to identify an inexorable move toward late vesting rules, undermining developers' protection against some kinds of regulatory change. A nearby developer may own a project that would have vested under the old rule but not under the new, and the court-made change will fundamentally alter the developer's rights

and dramatically diminish the project's value.[187] A non-party-plaintiff can be deeply affected, that is, by a nonjurisdictional court's decision. So perhaps she should be able to bring suit, on occasion, against a seemingly nonbinding court.

How nonparties will learn about such decisions raises a second timing question: When will, or should, plaintiffs be aware of the pertinent harm?[188] Party-plaintiffs will, and should, be aware of that harm as soon as it happens. As participants in the original litigation, these plaintiffs have the quickest and most personal notice of the relevant court decisions. If one of those decisions takes the party-plaintiff's property, for example, she will know it—and likely know it first.

A non-party-plaintiff will not know it first—and may not know it for some time. Few people comb comprehensively through recent court opinions, searching out those rare decisions that negatively impact their rights. Fewer still find much if they do. Some nonparties may take notice of certain judicial decisions, especially those high court rulings that catch the eye of a fickle press. But even those decisions may seem irrelevant to most nonparties, at least initially, and this general inattention will only grow stronger when the court is less prominent and less proximate. Many nonparties, in short, will be understandably unaware of important court-made changes—and not because of their own negligence.

They may be unaware of important regulation and legislation too. But with judicial decisions this problem of notice seems particularly acute.[189] Owners of property, for example, are on constructive notice of relevant legislation and regulation.[190] And if an owner (or prospective owner) wants to learn about the zoning regulations applicable to her property, she at least knows where to look. Her search may be cumbersome and complicated, but it is also relatively targeted—something a random walk through recent slip

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187 It is possible that this hypothetical would result in a traditional regulatory taking instead of a judicial one. The affected developer may well sue the local government for applying the new zoning ordinance, instead of the court for changing the vesting rules. But it is at least possible to imagine a zoning official successfully defending such a claim by pointing to the earlier judicial opinion, thus putting the court squarely in the legal crosshairs. If anything, the apparent fungibility of defendants counsels for relief to be available regardless of the source of the legal change.

188 This is a kind of ripeness question (and perhaps a standing one), but not of the same variety asked by *Williamson County*, 473 US at 186. *Williamson County*'s ripeness inquiry is as much about forum selection as it is anything else—as we address in Part III.A.4.

189 We are saying, in a sense, that the background principles so important in *Palazzolo*, 533 US at 629, are different and harder to detect in the case of common law.

190 See *Ruckelshaus v Monsanto Co*, 467 US 986, 1006 (1984).

opinions may not be. Even more, open meeting laws and explicit notice provisions go at least some way to ensuring that notice of regulatory and statutory change is more than constructive, that regulatory and statutory change is transparent, and that owners are actually aware of the change ahead of time.[191] This is simply not true of judicial opinions, particularly those opinions given in litigation unknown to but potentially significant for nonparty property owners. What is true, rather, is that these opinions may escape almost everyone's notice. Title insurance companies typically give no assurances about background common law limitations;[192] lawyers doing sale-related due diligence—if there is a sale and if there are lawyers—typically offer no opinion about common law property rights; and real estate agents typically provide no nuanced understanding of recent doctrine, even when they have some general sense about the state of the relevant limits and law.[193] It is not clear, then, when the effect of a judicial opinion will be reasonably ascertainable or foreseeable to non-party-plaintiffs. So it is not clear when, precisely, the statute of limitations for these non-party-plaintiffs should begin to run. We thus endorse a familiar if somewhat malleable standard: the statute will start when the effect of the decision is sufficiently definite and foreseeable that a court can determine the extent of the decision's impact into the future. The statute will start, to borrow a colloquial Takings Clause phrase, when it is apparent the decision actually goes too far.[194]

When that statute should stop is the third (and final) timing question. And for party-plaintiffs, the answer to this time-bar question is again predetermined. The claims they bring in the context of appeals will be subject to appellate time limits. The claims they bring separately, if any, will be subject to the time limits that apply already to comparable claims. So too are claims brought by nonparties. These time limits are not uniform across jurisdictions, for takings claims or for others. But most jurisdictions have regularized timing requirements for claims of many kinds. Most jurisdictions

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191 See 5 ILCS 120/1; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum L Rev 479, 489–90 (2010).

192 See, for example, *Elysian Investment Group, LLC v Stewart Title Guaranty Co*, 129 Cal Rptr 2d 372, 376–77 (Cal App 2002).

193 A long-term owner who does not explore a sale may never find out about the legal effect a distant judicial opinion (theoretically) has on her property and its value. In response to our proposal, of course, a market for such information could arise.

194 See *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

require, for example, that regulatory takings claims be brought within a fixed amount of time after the impact of the relevant regulation has stabilized.[195] These time limits make as much sense for suits against the court as they do for suits against other parties. So claims against the court—by party or non-party-plaintiffs, for judicial takings or perhaps other things—should be brought within the time permitted by the pertinent state statutes of limitation. Claims filed any later should be time barred.

This seemingly obvious conclusion caps an issue that, when suing courts, proves surprisingly slippery. Simple questions about lawsuit timing quickly multiply into complex problems about when cases finish, when harm accrues, and when to establish appropriate time bars. Forum choice is no less elusive—and, at least for judicial takings, it is also burdened by a potential doctrinal trap.

4. Forum.

This trap does not ensnare everyone. It does not catch party-plaintiffs, for whom choice of forum should be obvious: they must choose the forum that the appellate process prescribes for them—through direct appeal when pertinent, and through certiorari and § 1257 when moving to the Supreme Court. As before, party-plaintiffs will raise their claims against the court in the appellate process. And so, as before, the appellate process will dictate their forum choice.

It will not dictate that choice for non-party-plaintiffs. Non-party-plaintiffs would thus seem unrestricted in their choice of forum and so able to file, if they wish, in federal district court. This federal forum would fit the substance of the lawsuit—which is a challenge, under the federal constitution, to a judicial decision. It would satisfy the original subject-matter jurisdiction demands of district courts, since the federal question would arise, as required, on the face of the plaintiff's complaint.[196] And it would comport with the plurality's vision of these suits in *Stop the Beach*, which expressly contemplates the claims being filed in federal court.[197]

But it may not be quite so easy for non-party-plaintiffs, especially takings plaintiffs, to secure a federal forum. For they may

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195 See *United States v Dickinson*, 331 US 745, 749 (1947) (holding that a landowner may wait until the impact of a regulation is fully realized before bringing a takings claim).

196 28 USC § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). See also *Louisville and Nashville Railroad Co v Mottley*, 211 US 149, 152 (1908).

197 See *Stop the Beach*, 130 S Ct at 2609–10.

well find themselves tangled in a knot of Supreme Court doctrine that pushes them, time and again, into state court.

That knot starts with *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*,[198] a 1985 case in which the Court announced a two-part ripeness requirement for federal takings claims brought against states. The first part of *Williamson County*'s requirement concerns finality and board variances, and it likely has little to say here.[199] But the second part involves claim elements and case location, and it is squarely relevant to our forum question. As *Williamson County* reiterates, the Takings Clause does not prohibit the state from taking property. It only prohibits the government from taking property without also providing just compensation. A governmental "taking" does not actually violate the Takings Clause, then, unless and until the government has also refused to pay compensation. And no takings claim is proper in federal court, in turn, unless and until a plaintiff can show both that the property has been taken and that just compensation has been denied. For a federal takings claim to be ripe, in other words, plaintiffs must first seek and be denied compensation from the state—so long as there are mechanisms available for doing so.[200]

All states now provide such a mechanism. And that mechanism, interestingly and importantly, is a so-called inverse-condemnation action filed in state court. These inverse-condemnation actions amount to a kind of eminent domain proceeding in reverse: they are initiated by the property owner rather than the government, but like eminent domain actions, they ask if property has been taken and the government should thus be forced to pay. The answers in these state court suits typically come straight from regulatory takings law. And they have, after *San Remo Hotel, LP v City and County of San Francisco*,[201] full preclusive effect.[202] Having litigated an inverse-condemnation action in state court, that is, plaintiffs are barred from relitigating in a federal one. State courts thus get first bite at these actions under *Williamson County*—and they get the only bite under *San Remo*.

198 473 US 172 (1985).

199 The first prong of *Williamson County* holds that a federal takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id at 186. This imposes on plaintiffs an obligation to seek whatever administrative relief might be available.

200 Id at 193.

201 545 US 323 (2005).

202 See id at 337–38.

It is not yet clear if and how this inverse-condemnation puzzle might reach judicial takings. Nor is it clear if *Williamson County* and *San Remo* will, or should, even apply to judicial takings claims. The newness of suing courts as an accountability measure leaves those matters temporarily unresolved. So too do the complexities of suing judges and the states' various inverse-condemnation laws. In some states, inverse-condemnation law is judge made, often growing from state constitutional provisions or broad limits on sovereign immunity.[203] In those places, state court damage actions for judicial takings seem available, at least theoretically. Nothing in these court-made inverse-condemnation rules expressly forecloses liability for judicial takings. Some state statutes seem to do the same: they leave room, however tacitly, for inverse-condemnation actions that result from judicial decisions.[204] But other state statutes would seem to exclude inverse-condemnation proceedings rooted in judicial takings. Wisconsin's inverse-condemnation statute, for example, authorizes condemnation proceedings initiated by the property owner only when "property has been occupied by a person possessing the power of condemnation."[205] Courts do not hold that power.

We will not pretend to resolve which approach is better. But we will say that neither is perfect. If *Williamson County* and *San Remo* do not apply to judicial takings, the state-only trap is avoided, and parties may pick a state or a federal forum for their suits against the court. This option has its benefits: It would enhance litigant choice. It would remove what seems like a backdoor exception to federal-question jurisdiction, since otherwise federal takings claims may never get into district court. And it would achieve a kind of parity between party and non-party-plaintiffs—since non-party-plaintiffs could choose federal courts initially while party-plaintiffs, should they have any stand-alone claims, could file there too. But removing judicial takings from the reach of *Williamson County* also poses a significant problem: it severs judicial takings law from regulatory takings law, opening a doctrinal asymmetry we are not eager to create or condone.

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203 See, for example, *Williams v Oklahoma*, 998 P2d 1245, 1248–52 (Okla Civ App 2000) (describing Oklahoma's modern inverse-condemnation action as judicially created).

204 See, for example, Mass Ann Laws ch 79, § 10.

205 Wis Stat Ann § 32.10. See also NM Stat Ann §§ 42A-1-2(C), 42A-1-12 (limiting inverse-condemnation actions to defendants with the power of eminent domain); NC Gen Stat §§ 40A-3, 40A-51 (same). For a summary of approaches, see Seamon, 76 Wash L Rev at 1118 n 249 (cited in note 182).

If *Williamson County* and *San Remo* do apply to judicial takings, by contrast, the scale tips in largely the opposite way. Here the state-only trap takes over, requiring some plaintiffs to sue state judges only in state court. Odd as this option may seem, it too has its benefits: It tracks *Williamson County*'s compelling notion of ripeness, which requires claims to be ready before they are filed. And it restores the regulatory-and-judicial takings symmetry that ignoring *Williamson County* would lose. But the costs are significant here too: Forcing plaintiffs to pick state court would limit litigant options. It would reinforce a curious but quiet exception to federal-question jurisdiction, since the combination of *Williamson County* and *San Remo* would keep some federal takings claims forever out of district court. It would substitute a party asymmetry for a doctrinal one, since non-party-plaintiffs would need to file all claims in state court while party-plaintiffs, provided they sought and were denied damages in their judicial takings "appeals," would have both exhausted and achieved ripeness—and thus would be able to file a stand-alone judicial takings actions in federal court.[206] And it appears plainly futile on its face, as if it asks lower state judges to "overrule" recent decisions by their own supreme courts.

Three of these worries are on-point and largely unanswerable. For litigant choice, subject-matter jurisdiction, and party asymmetry, then, the question is simply whether we should tolerate the associated costs. But the fourth worry is less obviously pertinent, even if it seems the most evident. It is surely right, of course, that state trial judges would be reluctant (or more) to declare their own supreme court's recent decisions wrong. It is surely right, too, that *Williamson County* recognizes a seemingly helpful futility exception, allowing resort to federal court when state litigation would be pointless.[207] But we have our doubts about whether that exception even applies to *Williamson County*'s second (and pertinent) ripeness prong. And we do not believe that futility here is quite so inevitable, for declaring superior courts wrong is not what our suits ask judges to do. In the suits against the court we envision, judges are not

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206 If *Williamson County* applies, that is, non-party-plaintiffs will have only one option: to file a request for compensation in state court, at least in those states with inverse-condemnation laws that include judicial takings. But party-plaintiffs may have more option than one: They could, like non-party-plaintiffs, file in state court. Or they could, in theory, file in federal court, since their first-run appeals may have satisfied *Williamson County*'s ripeness requirement. *Williamson County* forces takings plaintiffs to exhaust state remedies and to demand compensation from a state tribunal. Some party-plaintiffs will do precisely that via appeal—and in so doing apparently unlock the federal courthouse doors.

207 *Williamson County*, 473 US at 194–97.

searching out error. They are ensuring accountability of a different kind, managing the party-borne costs of legal transitions while still embracing the relevant change. Lower state courts are not asked to find that their supreme courts misread the public trust doctrine or mistakenly changed adverse possession law. They are asked simply to shield particular parties from the full costs of important changes to the law. This fits with the novel form of accountability we offer. It is also something that lower state courts may well do.

And even if *Williamson County* and *San Remo* apply to judicial takings, some claims may still land in federal district court. Party-plaintiffs who raise such claims in their appeals, exhausting the appellate process and ripening their claims, would seem to have direct access to federal court. So too would non-party-plaintiffs should *Williamson County* not apply. Two key forum questions thus remain—one about abstention, the other about *Rooker-Feldman*.

The first question asks whether federal district judges should abstain from hearing suits against state courts, even if they are otherwise properly filed. Most abstention doctrines answer this question emphatically, and negatively, by their own terms—*Younger* because these suits involve neither criminal proceedings nor civil enforcement actions,[208] *Burford-Thibodaux* because the courts would not be sitting in diversity jurisdiction,[209] *Colorado River Water Conservation District v United States*[210] because there are no already-pending duplicative lawsuits or stunningly inconvenient judicial forums.[211] And though *Railroad Commission of Texas v Pullman Company*[212] may at first appear more apposite—not least because the Court discussed it at length in *San Remo*—it too counsels against federal abstention. *San Remo* looks the part of a *Pullman* paradigm, arising as it does amid a contentious challenge to a city's land use plan and a dubious designation of a hotel as residential property.[213] But suits against the courts are nowhere close. In judicial takings actions, in fact, *Pullman* would have almost no traction: the relevant state law, for one, would not necessarily be unclear, as *Pullman*

208 See *Younger v Harris*, 401 US 37, 40–41 (1971) (barring federal courts from hearing civil claims brought by a person currently being prosecuted in state court).

209 See *Burford v Sun Oil Co*, 319 US 315, 332 (1943) (advising abstention when a diversity case presents a particularly complex question of state law); *Louisiana Power & Light Co v City of Thibodaux*, 360 US 25, 29 (1959) (advising abstention when a diversity case presents an issue of great public importance to a state).

210 424 US 800 (1976).

211 See id at 819–20 (encouraging abstention in narrow contexts of parallel litigation).

212 *Railroad Commission of Texas v Pullman Company*, 312 US 496, 501 (1941).

213 *San Remo*, 545 US at 330–32, 338–42.

requires, since many judicial takings will come in opinions clear as day. And additional state court consideration, for another, would not necessarily "moot the remaining federal questions,"[214] as *Pullman* likewise demands, since those questions were already necessitated, not obviated, by state court rulings.

At the heart of much of abstention, of course, is a policy no less important than this doctrinal black letter. That policy is explicitly state protective, anchored in a desire to keep federal courts out of the messy business of interpreting or interfering with state law. Suing state judges in federal courts may seem to promise just that kind of interference. Nothing would seem more contrary to the spirit of "Our Federalism," in fact, than holding state courts accountable in this way.[215] But the details of these suits actually suggest quite the opposite. They suggest federal courts are ready, even compelled, to accept a state court's interpretation of its own law faithfully and fully—and to leave that interpretation entirely in place.[216] They also suggest lawsuits rooted firmly and unavoidably in the federal Constitution. A judicial takings suit against the Minnesota Supreme Court, for example, does not ask a federal district court to rethink Minnesota law or to enforce that law against its own interpreter. It asks only that the district provide some sort of remedy, discussed below, for the state court's judicial acts. Neither judicial nor sovereign immunity should prevent this kind of lawsuit, as we argued above. Nor should the federalist underpinnings of federal court abstention.

Rooker-Feldman should not prevent it either. *Rooker-Feldman* doctrine is focused on federal limits: it prohibits lower federal courts from exercising appellate authority over state court decisions.[217] That kind of appellate review is limited to particular courts and places—to the Supreme Court's certiorari practice and, in a way, habeas corpus. Other exercises of federal appellate power are not permitted. So if

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214 Id at 330.

215 See *Younger*, 401 US at 44–45.

216 We likewise believe that federal courts must accept what state supreme courts say about changes in law. If a state court acknowledges it has changed the law, the federal court's job will be easy enough. And it will be easy enough too, if somewhat more uncomfortable, if the state court disingenuously says that it has changed the law or that it has not—though we hope such dishonesty will be rare. In both cases, the federal court must accept what the state court has said, even if wrong. But in all other cases—particularly those with no answer from the state court at all—the federal court sits in a harder position, though it still has its standard *Erie* options: certify a question to the state court, perhaps abstain, or guess. See generally Stacey L. Dogan and Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 Duke J of Const L Pub Poly 107 (2011).

217 See note 10.

suing state courts in federal ones focused on error correction, *Rooker-Feldman* may well control.

But suing courts is not, again, about error correction. And so *Rooker-Feldman* should not control. It does not control suits by non-party-plaintiffs, since *Rooker-Feldman* does not apply when the federal plaintiff was not a party to the original state court suit.[218] And it does not control suits by party-plaintiffs either, since there is no inferior federal court appellate review. As with abstention, no doubt, the policy behind *Rooker-Feldman* may seem a surer fit than its (convoluted) formal letter. But as with abstention, that fit is misleading and that policy concern misplaced. Lower federal courts are not using these suits to substitute their judgment for that of state courts—the driving fear of *Rooker-Feldman*. They are simply assessing the consequences of state court decisions, perhaps awarding remedies, and leaving those decisions otherwise alone.

Many of these suits will still land in state court, either because of plaintiff choice or because of *Williamson County*. And some may land in federal district courts, as we believe they should. But this forum conclusion only prompts a final mechanical question: If the plaintiffs in these suits deserve some sort of remedy, what can the courts do?

5. Remedy.

Plaintiffs suing courts will likely seek some combination of three things: a reversal of the initial court decision, compensatory damages, or a determination that the change in law does not apply to them. Not every plaintiff can seek every one of these remedies. Only party-plaintiffs appealing to superior courts, for example, may request reversal. Non-party-plaintiffs filing new claims in lower courts, for reasons of abstention and (again) *Rooker-Feldman*, understandably should not.[219]

Of these three remedies, the Court has expressly considered two: reversal and damages. Justice Scalia, in his *Stop the Beach* plurality, argued for the former, suggesting that the appropriate remedy for a judicial taking (and perhaps other claims against the court) would be a reversal of the state court's judgment. Damages might also be possible, he admitted, but they would in no way be "exclusive."[220] Justice Kennedy, by contrast, focused on the latter,

218 See *Lance v Dennis*, 546 US 459, 466 (2006).

219 See notes 208–18 and accompanying text.

220 *Stop the Beach*, 130 S Ct at 2607 (plurality).

noting that the Court has mandated the payment of damages for regulatory takings—and, by extension, judicial takings too.[221]

We do not wish to pick one over the other. Reversal may well make sense in at least one setting—where the challenge comes as part of an appeal that merges a new claim and an old mode of error correction. It also recalls a familiar takings argument, by which the favored remedy for regulatory takings was injunctive, not legal, relief. A preference for reversal in certain claims against the court would push the taking power back to state legislatures[222] and encourage those legislatures to write compensation provisions into the relevant laws.

But damages make sense in certain settings too—when non-party-plaintiffs bear the brunt of a needed transition, for example, and when the courts are unwilling or unable to invalidate the relevant law. Even more, damage relief fits better with current takings doctrine, which mandates the availability of damages for regulatory takings, at least for the period of time when the regulation was in effect.[223] This requirement reflects a hard-won victory for advocates of strong property rights—a point that Justice Scalia's plurality, somewhat perplexingly, opts to ignore. It also meshes nicely with our broader and more nuanced notion of judicial accountability—a notion that acknowledges that certain judicial decisions will have consequences that should be mitigated without undoing the change in law.

Both reversal and damages could thus be proper remedies in suits against the courts—in appropriate settings at least. A "grandfather" declaration could also fit as a kind of milder alternative to damage awards. Some plaintiffs may not want damages—or at least not be entitled to them. They may simply be entitled to a judicial determination that the new, court-made change in law does not apply to them.[224] This type of tailored prospectivity is not common in modern doctrine, though such grandfathering does

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221 See id at 2617 (Kennedy concurring).

222 See id at 2607 (plurality).

223 See id at 2616 (Kennedy concurring), citing *First English*, 482 US at 321. See also John D. Echeverria and Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 Vt L Rev 695 (1993) (discussing remedies for regulatory takings).

224 We believe that leaving the original decision in place generally while invalidating it as to a particular plaintiff will still offer plenty of incentive to litigate, even for the party-plaintiff. But see Peñalver and Strahilevitz, 97 Cornell L Rev at *26 (cited in note 130). Not applying that decision to the original party might challenge current thinking on questions of prospectivity, but that hardly suggests that any party will litigate half-heartedly. It may even comport with broader notions of equity: a state court may have the option to enforce a ruling against the party-plaintiff with a cost-easing offer of compensation.

happen, as we discuss below. Like damages, it fits with contemporary takings doctrine. And like damages, it advances a less all-or-nothing vision of judicial accountability. Through damages or declarations, that is, courts can offer a kind of compromise relief.

This compromise is not perfect. Damage claims against state courts trigger skeptical thoughts about sovereign immunity, a concern we hoped to allay above. They also raise questions about agency and political economy—about democratically unaccountable judges setting costly public policy—that we engaged more fully above, too. But if damages seem problematic, the alternative is only more so. Limiting available remedies to reversal would reopen the abstention and *Rooker-Feldman* potholes that the preceding subpart aimed to fill. It would also return judicial accountability to a blunter, all-or-nothing, error-centric mode. And it would inevitably implicate *Erie*, at least when federal courts were asked to reverse state court judgments on matters of state law.[225] It is far better, then, to resist this reversal-only limit in suits against the courts. We thus suggest reversal, damages, and grandfathering—in appropriate doses in appropriate cases—as appropriate remedies.

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The mechanics of suing courts thus prove clear in some places and stubbornly murky in others. But answers to every question invariably come through: Plaintiffs fall into two narrow groups—parties to the original suit and nonparties especially affected by judicial decisions. Defendants form a superficially diverse but substantively indistinguishable mix of judges, panels, and complete courts. Timing rules track appellate procedure for party-plaintiffs and existing statutes of limitations for nonparties, some of whom may find the clock more forgiving at the front than at the back. And

[225] Should a federal court reverse in this setting, it might evade the "positivist trap" we discuss in Part II.A. But it would also run headlong into abstruse notions of "natural property"—and perhaps subtly revive the long-discredited *Swift v Tyson*, 41 US 1, 18 (1842). We realize, of course, that one positivist trap can be layered on top of another. A state court, for example, could simply say that a property owner's reasonable expectations under *Penn Central* must include the chance of common law change. A holding of this kind could cleverly undercut judicial takings claims almost before they start, and it may be as authoritative as any other provision of state law. Gamesmanship like this strikes us as troubling, though we believe it will be exceedingly rare. We also believe that due process may play a helpful role here. For further discussion of the role due process could play in judicial takings claims, see *Stop the Beach*, 130 S Ct at 2615–18 (Kennedy concurring). For a discussion of the transformation from "distinct" to "reasonable" investment-backed expectations, see Serkin, 84 NYU L Rev at 1129 (cited in note 117).

state courts may hear many of these lawsuits, but federal courts will hear some too—and turn to reversal, damages, and grandfathering as remedies when they do. Despite all odds, then, suing courts may be both theoretically plausible and mechanically possible, at least when seen as a mode of transition relief.

6. Hard cases.

But possible does not necessarily mean easy. Suits against the court, as Justice Breyer understandably worried, could still grow tremendously difficult, framing hard cases of two main types. In one, federal courts confront complicated state-law questions in conventional lawsuits—cases that inevitably shape state policy and perhaps give rise to almost impossibly thorny suits against the courts. In the other, courts face sensitive questions in those suits against courts or judges—cases that ask more for application (and for deference) than for the crafting of new state rules.

Of the two, we think the second type less problematic. Courts in our suits are not asked to engage unexpected legal questions or to shape expansive portions of state policy. They are asked, rather, to compare and apply—to determine how an existing rule fits with a new set of facts and to deliver appropriate remedies. A federal court in a judicial takings suit, for example, is not asked to revise California's public trust doctrine or to revamp that state's operative law. It is asked only if a California court's new public trust rule effected a taking of an owner's property—and, if so, what remedy should follow. This task can be difficult and delicate, as we have noted. Courts cannot, and will not, be automatons. But their task here is not especially taxing or unusually novel. It is what courts often do.

In other suits, of course, courts must answer tough questions of substantive law. And here, on this complicated first side, there is more cause for concern. These other suits do not necessarily start as claims against the court, though they may well prompt them. They are suits, instead, about things like prescriptive easements and adverse possession—and they frame our proposal's most difficult case.

That case starts in federal court. A judge there, sitting in diversity jurisdiction, is asked a serious question of state law: Has one person adversely possessed another's property—or, more specifically, has the statutory period for adverse possession changed? The judge looks to state law for her answer, as *Erie* plainly dictates, but her search is unrevealing: no state court has yet answered this

question, and those who have peeked at it have only noted the law's uncertainty. The judge is thus left to guess at the answer—to predict, as a tentative judicial stand-in, what the state supreme court would do.[226] Her guess may be right. It may be wrong. But more interestingly and perhaps more troublingly, her guess may "take" property: a federal judge may interpret state law in a way that qualifies as a judicial taking and thus, in our account, permits a suit against the court. But what, exactly, should happen if she does?

The most obvious next step is to appeal. And in some cases this might moot the point. A circuit court or the Supreme Court might guess differently than the district court, ending the case in a way that effects no taking at all. In other cases, though, an appeal will postpone the puzzle without solving it: a circuit court or the Supreme Court could affirm the district court[227]—and thus participate in the taking, too.

One option would then be to sue a federal court. If judicial accountability truly entails making courts liable for the harms they impose—even when they are right on the law—then the wise choice would seem to be to sue the ultimate federal actor. But this choice is structurally and substantively odd: Structurally, it portends a strange[228] judicial inversion, since the Tucker Act[229] sends damage actions against the federal government (including, ostensibly, the Supreme Court) to the Court of Claims.[230] Substantively, it neglects the core of the lawsuit, since it asks the federal government to provide compensation for takings made under state law. In this case,

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226 See, for example, *Intec USA, LLC v Engle*, 467 F3d 1038, 1040 (7th Cir 2006) ("Under *Erie* . . . the federal court's task is not to make an independent decision but to predict how the Supreme Court of [the state] would understand and apply its own law."). See also Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L Rev 651, 714 (1995). We admit that this may be a better case for *Burford* or *Pullman* abstention than in the follow-on suit against a court, since here the state law is unsettled, a federal court is sitting in diversity, and a state-court decision could obviate the need for federal review. See notes 208–14 and accompanying text. The federal court might also attempt to certify the question to the state supreme court, provided that court was open and amenable. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U Pa L Rev 1459, 1556–63 (1997) (proposing a presumption in favor of certification). But this hard case is in no way a red herring. Federal courts can predict. Even more, they can well predict rightly that an old and confusing adverse possession approach, say, will be completely supplanted by a newer one—one that all of a state's intermediate courts tepidly endorse. In a case like this, the federal court may thus seem to change state law without being wrong.

227 And current numbers suggest that this is likely. See note 17 and accompanying text.

228 But not fatal. Note, again, that our model does not ask courts hearing suits against other courts to declare the first court wrong, but instead to award some remedy.

229 24 Stat 505 (1887), codified as amended at 28 USC § 1491.

230 Tucker Act ch 359 § 14, 28 USC § 1491.

federal courts were merely diversity mouthpieces, seemingly faithful interpreters of controlling state substance. Suing them thus seems less like ensuring accountability than like shooting the messenger.

So perhaps the suit should not target the federal courts. But no other defendant is at all obvious. State judges and state courts seem wrong because none ever ruled on the issue. And the state itself seems off because federal courts, even in diversity jurisdiction, are well outside the state's immediate control. Suing the state would lead to other complications too: *Williamson County*, if it applies, would seem to require a property owner to seek compensation in a state court simply to ripen her federal takings claim. This owner, then, must bring an inverse-condemnation action in state court alleging that the state took her property by way of a federal-court ruling on the content of state law. The state court may agree with the owner and award compensation. Or it may disagree with the owner and deny any remedy, though things would not necessarily end there. The owner would now seem to have a ripe judicial takings claim, one ready to bring, curiously enough, back in federal court. Having started in federal court and lost in state court, that is, the owner could return to federal court once more.[231] And the content of this second federal suit would still be unclear: it could challenge the federal court's own initial decision, or it could target the state court's denial of relief. If the former, the case confronts real futility and preclusion limits—either because of *San Remo* or because of traditional issue preclusion. But if the latter, the case risks becoming an endless loop: the federal court could hear the challenge to the state court's decision, but a rejection of that first claim could trigger a new claim of judicial taking, which would then require an inverse-condemnation action in state court, which could then, if denied, prompt yet another filing in federal court.

There is no simple key to this puzzle. Our answers about mechanics give shape and substance to a novel court invention, but even they can go only so far. Hard cases will continue to defy elegant solution—because of the demands of *Williamson County*, because of the operation of *Erie*, and because of the Möbius strip of cases moving back and forth between state and federal court. These complications paint a gloomy picture of judicial takings specifically and of suing courts generally. But we hope the hardest cases are also anomalous ones—rare enough, in fact, that we are right not to

[231] It would now seem to satisfy the original subject-matter jurisdiction demands of 28 USC § 1331.

structure our proposal around them.[232] And we believe that, as a means and measure of judicial accountability, suing courts can still work. It will not serve to correct court errors. But it can, for judicial takings and perhaps other things, facilitate common law improvement while providing transition relief.

B. Scope and Uses

A final question asks where our proposal might work. It may work for judicial takings, where the Court now most expects it. And it may work elsewhere too, though we are admittedly skeptical. This subpart explores both the reach of our proposal and the reasons for our skepticism. It then considers those places, already in the law, that now combine accountability with transition relief.

1. Full suit.

If suing courts works anywhere, fully and freely, it works for judicial takings. There, by accident or design, constitutional text, state law, current doctrine, and transition-based accountability best align. The Fifth Amendment commits the government to providing just compensation for the taking of property, not based on which state actor took it, but on whether it was taken at all. The mechanics of litigation also make the most sense there: plaintiffs have defendants to sue and a place to sue them, as we detailed above.

Other property settings may also permit suing courts. Some pension benefit decisions, for example, may look not just like adjustments to pension holders' essential benefits, but like takings by a court. Were a court in Michigan, say, to suspend cost-of-living increases for pension-backed retirees, a takings-like suit against the court might follow—though this seems unlikely from the start. Recent reductions in pension benefits have been made, not by determined judges, but by cash-strapped state legislatures.[233] And the follow-on litigation has centered less on takings doctrine than on the Contract Clause.[234]

The Takings and Contract Clauses fit well together. Both Takings and Contract have played some part, for example, in the

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232 And, again, perhaps the federal court will peek ahead, fear what this morass promises, and abstain under *Burford* or *Pullman.*

233 See, for example, First Amended Class Action Complaint, *Justus v Colorado*, No 2010-CV-1589, *11–12 (Colo Dist Ct filed Mar 17, 2010) (on file with author).

234 See id at *11. This is true even as states have deemed pension interests vested property rights and thus suggested that judicial abrogation of pension benefits would fit well with our model of transition relief.

evolution of the public trust doctrine.[235] Both create federal safeguards for interests created primarily (or entirely) by state law. And both seem open, more or less, to protection by way of transition relief—Takings by its plain language, Contract by an early interpretation focused on remedial adequacy.[236] Yet these useful similarities make only half a case that the Contract Clause might subject a court to suit. The Contract Clause, for one, closes a door that the Takings Clause leaves conveniently open, since it prohibits only impairment by legislation, not by judicial decree.[237] And the Contract Clause, for another, may be a constitutional dead letter, since its protections admit so many exceptions that there seems almost no life left.[238] Suits against the court seem an unlikely place for revival.

Suits in other settings may seem unlikelier still. The reason is not that courts never violate individual rights. On occasion they do, as *Shelley v Kraemer*[239] makes clear.[240] But if a court infringes constitutional rights—by denying a defendant's right to confront witnesses, say, or by enforcing a racially restrictive covenant—the smart response is still the traditional one: to use appeal, mandamus, or habeas corpus to correct the court's mistake. In those contexts, accountability does not entail protecting individual litigants from the harshest effects of useful legal change. It entails remedying a blunder, and so there is no need for separate suit.

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235 Today, takings doctrine seems to moderate the harsh effects of public trust doctrine. Long ago, the Court used public trust doctrine to weaken the Contract Clause. See, for example, *Illinois Central Railroad v Illinois*, 146 US 387, 460 (1892); id at 473 (Shiras dissenting).

236 See, for example, *Sturges v Crowninshield*, 17 US (4 Wheat) 122, 200 (1819) ("Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."). See also James W. Ely Jr, *Whatever Happened to the Contract Clause?*, 4 Charleston L Rev 371, 377 (2010) ("States, for instance, could abolish imprisonment for debt without running afoul of the Contract Clause so long as other effective means of enforcement remained.").

237 See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 199–202 (Macmillan 1928).

238 See, for example, Ely, 4 Charleston L Rev at 376 (cited in note 236) ("Between 1941 and 1977, the Supreme Court heard few cases raising Contract Clause issues and found no violations of the provision. By 1978, the Court felt a need to insist that 'the Contract Clause remains part of the Constitution. It is not a dead letter.'") (citations omitted).

239 334 US 1 (1948). See also Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 Minn L Rev *9–12 (forthcoming 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788242 (visited Jan 5, 2012).

240 *Shelley*, 334 US at 20. See also generally Nestor M. Davidson, *Judicial Takings and State Action: Rereading* Shelley *after* Stop the Beach Renourishment, 6 Duke J Const L & Pub Poly 75 (2011).

But the need for an alternative remedy may elsewhere be more acute. Say, for example, that the Connecticut Supreme Court refashioned a key portion of its products liability law, shifting an all-important duty from retailers to manufacturers.[241] Under old Connecticut law, only retailers needed to inspect motorcycle wheels before sale, so manufacturers typically performed no such inspection. Under new state law, though, manufacturers must inspect those wheels themselves—and now face liability for items distributed before the legal change. This court-made change may well be a good one, a move that allocates costs to the lowest-cost avoider and better protects riders and nonriders alike. But some manufacturers might still feel especially and almost uniquely aggrieved, as if somehow deprived of due process of law. These manufacturers might feel, that is, much like a property owner feels in a judicial takings lawsuit: as if a state court has infringed their rights,[242] not by immediately wrongful conduct, but by crafting a state rule that is, as to them, incompatible with a federal backstop.[243] A suit against the court, brought by a manufacturer seeking a measure of transitional remedy, might thus work here, too.

We say this hesitantly for a reason. Any suit of this type would confront sovereign immunity barriers that, under due process, are not clearly abrogated. Any suit of this type would also raise hard questions about proper parties, valid forum, reasonable timing, and appropriate remedies. And any suit of this type would thus demand the kind of detailed analysis that, for takings-based claims, we provided above. We do not mean to gainsay these complexities. Questions of harm, immunity, and transitional accountability may well point one way for takings cases and a different way for most others. Even the closest (known) candidate for extension—the Contract Clause—is at best moribund. But we think that there may be other places where suing courts could work, and we believe that those places, if they exist, will likely mirror the Takings and Contract realm: individual rights defined largely by state law but still set

241 For an example of such a decision, see *MacPherson v Buick Motor Co*, 111 NE 1050, 1053 (NY 1916).

242 Ignore long-argued questions about whether personal jurisdiction is (or should be) about fairness or federalism. See Bloom, 61 Stan L Rev at 984 & n 73 (cited in note 144).

243 See Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others under the Burger Court*, 59 NYU L Rev 482, 570–74 (1984) (arguing against the Burger Court's extension of positivist theory—and thus the setting of another positivist trap—from property to liberty).

against a federal backdrop.[244] For now, though, our proposal draws a limited frame. Suing courts holds an unexpected promise, but it holds that promise narrowly.

2. Half shades.

But that does not mean our vision of accountability has only one doctrinal home. There are shades of this vision in other places—not in full-scale suits against judges, but in the shadows cast by other things.

One is harmless error. Harmless error, again, is a common feature of modern appeals. It allows appellate courts to call out lower court errors without correcting them—to note legal missteps but still preserve the lower court decision because the missteps did no harm. There is no suit against the court here and no claim for money damages. But there is a crucial compromise: courts can clarify, even improve, the law while leaving unaffected particular parties' rights. Harmless error thus looks in part like our suits flipped over. It seeks out harmlessness instead of harm, errors instead of improvements. But harmless error and harmful improvement look like partial partners too. Both embrace that important space between what courts say about law and what happens to particular parties—harmless error by leaving some legal missteps uncorrected, harmful improvement by allaying the costs of some legal change.[245]

Modern habeas and our suits share something different. They share a kind of deference to lawmaking state courts. This deference is more obvious in modern habeas. There, under AEDPA, state courts can push the law in new and different directions—and so long as these pushes are not "unreasonable," federal courts must leave them alone.[246] Our suits can be similarly state court friendly, not

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244 We do not think this will include wrongful conviction claims. Some of those claims, like those in DNA exoneration cases, involve changes in facts, not law, and so fall outside the focus of our proposal. Other such claims, like those about changes to confrontation clause doctrine, involve changes in law but with a very different impetus for prospective plaintiffs: Our plaintiffs want out of a legal change—to avoid the harm of the harmful improvement. Those other (wrongful conviction) plaintiffs want into a legal change—to take advantage of a new regime that might be an improvement and might also be harmless. They are thus very different from the perspective of prospectivity, and they fall importantly outside our scope.

245 For a similar proposal in the context of the Fourth Amendment, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 801–11, 814–15 (1994) (proposing that otherwise-invalid evidence should be admitted and those thereby harmed should sue for damages). Our proposal differs fundamentally from Amar's in that his, unlike ours, concentrates on error. But our ideas are similar in one key respect: both aim to ease the burden on some parties who bear great costs.

246 See Bloom, 93 Cornell L Rev at 538–40 (cited in note 37).

because they encourage legal error, but because they open new room for courts to change the law. A state court fearing the uncompensated harm that might follow a decision may choose not to make it—just as a state court fearing reversal may opt to change its course. But current habeas doctrine gives state courts some comfort in criminal cases, quietly inviting them to push the boundaries of existing federal law.[247] Our suits may give some comfort in other settings, freeing state courts to update laws of their own.

That freedom has real limits. We do not think our suits will encourage courts to change the law rashly or regularly, nor do we think they should. But there is a chance that they will do more than mirror habeas and harmless error in some key respects: they may reshape certain matters of legal prospectivity. The prospectivity question—whether a new law should look forward only, or if it should also look back—has different answers for different laws. Legislative rules are typically prospective, operating only going forward and encouraging full reliance on preexisting law. Judicial rules, by contrast, are generally both prospective and retroactive, applying to what is coming as well as some of what came before. A new statute raising diversity jurisdiction's amount-in-controversy requirement, for example, would apply only to cases filed after its enactment. A new common law doctrine declaring certain evidence inadmissible, by contrast, would apply to subsequent cases and older ones still under review. We do not mean to overstate this prospectivity black letter. "Retroactive" and "prospective" are oversimplified categories, and a long list of exceptions clutters these baseline rules.[248] But judicial decisions still tend to follow a prospectivity pattern: they apply to subsequent parties and to the parties before the court.

Our proposal permits a finer-grained approach. It allows a nuanced kind of judicial prospectivity, giving courts the ability to announce a new rule but not apply it to the parties before it—or even to some others who come after. This kind of judicial prospectivity is not unprecedented. The Supreme Court has experimented with it, in other ways and other settings, since at least 1961.[249] The Court has also, on occasion, pulled prospectivity and

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247 Id.

248 One such exception is *Teague v Lane*'s limits on retroactivity in collateral review. See 489 US 288, 310 (1989) (plurality).

249 See *James v United States*, 366 US 213, 221 (1961).

retroactivity away from their "purest" forms.[250] Our suits against courts likewise shed these inflated "pure" categories. They permit courts in some settings to make party-specific prospectivity decisions, eliding all-or-nothing prospectivity rules. And they help relieve party burdens where that relief is most needed—in property settings, for example, where a party has justifiably but to her detriment relied on an existing rule.[251]

Critics might call this "activism."[252] Judicial prospectivity is, to them, a "born enemy of stare decisis" and a quick route to legislating from the bench.[253] But these same critics stand at the vanguard of judicial takings, and we believe they think too little of modern courts. "In the hands of skilled judicial craftsmen," California Supreme Court Chief Justice Roger Traynor once suggested, judicial prospectivity "can be an instrument of justice that fosters public respect for the law."[254] So too, more generally, can suing courts.

CONCLUSION

This paper started with a simple reminder: today's courts, for ill or for good, sometimes change the law. Many of those changes are marginal, so slight that they generate almost no notice. Others are mistaken, good-faith fumbles that get things wrong. For these legal blunders, the law has clear solutions: appeal, mandamus, and habeas corpus all aim to root out court-made mistakes.

But other court-made changes are neither trivial nor erroneous. They are good, critical, perhaps even necessary—though not always without harm. Old error-correcting models have little to say here, and so these real harms can often go unaddressed. We propose something to fill that gap in court accountability: suits against the courts.

Our proposal comes with more than a dose of helpful provocation. It provides the first complete account of how, where, and why suing courts might work. A suit against the court is not

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250 See William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 652–54 (Thomson 4th ed 2007). See also *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 88 (1982) (plurality); *Li v Yellow Cab Co*, 532 P2d 1226 (Cal 1975); *Spanel v Mounds View School District No 621*, 118 NW2d 795, 796 (Minn 1962).

251 See Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L J 533, 535 (1977).

252 See *Harper v Virginia Department of Taxation*, 509 US 86, 105 (1993) (Scalia concurring).

253 Id (emphasis omitted).

254 Traynor, 28 Hastings L J at 542 (cited in note 251).

designed to correct judicial errors—and even less to invite angry losing parties to settle legal scores. Nor is it a last-chance stand-in where old models fail. It is something new in focus and different in form. Suing courts allows parties to access legal remedies when they shoulder the heaviest burdens of desirable legal change. We think those parties, and thus their suits, will be unusual—limited, perhaps, to judicial takings claims. But in that space these suits are conceptually rational and mechanically reasonable, a tool that eases legal transitions while navigating the many hurdles modern doctrine sets in its way. These suits are thus more plausible than many might anticipate. They discipline courts and simultaneously liberate them. And they hold surprising promise for all concerned, as a narrow hope for impacted parties and as a new measure of accountability for law-changing courts.