REDISTRIBUTIVE LITIGATION—JUDICIAL INNOVATION, PRIVATE EXPECTATIONS, AND THE SHADOW OF INTERNATIONAL LAW

Paul B. Stephan*

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   A. Redistributive Legislation and Litigation—A Dynamic Analysis.................................................................852

* Percy Brown, Jr. Professor and E. James Kelly, Jr.—Class of 1965 Research Professor, University of Virginia School of Law. Thanks to Pamela Clark, Barry Cushman, John Harrison, John Jeffries, Kevin Kordana, Saul Levmore, Paul Rubin, Robert E. Scott, and Anne Woolhandler, and to participants in the Virginia Law School faculty retreat, the 2001 Annual Conference of the International Economic Law Interest Group of the American Society for International Law, and the University of Texas Law School faculty colloquium, for comments and criticism. Blunders remain my sole responsibility.
WHAT constrains judicial innovation? The late controversy over the 2000 election surfaced this question. In *Bush v. Gore* ("Bush II"),\(^1\) three members of the United States Supreme Court believed that the Florida Supreme Court had invented a new rule to decide the case before it, and that federal law barred such creativity.\(^2\) The four dissenters found it amazing that the Court would regard a state court’s interpretation of state law as willful lawmaking forbidden under federal law. Justice Stevens put it succinctly: "[The Florida Supreme Court] did what courts do . . . ."\(^3\) In these different perceptions of the lower court’s behavior and a

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\(^1\) 531 U.S. 98 (2000).


\(^3\) *Bush II*, 531 U.S. at 128 (Stevens, J., dissenting).
higher court's duty to respond, we find framed a persistent issue of increasing significance. To what extent do courts compete with other lawmakers in the creation of legal rules? Where a court acts as an independent lawmaker, do external limits apply, and if so, what kind?

At the dawn of the twenty-first century, we have long since shed the belief that courts "find" rather than "make" law. Once we crossed this line, we had to struggle with contradictory commitments. We embrace the ideals of liberal democracy, which include the notion of holding lawmakers accountable for their actions through democratic processes. We believe in judicial independence, which means insulating courts from direct political intervention. But we cannot accept judicial lawmaking and still give full rein to both of these aspirations.

Our responses to the dilemma fragment. Some find it sufficient to expose the naked preferences that underlie judicial lawmaking. Others seek to develop a system of internal constraints that judges can adopt to master themselves. Another possibility entails the fashioning of external mechanisms that would limit what judges can do, either by imposing a self-enforcing doctrinal check, enlarging the areas in which the political branches may override judicial conclusions, or bolstering supervision of subordinate courts by those higher in the hierarchy. The Bush II concurrence represents a variation of the last approach: Chief Justice Rehnquist and his colleagues used a perceived federal interest to justify their rejection of what they saw as a state court's invention of state law. International institutions increasingly provide another instance of the same strategy, as tribunals created by international agreements hold nations accountable for the actions of their courts.

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4 I take this to be the principal accomplishment of the critical legal studies movement, as well as of the earlier legal realists.

5 One thinks of the work of Ronald Dworkin and Cass Sunstein, among others. In a sense, this approach might function as a kind of external constraint, inasmuch as academic critics will hold judges accountable for a failure to honor whatever internal constraints the critics may believe to apply. Academic critics have little power to alter the result of judicial lawmaking, but they may have some ability to determine judicial reputations, which in turn may affect judicial behavior. For more on factors affecting judicial behavior, see the authorities cited infra note 142.

Embedded in the strategy of external constraint, as Bush II illustrates, is a paradox. For a superior court to seize on the excessive creativity of an otherwise competent lower court as a ground for reversal, the supervising court itself must invent a new rule, or at least significantly extend preexisting doctrine. From the perspective of the lower court, what distinguishes creativity from defiance is the absence of a clear edict from higher authority foreclosing the path taken. We normally regard federal courts as powerless to revise state court determinations of state law, just as international tribunals ordinarily have no right to correct findings of national law. But if federal courts or international lawmakers are to get into the business of overseeing judicial innovation, they necessarily must decide what outcomes would not be surprising. They thus must indicate something about the permissible limits of innovation, even though promulgating and determining state or national law falls outside their capacity. The antidote to surprising and destabilizing judicial activity thus becomes more ingenious, and perhaps still surprising and unstable, law arising at a higher level in the judicial hierarchy.\(^7\)

Yet in spite of these disturbing implications, the idea that a court may commit reversible error simply by straying too far from the predictable path of its past declarations of the law is as old as the Republic. It most certainly did not first appear full blown in the Bush II concurrence. Occasionally, if rarely, federal courts have assumed the power to reject state court interpretations of state law that seemed fanciful and suggested hostility to federal interests. In these cases, courts have invoked due process and related constitutional doctrines to nullify judicial actions that seemed too surprising and too unbounded to fit within the framework of conventional judicial lawmaking.\(^8\)

\(^7\) See Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1468 & n.83 (1990).

\(^8\) See, e.g., Presnell v. Georgia, 439 U.S. 14 (1978) (affirming a criminal conviction on a different ground from the trial court decision violates due process); Henry v. Mississippi, 379 U.S. 443 (1965) (disregarding a state court ruling on procedural default); Bouie v. City of Columbia, 378 U.S. 347 (1964) (finding that a change in court interpretation of state criminal law cannot justify criminal punishment); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (disregarding a state court ruling on procedural default because it was contrived); Cole v. Arkansas, 333 U.S. 196 (1948) (resting affirmance of state criminal conviction on a different statute from that
To be sure, the Supreme Court cases do not deal with surprise as such, but rather apparent antipathy to a significant federal interest. Yet some courts have hinted, and a few commentators have argued, that settled expectations vel non create a protected federal interest. In property law, the argument that creative judicial decisions altering the rights of property owners implicate the Takings Clause enjoys some currency.9 In international law, some have seen discriminatory or uncompensated expropriations carried out by the judiciary as every bit as objectionable as those imposed by other branches of government.10 In other words, the modest external limits on the power of governments to redistribute wealth retain some vitality when the judiciary, rather than the legislature or the executive, undertakes to alter settled material interests.

I wish to ground this struggle to limit litigation’s redistributive possibilities in a familiar project of both constitutional and international law. One of the great ambitions of the Constitution—some would say its central purpose—was the creation of a national common market free of the risk of predatory localism. The founders believed that absent legal and institutional restraints, local authorities would seek short-term advantages resulting from exploitation of strangers and outsiders at the cost of a flourishing
national commerce. Consistently throughout the nineteenth century, and intermittently throughout the twentieth, the Supreme Court honored this commitment by rejecting state court interpretations of local law that smacked of localist exploitation. Similarly, over the last two centuries, international law has devoted much of its resources to promoting the “national principle,” under which outsiders enjoy some of the privileges and rights of locals. The principle does not rest on abstract humanitarian values, but on a conviction that protecting outsiders can bring tangible benefits. Both of these legal traditions, I argue, should shape our efforts to contain expropriatory judicial actions.

I begin by defining and exploring the concept of redistributive litigation. I concede the slipperiness of the subject, as all judicial activity contains the incubus of instability. I argue, however, that one sensibly can distinguish between more and less predictable outcomes, and that some departures from prior authority have such a significant effect on distributions of rights, duties, powers, and immunities that the concept of redistribution seems appropriate.

I reinforce these conceptual arguments by demonstrating how, at times, the law deals with the general problem of government redistribution and the extent to which it has applied its tools to judicial behavior. I provide a brief history of “takings” jurisprudence and the international law governing expropriation to illustrate how courts and their international counterparts have used these doctrines to constrain governmental (including judicial) action. What we find is not a set of hard rules that reliably deters judicial innovation, but rather the outline of a strategy that federal courts and international tribunals have invoked in the face of unwanted judicial creativity.

Next I describe theoretical arguments for constraining redistribution. I narrow the field of inquiry by putting aside competing moral claims about the sanctity of property and the need to rectify morally arbitrary distributions of rights. I instead focus on those instances of redistribution that seem most likely to harm general welfare. I employ the conventional Prisoner’s Dilemma analysis to identify the instances that present a collective action problem and thus seem most likely to be harmful. The argument suggests that welfare-reducing redistributions pose special problems when the
decisionmakers choosing redistribution do not have to bear a proportionate share of the costs of redistribution. Cost externalization thus becomes the tell-tale sign of redistributions that we should wish to constrain. This argument points directly to predatory localism as the central problem for which external constraints on judicial creativity have their greatest justification.

I then extend this analysis by exploring how a redistributive judiciary might function. I examine structural attributes that may lead the judiciary to embrace redistributive projects without legislative authorization. Identifying the conditions under which a judiciary may stray from legislative preferences suggests an argument for limiting external review of judicial redistribution. In most instances, legislatures can rein in overly creative courts without any need for other checks. But this constraint may not suffice for those redistributions that present significant problems of cost externalization. The problem of predatory localism resurfaces, because we might anticipate that legislators will fail to rein in free-lancing judges exactly in those instances where we might question the efficacy of judicial outcomes. Where a redistribution achieved through litigation systematically disfavors outsider groups (the prototypical case involves nonresidents) and the judicial process producing the redistribution seems vulnerable to bias against such outsiders (for example, popularly elected judges, flexible venue rules, and the use of local jurors), external constraints might have greater benefits than costs. Hence the conventional, if not fully developed, law governing expropriation of foreign investors might help to anchor an otherwise difficult problem under the Takings Clause.

Besides exploring the possible evolution of takings doctrine, I also suggest a fairly straightforward legislative step that might dispel many of the problems associated with redistributive litigation. During the nineteenth century, the Supreme Court employed creative interpretations of diversity jurisdiction and removal statutes to expand the opportunities for outsiders to avoid litigation in localist courts. Congress similarly might address the contemporary variation of this problem by broadening the diversity and removal jurisdiction of the federal courts. I explore the constitutional issues that such an expansion might present and explain why, on balance, they are chimerical.
I. REDISTRIBUTIVE LITIGATION: A DEFENSE OF THE CONCEPT

A proponent of the "redistributive litigation" concept must grapple with two problems. First, in one sense, all litigation smacks of redistribution. One side defends the status quo, the other side attacks it, and at a certain level of abstraction a court's only choice is between keeping things as they are and effecting change. Second, in another sense, no litigation is redistributive. Legal principles in most cases are sufficiently abstract and indeterminate to justify, or at least to lend a patina of legitimacy to, almost any outcome. Each of these points threatens to rob the concept of any meaning that can give it purchase.

I respond to each argument by demonstrating its incompleteness. I then clarify the distinction between redistribution and innovation. While redistribution involves the unsettling of expectations, and in that sense presupposes innovation, an innovative legal rule does not necessarily lead to wealth redistribution, as distinguished from wealth creation. Finally, I illustrate the concept of redistributive litigation with examples.

A. Not All Litigation Is Redistributive

I first take up the problem of over-inclusiveness. Only from an ex post perspective can one say that all litigation involves redistribution. Every case entails a struggle over particular assets, whether tangible or abstract, but it also presents an opportunity to confirm or announce a legal norm. A case involves both an ex post resolution of a fully formed dispute and an ex ante indication of a standard or rule that will govern future conduct. On the one hand, the transfer of even a large body of assets as a result of the application of a well-established rule reflects not redistribution, but rather confirmation of the principle that law, not power, determines the ability to enjoy particular rights and privileges. The announcement of a new and surprising application of a rule, on the other hand, can be considered redistributive to the extent it achieves a significant alteration in the legal interests held by people subject to the rule. Note that a case decision can be redistributive even if the assets at stake in the litigation are insignificant or do not change hands. Rather, the redistributive nature of litigation comes from the power of courts to reach a legal outcome that unsettles reasonably
fixed expectations, whether those of the parties to the case or of others.

Courts have two different ways of unsettling expectations ex ante. First, they can demonstrate that they will disregard well-established norms without indicating convincingly how they will behave in the future. They can become, in essence, unpredictable. Perhaps the most common criticism of *Bush II*, for example, is that the Court failed to articulate a principle that plausibly would govern its future decisionmaking. Courts at any level of the judicial system can carry out this kind of unsettling. A surprising trial outcome that goes uncorrected, perhaps because the parties settle, also degrades the predictability of law, even though such events necessarily do not substitute a new legal norm in place of the newly unreliable one.

Second, courts can use their powers of stare decisis to declare new rules for the future. This power varies with the level of the court. The Supreme Court’s declarations leave the widest wake, a trial court’s the narrowest. A subsidiary issue is the credibility of the courts’ pronouncements. A court with a history of disregarding precedent has less of a capacity to shape future behavior, whether its own, that of subordinate courts, or that of persons reacting to legal rules. A convincing announcement of a new legal rule by a court at the top of the hierarchy has the greatest redistributive effect, but other judicial actions also can contribute to redistribution.

Even this generous understanding of redistribution does not encompass all litigation. Some legal outcomes are uncertain, if only in the sense that reasonable people would invest money in the lawsuit to find out the outcome. But not all outcomes are surprising, in the sense that a reasonable person would have heavily discounted the likelihood of it occurring. My focus is on the class of remarkably unexpected outcomes of litigated cases.

**B. Some Litigation Is Redistributive**

The problem of under-inclusiveness—the claim that no litigation produces a completely surprising outcome—can rest on either old-fashioned conceptions of law as something found rather than made, or on post-modern depictions of judicial lawmaking as contingent, incoherent, and fundamentally an exercise of power. Consider the law-is-eternal argument first. All legal claims use a
vocabulary that implies ancient usage, no matter how innovative the underlying effort. The most surprising decision comes equipped with hoary arguments: It is the application, and not the supporting authority, that catches people off guard.

_McBryde Sugar Co. v. Robinson_\(^{11}\) illustrates the law-is-eternal strategy. Forty years earlier, the territorial Hawaiian courts, in a case to which McBryde was not a party, had ruled that Robinson owned an unqualified right to all the surplus water from a particular river.\(^{12}\) Other precedent, however, had indicated that surplus water interests were subject to a right of reasonable use in favor of downstream riparian owners.\(^{13}\) More generally, the territorial courts seemed to treat Hawaiian land grants as sui generis and absolute, but early colonial legislation also suggested that something like the common law concept of riparian rights existed.

_McBryde_ represented the first opportunity for the Hawaii Supreme Court, a body produced by statehood, to look at these issues. It ruled that the earlier decision in favor of Robinson had no res judicata effect on persons who had not joined in the earlier litigation, and further determined that the concept of "normal daily surplus water" constituted a null set because of riparian rights of downstream owners. Finally, the court rejected the argument that the state had not retained certain rights to the water flow.\(^{14}\)

Unlike the territorial court decisions, the Hawaii Supreme Court relied heavily on Anglo-American common law concepts of "fair use" of water to guide its decisions.\(^{15}\) The United States Court of Appeals for the Ninth Circuit later characterized the Hawaii Supreme Court as throwing out an indigenous system of real property law and supplanting it with the common law of riparian rights.\(^{16}\) But the territorial law of Hawaii was at least pregnant with the

13 McBryde, 504 P.2d at 1336–38.
14 Id. at 1344–45.
15 Id. at 1336–38.
possibility that riparian rights existed, and all the cases on which Robinson and the other private landowners relied were distinguishable. The law announced by the Hawaii Supreme Court might have surprised the parties, but nonetheless it was "out there" in the sense that prior authority did not specifically dictate a contrary result and did hint at the conceptual architecture for the result reached.

A more sophisticated alternative to this essentially pre-modern argument would contend that anyone surprised by any judicial outcome must suffer from unforgivable naiveté. We must see all judicial decisions, before their announcement, as smears of probability, clusters of possible results across an indefinite range of potential choices. Privileging any subset of these possible rules as "normal," and stigmatizing the remainder as "surprising," denies the fundamental arbitrariness of any choice among the range of possibilities. We know that courts do bizarre and incoherent things—one need look no further than the per curiam opinion in Bush II—and the recognition of this indisputable fact unsettles any claim that people have a reliance interest worth protecting in any particular cluster of expectations about legal entitlements.

Either variation of the under-inclusiveness assertion poses a formidable, but not insurmountable, objection to the concept of redistributive litigation. Yes, legal authority and legal reasoning are plastic, and determined courts may find little in the way if they wish to take the law in a new direction. But the path of the law is not completely random. Students of law can recognize a distinction between impossible outcomes and unlikely ones: The former may not exist, but the latter certainly do.

To begin with, what about law's own claim about the reliability of particular legal interests? Both takings and expropriation law, which I discuss below, presume that people can count on the expectations that the legal system generates. Each of these bodies of law recognizes, at least theoretically, a class of actions that government may not undertake because of the absence of any discernible public purpose, and a much wider class of actions that government may undertake but for which it must pay compensation. The distinction between compensable infringement and unfettered power to intrude on private interests presupposes a legally defined territory of private domain. But why respect this
boundary if it rests on endlessly shifting rules, norms, and principles?

A critic of the concept of redistributive litigation might rejoinder that takings and expropriation law confirm, rather than contradict, the fundamental unreliability of the legal system. Although both bodies of law invoke the rhetoric of legitimate law-based expectations, each has proved elusive and malleable in its content. The disorder in the Court's contemporary takings jurisprudence is well documented.17 As for expropriation law, we need only recall Justice Harlan's observation that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."18 We cannot have it both ways: The recent trend towards greater assertion of judicial power to protect law-based expectations contains the seeds of its own subversion, exactly because it is a recent trend away from the legal status quo.

Yet these objections seem clever rather than profound. The perception of law—or more precisely, of some areas of the law—as reliable, in the sense that they provide a basis for organizing expectations about the future, does not appear to rest entirely on mystification and magical thinking. Beyond the internal logic of the legal system, we find a social reality that manifests great faith (whether reasonable or not) in the idea that law can be settled. Those of us who work closely inside the system, and thus have access to all the sources of its instability and indeterminacy, tend to overlook the resilience of the public's conviction that one can count on law.

A simple way of demonstrating social confidence in law's reliability—or at least of the extent of the social delusion, if that is what it is—is the billions of dollars and millions of person-hours devoted to non-litigation legal services. Across a wide range of human activities, whether organizing a business, a vacation, a fain-

17 Cf. Abraham Bell & Gideon Parchomovsky, Takings Reassessed, 87 Va. L. Rev. 277, 287 (2001) (describing a "confounding welter of cases"); Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 889–90 (2000) (noting that the most recent pronouncements of the Court on the constitutional law of property are "to put it mildly, likely to produce bewilderment among lower courts and practicing lawyers").
ily, or an estate, people act as though informed predictions about legal outcomes have value. This behavior may not provide logical proof that legal outcomes rest on legitimate expectations, but it does indicate that people consider some guesses about them as more reliable than others.

It is not necessary to go down the path of determining how and why an objective basis exists for popular reliance on some portions of the law. It suffices to suggest that the persistence of the belief that some law can be counted on may have something to do with the success of this belief as a guide for action. It seems as if people who act as if law were reliable by and large learn nothing too discouraging from their experience. To use the rhetoric of evolutionary science, investments in the prediction of legal outcomes seem to constitute a successful adaptation to the social environment in which we live.

This evidence that reliance on law is rational, in the sense that individuals more often than not do not come to regard their belief in law's predictability as a source of disappointment, does not prove that this reliance is reasonable, in the sense that the benefits to society resulting from reliable law outweigh the costs. The former is simply a positive claim, that people by and large do not regret their reliance on law. The latter implies a normative judgment, namely that it is good that people so rely. People may expect to find law reliable, but there may exist good normative arguments as to why they ought not.

Acknowledging the existence of those arguments, however, does not negate the existence of powerful counterarguments. The desirability of honoring widely held expectations is one of the most commonly offered normative justifications for the existence of both property and contract law. The intuition that prevents this justification from becoming circular is the belief that life would be incoherent and morally arbitrary, and thus human flourishing would be impossible, unless some command over the future were possible. Law can aid in developing some sense, however limited, of the future's possibilities by rendering them predictable.¹⁹

¹⁹ Other counterarguments exist, in particular the claim that predictability in legal relations enhances welfare by facilitating cooperation and exchange. See, e.g., Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1274–88 (1980).
C. Not All Innovation Is Redistributive

Not all surprising judicial outcomes result in redistribution. A court might answer a question no one had thought to ask before. Alternatively, a court may come up with a creative solution that, while changing the status quo, makes everyone better off. In either case, some people end up better off and no one ends up worse off. By definition, no redistribution has occurred—only wealth creation.20 Alternately, the new legal rule may harm someone, but the beneficiaries compensate the losers out of their winnings.21 The adversarial structure of litigation makes it more difficult to compensate losers, relative to the legislative process. Many innovative legal outcomes, however, respond to gaps in the legal system, rather than replacing settled and reliable rules. Those of us who teach private law, for example, tend to think that many court decisions fall into this category. Such cases typically generate no welfare losses to anyone (ignoring the sunk costs of the litigants).

It is important to distinguish innovative cases where no redistribution occurs from those instances where society benefits from redistribution. In the latter case, the gains from the new rule exceed the costs, but, absent compensation, some persons suffer a net detriment.22 We might regard this kind of judicial innovation as desirable, at least if we value societal gains more than we care about the harms that the losers suffer, but these innovations nonetheless involve a wealth transfer.

D. Categories of Redistributive Litigation

Our subject, then, is litigation that produces surprising outcomes and, viewed from an ex ante perspective, imposes substantial net costs on a distinct class of persons (including, of course, a class of one). Consider now the categories of cases that might achieve this outcome. First, the government might assert on its own behalf a

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20 For reasons discussed in the preceding section, I am ignoring the direct effects from the litigation on the losing party. The issue is whether the outcome, once it occurs, imposes costs.
22 This is, of course, the distinction between Pareto-optimality and Kaldor-Hicks optimality.
redistributive litigation

right to obtain material benefits from private persons, relying on an unexpected application of a particular legal rule to certain facts. Second, private persons might claim against the government a right to obtain an entitlement previously unknown to the law. Third, private persons might seek to strip away property status from some right or power, thereby converting an interest previously protected *erga omnes* into one unprotected against invasions. Fourth, private persons might try to have a private property right declared in what previously was a public commons. Fifth, private persons might assert claims against others that previously had gone unrecognized. Illustrations come from contemporary headlines.

1. Suits by the State

As for state claims against private persons, consider either the lawsuits brought against the major tobacco companies by state attorneys general, or the more recent spate of claims made against U.S. gun manufacturers on behalf of various city governments.\(^{23}\) Whether one considers these suits redistributive depends on the level of generality with which one views the claims. None of these cases involves a startling new legal theory. Each sounds in some mixture of tort and product liability, bodies of law that have been with us for some time. Yet something seems decidedly odd about a government body suing on its own behalf claiming compensable injury due to its own failure to regulate dangerous activity. This reverse paternalism, which depicts government as victim based on theories about improper private interference with the exercise of regulatory power, represents a remarkable extension of old liability principles into uncharted terrain. It also inverts a political order

that presumes government potency and private person vulnerability. Victory for the government plaintiffs certainly would not be inconceivable, but would be startling nonetheless.

Note that the characterization of these lawsuits as unsettling, and therefore redistributive, does not turn on the desirability of the underlying claim for compensation. It may well be true, as Dean-Saul Levmore has suggested, that the failure of a government to regulate risky behavior may have less salience than one first might think. The industry producing the risky products might withhold information to which it has particular access and thus induce the government to make suboptimal regulatory choices. Under these circumstances, a rule requiring retroactive compensation dissipates the incentive to withhold harmful information.24 But Levmore does not offer this explanation to capture the common sense of a widely accepted practice, but rather to cushion the shock of recent legal outcomes that many find surprising.

The point is important, because it allows us to take an initial step toward disaggregating the concept of redistribution from general normative judgments, as well as distinguishing the case for redistribution from the case for redistributive litigation. Levmore makes a convincing argument for certain kinds of redistributions, namely those that will induce appropriate behavior on the part of persons with private knowledge about their own risky behavior. His argument, however, is not that such results are not redistributive, but rather that the redistribution produces net benefits for society as a whole.25

The structure of Levmore’s argument also is significant. Its premise is not the moral need to address an unacceptable status quo, about which only endless argument can ensue, but rather that certain kinds of redistribution will change behavioral incentives in a way that will enhance overall welfare. Premises of this sort are contestable, but also subject to some empirical verification. (How do people react to legal incentives? How do people anticipate changes in the law? How much private information about risky ac-

25 Id. at 1669–73.
tivity is hoarded?) I argue below that we should use this framework in assessing legal rules about redistribution.

The more general point is that—using assumptions that may attract broad support and in any event can be disputed without lapsing into a priori reasoning—some redistributions may be desirable. It follows that a blanket rule that deters all forms of redistribution would be costly. Not surprisingly, we cannot find such a rule anywhere in our law. No critique of redistributive litigation, then, can rest solely on opposition to redistribution.

A second, perhaps more subtle point, is that redistribution obtained through litigation may be problematic in ways that other forms of redistribution may not be. The role of specialized legal knowledge, the absence of unlimited participation rights, and the possibility of structural biases on the part of judicial decisionmakers (including civil juries) may produce outcomes that do not enhance welfare and would not have passed legislative muster. The tobacco litigation is arguably a case in point. The major producers used the settlement with the States both to advance cartelization of their industry (by sacrificing volume for higher prices) and to give the States, who took a long-term stake in the industry's future revenues, an incentive to ward off lawsuits by third parties. The effect, according to some studies, has been a net wealth transfer from cigarette customers, who disproportionately occupy lower socioeconomic strata, to general State revenues and attorneys, with little, if any, losses to the producers.26 It seems implausible that a legislative bargain would have imposed as great a cost on smokers or transferred as much wealth to the States or to lawyers.

Another instance of redistributive litigation exposes other difficulties. In many developing countries, the government seems torn between a desire to attract foreign investment and an inclination to pick off attractive business opportunities from those who developed them. One possible strategy for larcenous governments involves using the courts as a means of ousting the initial owners, on the theory that outcomes produced through litigation will not seem as naked an exercise of state power as would an executive

order of expropriation. Illustrative is a current dispute over the ownership of the foreign copyrights of cartoons produced by a Soviet film studio between 1936 and 1989.\textsuperscript{27} Films By Jove, Inc. ("FBJ"), a U.S. company, believed that a 1992 license agreement it entered into with Soyuzmultfilm Studio ("SS"), a private Russian firm, gave it an exclusive right to show and market this body of work outside of Russia. FBJ then invested considerable sums in the packaging of these cartoons for Western markets and developed a successful business.

A dispute over ownership of these rights arose in 1998, when FBJ brought an infringement action against Berov, a U.S. citizen selling videotapes of the cartoons without its permission. Berov defended by claiming, inter alia, rights under a license granted by Federal State Unitarian Enterprise Soyuzmultfilm Studio ("FSUESMS"), a firm wholly owned by the Russian government. At about this time, a bill introduced in the Russian parliament sought to nationalize the foreign rights to all films produced during the Soviet era; the Russian administration resisted the legislation on the grounds that such a law would amount to an expropriation of private rights for which the government would be liable for damages.\textsuperscript{28} Following the administration's lead, the legislature took no action, but the administration then initiated litigation in the Russian courts to establish the legal status of SS and FSUESMS. SS maintained that it was the legal successor of the state-owned film studio that had produced the cartoons and thus owned the films' copyrights, while FSUESMS contended that the Soviet state had retained these rights, which then had passed to the Russian Federation and ulti-

\textsuperscript{27}Films By Jove v. Berov, 154 F. Supp. 2d 432 (E.D.N.Y. 2001), contains an extensive discussion of the Russian litigation. A reader of this opinion will learn that Films By Jove retained me as an expert on Russian law, and that the characterization of the Russian litigation I offer in this Article corresponds to that I provided on behalf of my client. The U.S. trial judge appeared to accept my characterization, but in fairness I should note that the expert employed by an opposing party in the case, a distinguished U.S. law school professor, offered a significantly different account of the nature and purposes of the Russian litigation.

\textsuperscript{28}In addition to its constitutional obligation to compensate for expropriations, Russia has entered into several international agreements that provide for international arbitration in the events of disputes over seizure of a foreign investor's property. E.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Jun. 17, 1992, U.S.-Russ., S. Treaty Doc. No. 102-33 (1992); Agreement on Investment Incentives, Jun. 17, 1992, U.S.-Russ., T.I.A.S. 11471.
mately to it. The decisions of the Russian courts defy compact description, but it appears that they uphold some of FSUESMS's claims but do not resolve the issue of who owned the copyrights in 1992. It would seem that the object, although not the result, of the Russian litigation was to procure judicial decisions that would do what the proposed legislation would have accomplished, namely remove the legal basis for FBJ's successful business and expropriate for the benefit of the Russian state a valuable, if intangible, asset.\textsuperscript{29}

To summarize, actions by the state to redistribute private wealth may either advance or harm general welfare. The determinants of the value of particular redistributions involve too many factors to permit blanket and aggressive legal rules barring redistribution, and we do not find such rules in our, or in any other country's, legal system. Judicial redistribution may present additional problems that might require particular solutions. But we also should not expect to find comprehensive strategies to deter judicial innovation.

\textbf{2. Suits Against the State}

To illustrate the category of private suits against government, consider a lawsuit now under discussion, but not yet filed. Several prominent academics and trial lawyers suggest they may bring a claim for reparations on behalf of descendants of slaves.\textsuperscript{30} At this stage one can only speculate about legal theories and potential defendants, but consider one possible path of this litigation. If anyone owes a debt for this terrible historic injustice, it would be the sovereigns that maintained the institution of slavery through both law and violence. The Constitution itself enshrined slavery, both by promising not to ban the slave trade for twenty years after the foundation, and by specifying the weight of slaves in the census as

\textsuperscript{29} The precise holding of the Russian court decisions was that SS had ceased to exist in 1999, and that FSUESMS was a valid legal entity although not the legal successor of the former Soviet film studio that had produced the cartoons. The consequences of these decisions under Russian law remain uncertain, and the courts' decrees have not yet been implemented. In the U.S. litigation, the trial court determined that the Russian decisions had no bearing on the question of who had owned the copyrights in 1992 and determined that FBJ had obtained a valid exclusive license. \textit{Films By Jove, Inc.}, 154 F. Supp. 2d at 461–76.

\textsuperscript{30} For discussion of this prospect, see Kevin Hopkins, Forgive U.S. Our Debts? Righting the Wrongs of Slavery, 89 Geo. L.J. 2531 (2001).
equal to three-fifths of a free person. Given this strong authority in favor of pre-Thirteenth Amendment slaveholding, one might think that all slaveholders would have a valid defense (in addition, of course, to the statute of limitations) against civil actions, leaving only the federal and state governments as potential defendants.

Yet however justified may be compensation paid by these governments, any recovery through litigation would require considerable judicial innovation. More than a 130 years have passed since slavery (at least in its explicit legal form) ended in the United States. The national government and the states had an opportunity to make reparations at the time of abolition and yet chose not to do so. In the modestly analogous case of the Japanese-Americans who suffered imprisonment during World War II solely because of their race, the decision to pay compensation came from the political branches, not the courts. In addition, the institution of statutes of limitation, and the concept of finality it expresses, pervade the legal system, yet would have to be circumvented for the slavery reparations litigation to succeed. For all these reasons, any reparations payments resulting from a lawsuit against the federal or state governments would constitute a surprising transfer of resources from the general interest to private hands.

Note again that the claim about innovation is independent of any argument about the desirability of restitution to descendants of slaves. The issue of whether desirable redistribution should proceed through legislation or litigation also does not depend on the characterization of this claim as surprising, except to the extent one objects generally to judicial innovation. In the case of lawsuits that threaten to cost the government, in contrast to cases in the first category, we might worry less about the lack of transparency

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31 U.S. Const., art. I, § 9, cl. 1 (forbidding federal legislation on slave trade until 1808); U.S. Const. art. I, § 2, cl. 3 (weighing “other Persons”).

32 Levmore’s argument in favor of anticipating legal change might apply here, not because of private information but because the most affected class of persons (the slaves) had no role in choosing the legal rule. See Levmore, supra note 24. This argument, however, suggests only the desirability of a rule inducing such anticipation, not its predictability.

in the litigation process and count on the government to guard adequately against outcomes that reduce total welfare.

3. Creation of a Commons

Cases like McBryde, as well as the various beach access easement suits that have cropped up on the two coasts, illustrate the third category of redistributive litigation. Mathews v. Bay Head Improvement Ass'n, a principal case in a popular property casebook, exemplifies the beach easement litigation. Inhabitants of one community sued owners of beachfront property in a neighboring town to obtain a right to cross the privately held beaches. Persuaded by academic commentary rather than established precedent, the New Jersey Supreme Court earlier had determined that the tidal portion of beaches not only belonged to the state, but that the state's ownership rights required unrestricted public access to the state's property. Mathews took the logical next step, namely an implication of an access right over adjoining non-tidal beach property in favor of the general public. As a result of this holding, the apparent power of owners of beachfront property to exclude outsiders from crossing over their land disappeared.

Characterization of these cases as redistributive depends crucially on whether one considers the judicial delineation of property rights as sufficiently reliable to create justifiable expectations. In New Jersey, no earlier case had announced specifically that, with respect to beachfront property, the owner had the power to exclude the public. Rather, this power rested on strong inferences drawn from the general structure of common law property rights. Until the academy invoked the public trust doctrine as a means of converting recreational land into a commons, owners had no reason to believe that the state lacked the power to keep the general public off of tidal beaches. Once the New Jersey courts embraced the public trust doctrine, the implication of an access easement over adjoining land was not a completely implausible development.

34 504 P.2d 1330 (Haw. 1973). See supra notes 11–16 and accompanying text.
But, viewed from the time before the academy had spoken, the extin-
tion of the private owner's power to exclude interlopers crossing the beach would have seemed unexpected, if not incon-
ceivable.\textsuperscript{37}

4. Suits to Privatize

As a matter of historical development, the law has seen many in-
stances where commonly owned interests evolved into private property.\textsuperscript{38} Such developments count as redistribution, for the same reasons that transferring assets from the public fisc to private hands qualifies. Interests once open to enjoyment by anyone become closed to all but their designated owners; the shift enriches a few at the expense of the many, absent secondary welfare effects caused by altered behavioral incentives.

Remarkably, courts rarely have instigated such transformation. As a historical matter, custom or legislation has pushed the law away from commons, with judges then confirming the new settle-
ments. The relatively recent trend toward privatization, more often seen outside the United States but present within our borders, almost always involves a legislative or administrative decision rather than a judicial mandate.\textsuperscript{39}

At least within the common law tradition, the few instances of judicially imposed privatization of which I am aware involve information, a commodity that by its nature requires artificial boundaries to sustain its exclusivity. Even here the cases tend to be in spurts rather than representative of broad trends. Perhaps the best example is \textit{International News Service v. Associated Press},\textsuperscript{40}

\textsuperscript{37} Or at least several Justices have so argued. See Stevens \textit{v.} City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari); Hughes \textit{v.} Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

\textsuperscript{38} For a seminal account, see Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. (Papers & Proc.) 347 (1967).


\textsuperscript{40} 248 U.S. 215 (1918).
where the Supreme Court gave a news agency the right to prevent its competitors from reproducing the news it had gathered. The decision had enormous implications for those who invest in acquiring information, but the courts generally have refused to fulfill them. The more typical outcome, it appears, is for the courts to await legislative signals before carving out exclusive rights in information.41

5. Naked Wealth Transfers

The fifth category, like the third and fourth, involves litigation among private parties, but these cases transfer rights from one group of persons to another, rather than eliminating private interests in favor of the general public or creating private rights in public commons. The Loewen dispute is both typical of the category of naked wealth transfers and significant in its own right.42 Loewen Group Inc., a Canadian funeral services conglomerate, negotiated to buy a Mississippi funeral home and then walked away from the deal. The funeral home sued Loewen for breach of contract and fraud. A jury returned a verdict of half a billion dollars, mostly for punitive damages. Because Mississippi law conditioned the right to appeal this verdict on the posting of a bond well in ex-

41 See, e.g., NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); United States Golf Ass’n v. St. Andrews Sys., Data-Max, 749 F.2d 1028 (3d Cir. 1984); CBS v. DeCosta, 377 F.2d 315 (1st Cir. 1967); Cable Vision v. KUTV, 335 F.2d 348 (9th Cir. 1964); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929). For a rare instance of a constitutional attack on a congressional transfer of information rights from the public domain into private hands, see Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (upholding the Copyright Term Extension Act of 1998), cert granted sub nom. Eldred v. Ashcroft, 122 S.Ct. 1062 (2002).

cess of the judgment, Loewen settled for roughly a third of the jury award.

Under Mississippi law at the time Loewen entered into contract negotiations with the eventual plaintiff, there existed both a risk that a jury might regard Loewen's negotiating behavior as indicative of bad faith and that an outraged jury might award punitive damages for what it regarded as egregious misconduct. But the possibility that a dispute over the purchase of a ten million dollar business might lead to a half-billion dollar judgment did not seem plausible until it happened. This instance of litigation as ambush, with a conventional business disagreement leading to a massive money judgment, was extraordinary, even if not impossible to imagine.

The Loewen episode represents a type of redistribution that occurs because of increased unpredictability, rather than the substitution of an unexpected rule for a settled one. Because the case never got beyond the trial level, it did not announce a new rule. Rather, its occurrence introduced a strong element of instability to commercial relations. It signals that firms undertaking transactions in Mississippi, or at least firms subject to the jurisdiction of the court that tried the case, bear a significant legal risk.

A different category of naked wealth transfers involves instances where a higher court repudiates a rule on which people had relied and substitutes a new rule that shifts rights to different persons. The various landlord-tenant cases generated by the poverty law movement of the 1960s and 1970s, which endowed tenants as a class with claims against landlords that previously had not existed, offer an example. These cases did not simply propagate legal in-

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43 Notice of Claim, The Loewen Group v. United States (ICSID Case No. ARB(AF)/98/3), at http://www.naftaclaims.com (visited March 31, 2002). After declaring bankruptcy, Loewen then contended that the Mississippi litigation amounted to an expropriation of its property in violation of the North American Free Trade Agreement. Under that pact, the United States must submit all expropriation claims to mandatory arbitration before an international tribunal. An arbitration body established by the International Center for the Settlement of Investment Disputes has ruled that it has jurisdiction to consider this claim. The Loewen Group v. United States (ICSID Case No. ARB(AF)/98/3) at http://www.naftaclaims.com (Jan. 5, 2001) [hereinafter The Loewen Group].

44 E.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (imposing implied warranty of habitability and discarding common law duty of tenant to repair);
stability, but, to the extent the pronouncements had credibility, resulted in a wealth transfer from landlords to tenants (again ignoring secondary effects due to incentives).

The landlord-tenant cases also remind us that even naked wealth transfers do not necessarily constitute unwanted outcomes. I will not reprise the extensive literature on that development, but one should recall that the claim that these decisions increased overall welfare, and thus did not rest only on dignitarian arguments, has distinguished adherents. The similarity of the litigation to a once popular form of legislatively mandated wealth transfer from landlords to tenants, namely rent control, also suggests itself. The point, again, is that such litigation is redistributive, whether desirable or not.

6. Summary

These five types of redistributive litigation differ both in terms of the stakeholder and the ultimate beneficiary, but common themes emerge. The examples involve shifts between the government and private persons, between private and common ownership, and between private owners. But both public and common ownership can mask private interests; if discrete groups would or do derive disproportionate benefits from public or common ownership. The "general public" that obtained access easements over private beaches in the Matthews litigation constituted a broad class only in the formal sense; in reality only people who lived nearby but did not own beachfront property derived substantial value from the outcome of the case.

Two symmetric points follow from this observation. First, all redistributive litigation has the potential to blur into the last category of naked transfers, where rights pass from one discrete class of persons to another. Nominal ownership may obscure real interests. Second, the distinction among nominal interests—public, commons, or private—still has salience. Those who control either

Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Cir. 1968) (finding a lease to be unenforceable when property was in violation of housing regulations).

government decisions concerning litigation or who litigate on behalf of everybody (that is, in opposition to private ownership) may have an agenda apart from that of those who would gain materially from the rule they seek (for example, fund raising, career advancement, ideological argumentation, accumulation of power, and influence). Each of these points has a bearing on how the legal system might respond to redistributive litigation.

III. The Law of Property Safeguards—Takings Doctrine, Outsider Protection, and Expropriation Law

If the judicial system holds out to litigants the possibility of redistribution, whether in ways that benefit society or that harm it, what doctrines check and contain this potential? There is, to be sure, much in the structure of the common law that limits judicial innovation—the rhetoric of stare decisis, a concern about honoring legitimate expectations, the sense of legislative prerogatives. These norms not only limit what trial courts may do, but provide general authority for appellate courts to rein in their subordinates. On occasion, however, these norms do not suffice to deter courts from supporting significant redistributive projects. What happens then?

I consider two contemporary bodies of law—takings doctrine and international norms regarding expropriation—that address the problem of redistribution. I first explore their general boundaries, and then consider their applicability to the judiciary. Each is sufficiently unsettled to admit both aggressive policing of redistributive litigation and benign neglect. I note in particular how U.S. law has bolstered substantive rules limiting judicial creativity with forum-shifting procedures, particularly the removal jurisdiction of the federal courts, as a means of constraining inappropriate judicial behavior. International arbitration presents a parallel strategy.

A. Takings Doctrine and Its Neighbors

Establishing a link between takings doctrine as we find it and the problem of redistributive litigation requires some unpacking. The authors of the Constitution unquestionably sought to design a national state that would provide a secure foundation for private commercial activity. In particular, the Constitution addressed the concern that government would act as the agent of groups seeking
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to dispossess others. The limitations on federal and state power both overlapped and differed. Article I, Section 10 restricts the power of states to interfere with protected legal interests by prohibiting ex post facto laws and laws “impairing the Obligation of Contracts.” As for the federal government, Article I, Section 9 prohibits federal ex post facto laws, and the Fifth Amendment bars federal deprivations of property without due process of law and takings of private property “for public use, without just compensation.” But after some early uncertainty, the Supreme Court rejected interpretations of both the Ex Post Facto Clauses and the Impairment Clause that would have made them sweeping bulwarks against all redistributive governmental action. At the same time, the Court showed itself ready to oppose certain kinds of expropriation, namely those targeted at outside investors. By the end of the nineteenth century, the Court had channeled its opposition to redistribution into two doctrinal categories: substantive due process and the Takings Clause (applicable to the states through the alchemy of due process). With the ebbing of substantive due process, the takings doctrine became the principal constitutional impediment to redistribution.

This, at least, is the story that gives our current constitutional moment an aura of inevitability. A closer look at the history of constitutional protection against redistribution suggests a some-

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46 Article I § 9 also constrains federal power to tax by requiring that all direct taxation take the form of a capitation tax. While this limitation is of a piece with a broader story about the federal Constitution as a compact protecting property, its meaning and history go well beyond the scope of our inquiry here.

what more complex series of developments. The nineteenth-century cases reveal a tension between two conceptions of property rights protection, both directed more against the states than against the federal government. On the one hand, the Supreme Court believed in the existence of vested rights and invoked both general notions of legality and the Impairment of Contracts Clause to reverse state encroachments on these interests. On the other hand, the Court envisioned the Constitution as creating a common national market in the face of states that might prefer to extract local benefits to the cost of the national system by exploiting outsider investors. It responded to the threats of predatory localism with a mixture of substantive rules and procedural moves. Separating these two strands allows us to appreciate a variety of strategies available to the courts to deter certain kinds of redistribution, including that manifested in litigation.

1. Redistribution and Vested Rights

The early jurisprudence of the Supreme Court regarded certain legal interests as foundational, in the sense that the expectations private persons had in the continued existence of these interests transcended any legislative prerogative. The leading case is Fletcher v. Peck,\(^4\) where the Court invalidated an act of the Georgia legislature that had retracted land transfers procured from an earlier state legislature through bribery. Writing for the Court, Chief Justice Marshall did not doubt the strength of the state’s interest in rectifying a fraud, but argued that innocent purchasers for value stood on a different footing from those who participated in the outrage. Innocent purchasers could invoke the principle, derived from the common law and conceptions of natural justice, that legislatures cannot negate vested land titles without compensation.\(^4\) Marshall declared that such “general principles which are common to our free institutions” empowered the Court to intervene against the state.\(^5\)

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\(^4\) 10 U.S. (6 Cranch) 87 (1810).
\(^4\) Id. at 135.
\(^5\) Id. at 139. The alternative holding of the Court, that the Impairment of Contracts Clause invalidated Georgia’s attempt to reclaim fraudulently conveyed land, has come down to us as the principal teaching of the case. Mark Graber has demonstrated, however, that in the nineteenth century, the “general principles”
In justifying this outcome, Marshall hinted at a theory of constitutional authority that responds to the vices of unrestrained local power:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.\(^{51}\)

That which in Marshall's conception "may be deemed a bill of rights" ran not against the federal government, as did the first ten constitutional amendments, but against the states. And the source of these restrictions was not only the text of the Constitution, but also prior principles of which the common law of property and contract served as an expression.

This strand of constitutional jurisprudence, however, did not develop into a full-blown commitment to constitutional preservation of the common law. Other cases of the Marshall Court focused on the express language of the Constitution, in particular the words found in Article I, Section 10.\(^{52}\) References to general principles or natural law became less frequent, as the Marshall and, later, Taney Courts concentrated on the Impairment of Contracts Clause.\(^{53}\)

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\(^{51}\)Fletcher, 10 U.S. (6 Cranch) at 137–38.


\(^{53}\)The most significant, as well as the most disastrous, case of the Taney Court, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), appears to rest on the proposition
In retrospect, the "general principles" strategy embodied in *Fletcher* presented two problems, one functional and one doctrinal, that explain the transition to the Impairment of Contracts Clause. As the modern era emerged, the Court confronted the increasingly obvious attractions of legal dynamism. With the territory and population of the country growing and radically new technologies appearing, the legal system needed to do more than exercise a vigilant guard over the status quo.\(^5\) This functional need encountered a doctrinal difficulty. The "general principles" argument was too capacious to provide much useful guidance to an institution interested in threading its way between the need to protect stability and the demands of a rapidly changing social and economic environment. The specific language of the Constitution provided greater clarity, but at the cost of diminishing the role for judicial oversight of private law.

As the later history of the Supreme Court's use of the Impairment of Contracts Clause illustrates, a shift in focus from property to contract allows governments (including the judiciary) to make two moves that have the net effect of diminishing the stability of private legal interests. First, government can enact new rules prospectively, thereby restructuring the outcome of future contracts.\(^5\) Second, courts can invoke interpretive rules to diminish the scope of pre-existing contracts and, therefore, the extent of their constitutional protection.\(^5\) By the end of Marshall's tenure, both of these

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54 See 3 & 4 White, supra note 50, at 668–73.
56 E.g., Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (finding no implied reservation of monopoly right in bridge charter); Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) (finding no implied reservation of permanent tax exemption in bank charter). The Court also found it possible to distinguish contractual rights from contractual remedies so as to allow governments greater leeway over the latter. This move diminished the protection accorded contractual interests, but not in a way that would be any different if applied to property. See Bronson v. Kinzie, 42 U.S. (1 How.) 311, 315–16 (1843) (stating that States could change contractual remedies but not contractual obligations); Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834) (holding that a change in requirements for recordation of property interests did not alter underlying property right and facilitated protection of contractual expectations).
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strategies had become acceptable, allowing a growing body of state legislation to survive Impairment of Contracts review.

Perhaps just as important is the dog that did not bark. The logic and rhetoric of *Fletcher*, by referring to a bill of rights protecting private persons from the states, raised the possibility of some congruence between those protections explicitly guaranteed against the federal government and those implied against the states. But in *Barron v. Baltimore*, the Court emphatically renounced the application of the Takings Clause of the Fifth Amendment to any government besides the federal. The facts of the case may hint at why the Court did not feel compelled to make this move. The owner of the largest and most profitable wharf in an economically important harbor sued the city for losses caused by silting. The city did not deliberately seek to injure the wharf; rather, the gradual expansion of the city and the building of its streets produced the runoff. Nothing in the case suggests that Barron was anything other than a prosperous and locally influential burgher. Moreover, the silting damaged all owners of harbor property, although Barron may have suffered the most. The Court saw no need to intervene in circumstances where the injured party seemed capable of looking after his own interests. Whatever *Fletcher*’s "general principles which are common to our free institutions" may have meant to Marshall, they did not justify any judicial intervention on Barron’s behalf.

It took the adoption of the Fourteenth Amendment, signifying the revolution in federal-state relations that the Civil War effected, followed by the passing of another generation for the Court to again take up the cause of broad opposition to redistribution, this time under the flag of substantive due process. But in the interim, another tendency emerged. Even as its interest in protecting vested rights *vel non* receded, the Court showed heightened interest in guarding against a different threat to property, namely predatory localism.

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58 Moreover, Barron came from a state court, and Chief Justice Marshall did not invoke these principles in such cases. See 3 & 4 White, supra note 50, at 659.
59 For a valuable recent reappraisal of this period in our constitutional history, see John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493 (1997).
2. Outsiders and Predatory Localism

As part of its broad (if self-designated) role in policing the boundaries of the national common market, the Supreme Court increasingly confronted instances where state and local governments, including the judiciary, engaged in a kind of bait-and-switch tactic. Outsiders would invest resources and capital, only to discover that the rules had changed and that locals now owned everything. This kind of predatory localism often, although not inevitably, involved state courts as the main source of the switched law. The Court responded with a variety of strategies, which only at the end of the nineteenth century became anchored in the Takings Clause.

The early perception by the federal judiciary of its obligation to address localist transgressions of conventional property rights in part reflected the forces that brought about the Constitution, especially the felt need to protect rights derived during British governance against state impairments. One of the Court's earliest cases illustrates the connection. In *Ware v. Hylton*, the Court ruled that the 1783 Treaty of Paris, which established the terms of peace between Great Britain and the former colonies, revived the legal enforceability of a bond given to a British subject before the Revolution. After the outbreak of hostilities, a Virginia statute had sequestered the bond, in effect allowing the local debtor to discharge his obligation to the English creditor at a deep discount. The Court understood that the Constitution owed its existence in part to the inability of the old Confederation to hold individual states to the obligations of that Treaty, a failing that discouraged foreign investment and contributed to economic distress. This understanding led the Court to draw two important, but not inevitable implications: Virginia's ratification of the Treaty worked an implied repeal of inconsistent legislation; and the courts of the United States, a sovereignty that did not exist at the time of the Treaty, had the authority to invoke the Treaty to prevent enforcement of such legislation.61

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60 3 U.S. (3 Dall.) 199 (1796).
61 The latter conclusion seems to have rested on an easy, but not foreordained, reading of Article VI, Clause 1, which states that "Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Under the Confederation, however, there existed no Supreme Court that could intervene to invalidate state legislation in
Inchoate in the decision, although not stated in the opinion itself, is an intuition about the collective action problem that exists whenever a confederation seeks to make an international commitment. Any state that refused to comply with the Paris Treaty might garner local benefits by protecting persons who profited from the earlier seizure of British property. The costs of such opportunism would fall on the several states, all of which would suffer from the degradation of the Treaty commitment. Every state would face these skewed incentives and thus tend to dishonor the obligation to respect the property rights of Loyalists, even though collectively the states might do better by enhancing the value of their commitments. By asserting the power to negate state law that transgressed the Treaty, the Court proposed itself as the nexus of the collective action problem's solution.

After Marshall left the scene, the Court developed yet another basis for intervening to protect outsiders from local attacks on their property. Under the regime of *Swift v. Tyson*, the Court deemed it proper for federal courts to invoke general constitutional law to reverse state court decisions hostile to the property rights of outsiders. Representative is *Pumpelly v. Green Bay Co.*, a claim for compensation for flooding caused by the construction of a state dam. In similar circumstances, the Wisconsin Supreme Court had denied relief where a property owner suffered consequential injuries as a result of public improvements. Disregarding this conflict with the Confederation's international engagements. Antifederalists (not a group for which the Court of the day had much sympathy) might have argued that Supreme Court enforcement made the Confederation's former engagements more, rather than equally, valid.

A parallel development during the nineteenth century was the growth of the federal courts' activity as protectors against discriminatory legislation and regulation, typically under the aegis of what we now call the dormant Commerce Clause. See, e.g., *Minnesota v. Barber*, 136 U.S. 313 (1890); *Welton v. Missouri*, 91 U.S. 275 (1876); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). These cases reflect some of the same concerns as those dealing with predatory localism, but differ in two significant respects. First, the kinds of discrimination they confronted tended not to be predatory, in the sense that prior investment by outsiders was not the main target. Rather, their goal was to keep outsiders out. Second, the courts in these cases policed legislative and administrative outcomes, rather than judicial lawmaking.

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64 80 U.S. (13 Wall.) 166 (1871).
65 Alexander v. Milwaukee, 16 Wis. 247 (1862).
precedent, the Supreme Court imputed to Wisconsin an intention to honor what the Court saw as a universal principle—government obligation to provide just compensation for appropriated property.66

For our purposes, what is interesting about this line of cases is that it targeted predatory judicial activity as much as that of state legislatures and administrative agencies. The Court did not directly review state decisions that deviated from general constitutional law. Rather, it allowed persons already in federal courts—which, given the jurisdiction at that time, meant diversity cases—to find a way around redistributive state precedent.

This reliance on “general” constitutional law as a check on predatory local works made sense only if potential victims of redistributive litigation had ready access to the federal courts. Swift v. Tyson, one should recall, did not require state courts to follow federal interpretation of the general law, and thus provided no comfort to those who could not escape the jurisdiction of the local courts. As Professors Ann Woolhandler and Michael Collins have documented, the nineteenth-century Supreme Court saw to it that out-of-state investors would have easy access to federal jurisdiction. Its strategies included expanded interpretation of federal court diversity and removal jurisdiction (all to the benefit of outsider investors) and greater control over the federal civil jury.67 This combination of substantive doctrine and jurisdictional fine-tuning positioned the federal courts as a bulwark against redistributive litigation targeted at outsiders.

The point is important, because the pattern reappears when we turn to international law’s protection of foreign investors. Investor protection can come not only from substantive rules, but from a choice of venue.68 To understand how the Supreme Court has

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66 Pumpelly, 80 U.S. (13 Wall.) at 182. See, e.g., Louisiana v. Pilsbury, 105 U.S. 278 (1881); Butz v. City of Muscatine, 75 U.S. (8 Wall.) 575 (1869); Rogers v. City of Burlington, 70 U.S. (3 Wall.) 654 (1865); Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294 (1865); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863); Collins, supra note 8, at 1289–91.


68 Hence modern investor protection treaties not only provide for substantive rules governing state expropriation, but typically authorize binding arbitration of disputes
grappled with the problems of redistributive litigation, we must focus simultaneously on takings law and neighboring doctrines of federal jurisdiction.

3. The Emergence of Modern Takings Doctrine

The final step in assembling our present jurisprudence involved elevating “general” constitutional law into “federal” constitutional interpretation. At the end of the nineteenth century, the Court found in the Due Process Clause a means for making this move. In *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, the Court declared that any legal process through which a state or local government acquired property must contain a method for awarding just compensation. Moreover, it was not enough for state law to promise compensation: The Supreme Court had the authority to review the condemnation proceeding to determine whether it complied with the federal standard.

With *Chicago, Burlington*, the Court completed the assembly of the doctrinal elements of modern takings law. The Due Process Clause now looked to the same jurisprudence as did the Takings Clause of the Fifth Amendment: A view of the legal landscape that saw the common law of property as foreground and governmental power to rearrange property rights as limited by a compensation obligation. But the Court’s opinion also implied a limitation on the doctrine that the earlier “general principles” cases had suggested. The ability of the property owner to participate in the political decisionmaking leading up to the taking would influence both the determination as to whether a compensable taking had occurred and what constituted just compensation.

*Chicago, Burlington* embodies both of these points. Illinois had laws on the books that required just compensation for government takings. The railroad claimed that it had suffered from the city’s condemnation of its right-of-way as part of a street-widening project. The crux of the case was the Illinois court’s determination that one dollar would fully compensate the railroad for any injury suffered. If any violation of the Takings Clause occurred, it was due to judicial action, not legislative or executive. Accordingly, the Su-
The Supreme Court justified its jurisdiction by asserting that the Takings Clause governed judicial conduct, not just the actions of the political branches. This doctrinal stretch strengthens the functional ties between *Chicago, Burlington* and the *Pumpelly* line of cases, where the Court saw a particular role for the federal judiciary in policing state court decisions that smacked of outsider predation.

In one sense, however, this link is formal and somewhat incomplete. *Chicago, Burlington* did not involve a taking effected through a surprising shift in judicial interpretation, and without the city's decision to widen its streets (an executive rather than judicial action) the question of a taking could not have arisen. It fell to later cases to determine whether the newly restructured Takings Clause, available now as a tool for federal court supervision of state governments, would provide a general basis for federal control over excessively innovative judicial activity. These cases, however, provide something less than a clear response to this question.

In *Muhler v. New York & Harlem Railroad Co.*, the Court came as close to holding that the Takings Clause provides a means of supervising judicial innovation as it ever has. An Act of the New York legislature had required the building of an elevated railroad in place of a surface car. Owners of adjoining property sued the state for violations of their easements of sunlight and air. Early New York precedent had recognized these easements, but in *Muhlker*, the state's highest court had interpreted the statute calling for the building of the railroad as a repudiation of the existence of such rights. The Supreme Court reversed, holding that New York had an obligation to compensation the owners of the easements. The majority explained:

> We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.

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*70* 197 U.S. 544 (1905).

*71* Id. at 570. Justice Holmes, writing in dissent, protested that it "certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the
New York could let its common law develop as it pleased, but when those developments led to the destruction of previously recognized property interests, the Takings Clause required the payment of compensation.

Later cases backed away from the rhetoric of *Muhlker*, although not necessarily its function. Typical is *Brinkerhoff-Faris Trust & Savings Co. v. Hill*.\(^2\) The Supreme Court of Missouri had sought to defeat a lawsuit attacking discriminatory taxation of a corporation by asserting that the plaintiff had failed to seek pre-assessment administrative relief, thereby precluding judicial review of its claim. Earlier precedent of that court had seemed to make clear that no pre-assessment procedure existed. The Supreme Court of the United States declared that the Missouri court had failed to afford the plaintiff due process of law by penalizing it for failing to anticipate a reversal of well-established procedural rules. In defending this holding, Justice Brandeis used language that anticipated his *Erie* opinion, then eight years in the future:

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.\(^3\)

Because the Court held that what Missouri had done had denied the bank access to any judicial process in violation of the federal Constitution, Brandeis' observation, although fascinating, had no bearing on the outcome of the case.

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Two years later, Justice Cardozo’s opinion in *Great Northern Railway v. Sunburst Oil & Refining Co.* also seemed to suggest that federal courts had no authority to review state court interpretations of state law, although again the suggestion was superfluous to the decision. Montana’s Supreme Court had interpreted the state’s railroad tariff statute as allowing retroactive attacks on filed rates, if a court found the filed rate unreasonable. In a later case, that court ruled that it had misinterpreted the statute, and that, in the future, relief for unreasonable but filed tariffs could be prospective only. But because the parties had contracted under the earlier interpretation of the statute, the shipper had a right to seek restitution for overcharges. Cardozo argued that the state court has acted just like a legislature by making its changes in the law prospective, and that such behavior violated no interest protected by the Constitution.

Both *Brinkerhoff-Faris* and *Great Northern Railway* anticipated two key aspects of *Erie*. First, the Court conceived of judicial lawmaking as resting ultimately on jurisdictional competence: The power to announce rules of decision could not exceed the power to govern. Implicit in both opinions is the core idea that federal courts lacked the capacity to develop and impose rules in areas where federal lawmaking power, as opposed to federal court jurisdiction, did not go. Second, judicial and legislative lawmaking were, from a constitutional perspective, equivalent: State courts could adopt rules that were within the capacity of the state legislatures to enact, and would receive the same kind of federal constitutional analysis as did legislative enactments. In the context of *Great Northern Railway*, this posture suggested greater freedom of action for state courts. But the structure of the argument also contained a negative pregnant: State courts could not go where state legislatures could not. This last point became critical thirty years later, when interest in constructing a doctrine of judicial takings revived.

In the immediate aftermath of *Erie*, during the emergence of the New Deal Court, the suggestion that federal courts could guard against excess state court creativity would have cut against the grain. That period generally was one where the Court felt no need to defend the interests of capital against localist encroachments.

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74 287 U.S. 358 (1932).
Congress, a national body, had become the champion of economic regulation. If the Court needed to police, or at least disregard, state courts, it could avail itself of its power to interpret federal statutes. The great nationalizing force of the Second World War also may have dissipated the concern that predatory localism still mattered. As a more homogenous national culture appeared to emerge out of the cataclysm, members of the Court may have come to believe that its vigilance against crude efforts to expropriate outsiders no longer was necessary.

By the 1960s, however, the criminal procedure and civil rights revolutions had given the Court new reason to distrust the states, including the state judiciary. The more familiar of its responses was substantive, principally by federalizing much of the law of police investigation through the process of constitutional interpretation. Perhaps less well remembered is the Court’s alternative strategy for displacing distrusted state court determinations. Through a remarkably creative revision of habeas corpus jurisdiction, the Court expanded federal court review of state criminal proceedings. This move in some respects paralleled the nineteenth century’s expanded federal court review of investor exploitation cases, not by displacing state courts so much as by removing any sense of finality from their decisions.

What underlay these developments was a concern about a different kind of predatory localism. The outsiders who inspired the Court’s sympathy no longer were strangers to the community, but rather longstanding members who by dint of race and poverty bore special burdens and stigma. The general structure of the response, however, was the same—new substantive doctrines and expanded


77 The adequate-and-independent-state-ground cases of that period also reflected a willingness to disregard state judicial decisions, even on matters of adjectival law nominally left to their competence. E.g., Henry v. Mississippi, 379 U.S. 443 (1965); Bouie v. City of Columbia, 378 U.S. 347 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).
federal court jurisdiction, working in tandem to displace feckless, if not arbitrary and discriminatory, state courts.

For the most part, this newfound suspicion of the states and state judiciaries did not find its way into doctrines protecting property rather than liberty. Takings law generally languished during this period, including consideration of the concept of judicial takings. In 1967, however, Justice Stewart argued for a connection between the takings law and the Court’s heightened skepticism toward state judges. Using an argument that had its intellectual antecedents in *Great Northern Railway*, he argued that sudden and unexpected changes in state law precedent could constitute a taking of property: “For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”

If state courts shaped the substantive law as much as state legislators, then they should face the same constraints on their lawmaking powers as legislators. Stewart could advance this proposition without specifying the particular content of takings doctrine.

Stewart’s argument, for all its apparent coherence, did seem out of place in a period when courts generally invited critical reexamination of settled property doctrine. During the late 1960s, both the unfolding poverty law movement, strong in some state courts and triumphant in the academy, and the emergence of a nascent environmental movement prompted some judges to recognize new property norms and to reject conventional assumptions about the priority of private control as the essence of property. Whether by recognizing the right of guest workers to meet with activists over the landowner’s objections, imposing a warranty of habitability on landlords and tenants, or discovering a right of public access to privately owned beaches, these courts broadened the sphere of public authority and access at the expense of private ordering. Stewart’s claim threw down a gauntlet. If his position were to be

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taken seriously, none of these moves could proceed without some form of compensation to the property owner.

Despite its respectable antecedents and attractive implications, Stewart's suggestion remains only that. In the past decade, several Justices, writing in dissent or from a denial of certiorari, embraced Stewart's assertion that takings doctrine applied fully to judicial lawmaking.\(^2\) Otherwise, the Court has said nothing. Some scholars support at least parts of his argument, and a few lower court decisions have climbed onto the bandwagon.\(^3\) In the last fifteen years, takings doctrine has acquired a new bite, as the Court once again has taken seriously the need to constrain local regulators.\(^4\) Whether this new vigilance will extend to judicial regulation remains undetermined. Stewart's equation of judicial with other governmental takings continues out there, not quite accepted doctrine but never directly repudiated by the Court. It describes a possibility, a space for argument.

In Part IV, I return to the issue of whether Stewart's position deserves serious consideration, and what the concept of judicial takings might suggest about takings doctrine generally. But before exploring those questions, we must review that body of law with which takings doctrine resonates both historically and conceptually, namely the protection of foreign investors from expropriation under international law. Here, unlike takings law, tribunals have


\(^3\) See Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Haw. 1978); cf. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (applying federal law to right in land formerly covered by navigable water to avoid determination of whether state court determination created a compensable taking); Corp. of Presiding Bishop of Church of Latter-Day Saints v. Hodel, 830 F.2d 374 (D.C. Cir. 1987) (assuming that gross error or arbitrary action by state court regarding claim to land would constitute constitutional violation but upholding action of Samoan courts); Cherry v. Steiner, 716 F.2d 687 (9th Cir. 1983) (embracing Stewart position but upholding action of Arizona courts); Reynolds v. Georgia, 640 F.2d 702 (5th Cir. 1981) (accepting Stewart's position but dismissing claim on jurisdictional grounds); Williams v. Adkinson, 792 F. Supp. 755 (M.D. Ala. 1992) (same), aff'd without opinion, 987 F.2d 774 (11th Cir. 1993); Hay v. Bruno, 344 F. Supp. 286 (D. Ore. 1972) (embracing Stewart's position but upholding action of Oregon courts); Thompson, supra note 7, at 1468–72. See also Bederman, supra note 9 (discussing cases).

\(^4\) See cases cited supra note 44.
confronted the question of whether limits apply to judicial lawmaking, and answered strongly in the affirmative.

B. Expropriation Law

There exist two obvious objections to the use of takings law as a bulwark against predatory localism. First, the language of the clause, as well as much of the last century’s application and interpretation of it, does not suggest a distinction among classes of persons more or less vulnerable to economically harmful governmental actions. It addresses property, not owners, and it remains a stretch to suggest that the level of protection might turn on who the owner is. Second, in spite of the history sketched above, it seems rather odd to find, in a provision designed to limit federal power, a license for federal courts to intervene against overly enthusiastic local governments.

One might avoid these objections, if not surmount them entirely, by demonstrating that takings doctrine has both a historic and functional connection to a body of law that unambiguously is about protecting specific classes of owners from predatory localism. The source of this connection is the international law regarding duties owed to foreign investors. The framers of the Constitution took up their task in part as a response to the inability of the Confederation to goad the several states into providing minimum standards of security to foreign, largely British, commercial interests. A doctrine of foreign investor protection already existed in international law and informed the framers both thematically and directly.

In the previous Section, I noted that American takings law began with a classic international law problem, namely the duties owed by a host state to a foreign investor. *Ware v. Hylton*, the earliest Supreme Court case that struck down a local law in favor of property rights, relied on an international treaty to supplant a state statute and to protect a foreigner’s property. England, the home of capital exporters, needed some assurance that the newly

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85 A stretch, however, is not the same as an insurmountable obstacle. One might look by analogy to equal protection doctrine. The language of the Equal Protection Clause does not by its terms distinguish among classes of beneficiaries, but it has become a commonplace that the level of judicial scrutiny depends entirely on the status of the victims of differential treatment.

86 3 U.S. (3 Dall.) 199 (1796).
革命性国家不会借故篡夺主权——即从国王乔治向殖民主义者转移的权力——以重新分配财产权利，损害其臣民的权益。据埃德蒙·吉列尔莫·埃斯皮诺萨的说法，这种权力的委任与转移是革命性国家当中的某件大事。因此，直到1821年，只有美国一国曾向当时的革命性国家转交权力。由于美国当时正处在革命性国家的阶段，因此，1783年巴黎和约中的承诺同样适用于美国。这一承诺将美国的主权权力与财产权利公约为一体。

在美利坚合众国进入类似承诺的时期，同年1819年美国和西班牙共同签署了《友好、山坡和边界条约》。该条约承诺美国保护西班牙王室的权属，而美国所获得的土地则源于该条约。与1783年巴黎和约中的承诺相同，美国承认其主权权力的范围并不仅仅是其财产权利的范围。因此，这种由国家间协议，能够被当地法院执行的，赋予各国公民保护本土权利的承诺，是根本的，但并非是唯一的。随着美国向外国投资转变（仅次于阿根廷，英国在19世纪是美国的主要投资国），美国开始采用传统的英国论点，即在国际法并不承诺保护外国财产之前，主权权力的义务要以公约为基础。美国在20世纪头几十年的谈判及仲裁中，都提出了这一论点。在国际仲裁及其他领域，美国的政策制定者和学术界人士都向不愿接受其观点的国家进行了宣传。与此同步，美国的下级法院中，建立起了一套案例法，即认定至少在美国，至少当涉及外国投资者跨国纠纷时，法院必须尊重国际法中的公平条款。”

注1：美国司法部长科尔德尔·霍尔给墨西哥大使的备忘录（1938年7月21日），在《美国外交关系：外交文件1938》，第674页（1956年）。

注2：美国司法部长科尔德尔·霍尔给墨西哥大使的备忘录（1938年7月21日），在《美国外交关系：外交文件1938》，第674页（1956年）。

87 For litigation over the enforceability of this commitment in U.S. courts, see United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); United States v. de la Maza Arredondo, 31 U.S. (6 Pet.) 691 (1832); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

88 Note from U.S. Secretary of State Cordell Hull to Mexican Ambassador (July 21, 1938), in 5 United States Department of State, Foreign Relations of the United States: Diplomatic Papers 1938, at 674 (1956).
respect to property located within the confines of the United States, efforts by the owner’s sovereign to engage in discriminatory or uncompensated expropriations would have no legal effect.\(^8\)

During the Cold War, the U.S. drive to promote its formula stalled. The campaign’s nadir came in 1964, when the United States’ own Supreme Court refused to join. Confronted with a claim that Cuba’s seizure of a ship’s cargo in Havana harbor violated international law, the Court in \textit{Banco Nacional de Cuba v. Sabbatino}\(^9\) ruled that “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles.”\(^9\) As a result, the Court obligated the state courts to recognize, with respect to assets that had come into the United States, property rights derived from an uncompensated and discriminatory expropriation.\(^9\)

In retrospect, \textit{Sabbatino} seems an enigmatic case of uncertain doctrinal significance. One might dismiss it as an artifact of a particular time. Writing less than two years after the Cuban missile crisis, the Court seemed reluctant to take sides in the ideological


\(^9\) Id. at 428.

jousting that underlay the investor's argument. But Sabbatino's impact on the movement to recognize a universal norm of investor protection remained significant. Both scholars and government officials interpreted the Court's caution as indicating a lack of commitment to the principle. During the following decade a number of developing countries joined forces with the socialist states (the Soviet Union, China, and their respective myrmidons) in arguing for an opposing norm of permanent national sovereignty over property located in a state's territory.  

Frustrated in its efforts to establish a universal norm, the United States and its allies pushed the investor-protection position through a series of bilateral treaties. These instruments invariably would contain the U.S. formulation of the legal standard owed to investors, and typically would provide for some form of third-party enforcement. Sometimes the investment protection treaties gave the International Court of Justice jurisdiction to hear claims of unlawful expropriation. Alternatively, some treaties, as well as various contracts between host governments and foreign investors, provided for international arbitration, either through the World Bank's International Center for the Settlement of Investment Disputes ("ICSID") or a similar facility. The distinction mattered, because only governments may bring a matter to the International


Court of Justice, while a private investor can invoke arbitration agreements whether its home country government approves or not.

As disputes based on these instruments have arisen and reached resolution, a kind of expropriation law has emerged. This body of rules and standards rests not on general principles of natural law and international practice, as did the domestic U.S. investor-protection law of the nineteenth century, but on specific commitments entered into by sovereign states as interpreted by particular tribunals. It necessarily has an ad hoc and diffuse character, given the absence of any central body authorized to impose consistent interpretations. Yet enough coherence exists to sustain a narrative about its features, ambitions, and limitations.97

For our purposes, what is intriguing about this expropriation law is its tendency to treat judicial decisions as extensions of governmental actions, and thus bound by the treaty to the same extent as are the other branches of government. For example, the most prominent attempt to get the International Court of Justice to articulate norms governing the seizure of the property of foreigners involved litigation. Barcelona Traction, Light & Power Company, Limited98 resulted from a Spanish bankruptcy proceeding that enabled bondholders to gain control of a Canadian company worth many times the value of the defaulted bonds. The Spanish court served as an instrument to transfer millions of dollars in wealth from one set of private hands (the investors in the firm’s equity) to another (the bondholders, who enjoyed good relations with the Franco regime). The case was decided on procedural grounds: Belgium, the domicile of most of the company’s investors, had a treaty with Spain providing for resolution of such disputes by the International Court of Justice, but Canada, the place of incorporation of the company seized through the Spanish bankruptcy proceeding, did not. Nowhere in the vast literature that travels in Barcelona Traction’s wake can one find sustained arguments to the effect that an otherwise unambiguous expropriation of foreign-owned prop-

97 For a review of these commitments, see Thomas Waelde & Abba Kolo, Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law, 50 Int’l & Comp. L.Q. 811 (2001). For a critique of these trends, see M. Sornarajah, The Settlement of Foreign Investment Disputes (2000).
Redistributive Litigation

Property ceases to be objectionable if a judicial body acts as the agency of expropriation.\textsuperscript{99}

Other international bodies have directly endorsed the proposition that judicial acts may constitute expropriation within the meaning of the relevant treaties. In 1986, for example, the U.S.-Iran Claims Tribunal declared: "It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court."\textsuperscript{100} Accordingly, the tribunal ordered Iran to compensate the owner for machinery retained in Iran pursuant to a court order.\textsuperscript{101}

By far the most ambitious expropriation-law attack on judicial activity yet seen involves that of the bankrupt Canadian firm Loewen Group, described in Part I.\textsuperscript{102} The case is replete with ironies, not the least being that the United States, the author of the legal standard governing treatment of foreign investors, finds itself called to account for tolerating local autonomy in the judicial process. Loewen suffered a $500,000,000 verdict following a state court jury trial of a common law claim of fraud. Part of the plaintiff's argument to the jury focused on Loewen's status as a foreign corporation.\textsuperscript{103} Loewen maintains that the litigation amounted to a violation of North American Free Trade Agreement (NAFTA) Article 1110(1), which provides:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance

\textsuperscript{99} For a dispute where the U.S. government attacked an Italian bankruptcy proceeding as infringing on an investor's rights, see Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20); Sean D. Murphy, The ELSI Case: An Investment Dispute at the International Court of Justice, 16 Yale J. Int'l L. 391 (1991). Although the International Court of Justice rejected the U.S. claim, it did not suggest that judicial actions enjoyed any immunity from expropriation law.

\textsuperscript{100} Oil Field of Tex. v. Iran, 12 U.S.-Iran Cl. Trib. Rep. 308, 318 (1986).

\textsuperscript{101} Id. at 319.

\textsuperscript{102} See supra text accompanying note 43.

\textsuperscript{103} See authorities cited in supra note 42.
with due process of law... and (d) on payment of compensation... 104

The arbitration tribunal considering this case has not yet addressed the merits, but it has resolved the question of its jurisdiction. It ruled that the Mississippi litigation, if carried out in the manner described in Loewen's petition, could constitute a "measure tantamount to expropriation" and thus may render the United States liable in damages for Loewen's injury. In reaching this result, it argued that expropriation law generally, and Article 1110 of NAFTA in particular, recognized no distinction between judicial and other governmental action. 105

At one level, the refusal of expropriation jurisprudence to distinguish between the judiciary and other branches of government may reflect the formal premises of international law. Old-school international law, which upholds the principle of sovereign equality, professes indifference as to how a state organizes its internal affairs. As the International Law Commission, a UN agency, puts it:

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State. 106

From this perspective, international law does not decompose the state into its elements. Indeed it could not without assigning different rights and obligations to different kinds of states, a move that would transgress the equality norm that pervades international law. The only question is whether a state acts in a way that infringes


105 The Loewen Group, supra note 43, at ¶¶ 39–60.

upon an interest protected under international law. The definition of infringement does not turn on the mechanism that produces harm. The argument parallels that of Justice Stewart on judicial takings.

Yet old-school international law is not the only game in town. Over the last couple of decades, and especially since the end of the Cold War, a different kind of international law has emerged. What I elsewhere have called the new international law depends much less on ministerial and scholarly declarations of general principles, as exemplified by the work of the International Law Commission, and more on the specific acts and justifications of well-developed institutions with clearly defined responsibilities and explicit law-making authority. Because these institutions have the character of clubs that create particular rights and duties for their members, rather than promoting universal benefits in the nature of public goods, the principle of sovereign equality seems less robust and pervasive. Duties owed by particular states to some, but not all, nations now dominate the terrain, with general obligations owed by all to all receding into the background.

In this shifting environment, it may become possible to speak of international law obligations that turn on which branch of domestic government has acted. At a doctrinal level, one needs to argue only that the anti-expropriation obligations of a particular international agreement, such as NAFTA's Chapter 11, need not express, or be interpreted in light of, general principles of international law, but instead might reflect the particular context of the agreement and the specific understandings of the parties. At a functional level, one might assert that particularized obligations among nations should reflect the institutional structure of each nation, if only to ensure the development of a rich legal environment tailored to the needs of those that operate in it. Those countries that have established independent judiciaries might well maintain that international law should take account of this characteristic.

These arguments remain suggestions, not widely held convictions or solid doctrine. Much controversy surrounds efforts to pin

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down the differences in tone and character that have emerged in international law during the last decade or so. Controversy, however, is not the same as chaos. One suggestion that the academic community has received well involves the assertion that Kantian notions of "perpetual peace" infuse the modern world of international law. Central to Kant’s argument was an empirical claim: Liberal states, defined as those whose rulers face some kind of democratic political accountability and in turn strive to respect the rule of law, enjoy more cordial as well as thicker relations with each other. Professor Anne-Marie Slaughter, the most prominent proponent of this approach, has argued that these domestic institutional characteristics have an effect not only on international relations, but on the content of international law as well.\footnote{See Anne-Marie Burley [now Slaughter], Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum. L. Rev. 1907, 1909–14 (1992); see also Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 Int’l Org. 513, 513–16 (1997); Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 Am. J. Int’l L. 205, 226–38 (1993). Liberal internationalism as Slaughter and others have conceived it does not lack for critics, especially from the left. See, e.g., Christian Reus-Smit, The Strange Death of Liberal International Theory, 12 Eur. J. Int’l L. 573 (2001). But these critics presumably would be unhappy with any theory that privileged property rights as an extension of the status quo. To that extent, they should not object to using Slaughter’s arguments to take courts outside expropriation law.}

In keeping with Slaughter’s argument, one might maintain that international law does and should treat states with independent judiciaries differently, and generally should put the actions of well-ordered courts beyond the reach of constraints that otherwise apply to boisterous states. We might, in other words, apply different standards to the manifestations of judicial authority in revolutionary Iran and to the unpredictable actions of Mississippi trial courts. The former represent formal extensions of unchecked state power; the latter reveal an inevitable aspect of jury freedom and judicial autonomy, institutions that on the whole contribute to a flourishing liberal society.

Still, the old-school approach may have some life in it yet. One might concede the differences between Iranian and U.S. courts and still assert that the latter are not simply suffused with liberal virtue. Independence from political pressure does not automatically trans-
late into freedom from animus towards outsiders, as the history I traced in the prior section illustrates. A judiciary free from excessive governmental influence still might discriminate against strangers; indeed, as I will argue below, it might throw up greater, or at least different, hurdles to foreigners than do politically-accountable governments. And if discrimination against outsiders underlies expropriation law—a claim I have documented in this section—then a principled reason exists to include the judiciary within the strictures of the evolving jurisprudence of investor protection.

C. A Synthesis

Superficially, takings doctrine and expropriation law seem unrelated except to the extent that both deal with government encroachments on property rights. Takings doctrine rests on the U.S. Constitution, both expressly through the Fifth Amendment and implicitly through incorporation into the Fourteenth. Expropriation law today rests on a variety of international instruments, although at one time several nations tried to position it as a foundational principle of international law. U.S. courts apply takings law on behalf of all property. Designated international tribunals, whether permanent bodies such as the International Court of Justice or ad hoc arbitration tribunals such as those constituted by ICSID, enforce expropriation law on behalf of the beneficiaries specified in the instruments. The Loewen dispute, for example, could not have arisen if the putative victim were a British, rather than a Canadian, firm.

Yet the two doctrines share more than a focus on property and an intertwined genealogy. Structurally, each involves a superimposed norm. Federal courts enforce takings doctrine against state and local organs (as well as, of course, against federal organs). International bodies enforce expropriation law against all organs of a state subject to an investor-protection obligation, whether national or subnational. Subordinated bodies, including courts, may internalize the norm, but it is the lurking power of the superior tribunal that provides the motivation for internalization. In other
that provides the motivation for internalization. In other words, both are externally enforced commitments.

Moreover, each responds to the same kind of problem, even if each does other things as well. Expropriation law explicitly, and takings doctrine in its prehistory if not through present practice, regard the significant tension as not between property owners and non-owners as such, but rather between outside owners of property and the local demos. This focus may rest on an intuition that locals, owners and non-owners alike, have some ability to influence the processes that govern government actions regarding property, and thus require less support through an external norm.

Finally, both doctrines have the capacity to discipline courts as well as other organs. In the case of expropriation law, the premises of international law itself push the doctrine towards this result. With respect to takings law, the conclusion that judicial decision-making might trigger an obligation to provide just compensation is tentative at best. But the example of expropriation law suggests reasons why takings law might move in this direction. If the special risks borne by those who cannot influence local decisionmaking justify external protection, then one must ask whether those risks extend to the judicial process. An affirmative answer, the plausibility of which I argue in the next part, suggests that takings law has a job to do here.

I do not mean to suggest that both norms work directly to constrain subordinated courts. All U.S. courts have a duty to enforce all constitutional norms, including the Takings Clause. But in many cases, the international law obligation to respect a foreigner's property does not operate directly through local law. In the case of NAFTA, for example, Congress expressly provided for no private enforcement of the Agreement's various provisions, including Chapter 11's investment protection rules. Only the U.S. government has the authority to petition a court to bring a state or local organ into compliance with NAFTA. North American Free Trade Implementation Act § 102(c), 19 U.S.C. § 3312(c) (2000). This does not mean, however, that instrumentalities of state authority should be or are unmindful of NAFTA's requirements.

This argument also suggests why not all aspects of expropriation law translate back into takings jurisprudence. An expropriation case by definition involves outsiders as victims, while the Takings Clause implicates distributional choices made within a community. One might anticipate more rigorous and prophylactic rules governing expropriations, even if protection of outsiders underlies both bodies of law. Cf. Jon A. Stanley, Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment
If both of these doctrines devote special attention to the problem of the outsider, including the outsider drawn into litigation, what does this tell us about redistributive litigation generally? Is the problem one of the security of ownership _qua_ ownership, or should the law hone in on the vulnerabilities of some investors at the expense of others? Should courts take up this challenge, or leave it to other decisionmakers? The answers to these questions may be latent in existing doctrine, but plenty of room remains for serious consideration of their implications. I now turn to this task.

IV. EXPROPRIATION AS A COLLECTIVE ACTION PROBLEM—THE ROLE OF LOCALISM

Having defined the concept and reviewed the extant authorities that may apply to redistributive litigation, we now must return to the central question. Exactly what, if anything, is problematic about redistributive litigation? In particular, is it possible to develop a critique of redistributive litigation that is independent of general opposition to government-mandated redistribution?

Judicial unsettling of reasonable expectations may amount to nothing more than the cost of living in a dynamic society whose institutions respond to changing needs. In rejoinder, one might assert the primacy of property and contract as a means of organizing civil society and personal lives against the state’s encroachments. A respectable scholarly literature, highlighted by the work of Professors Robert Nozick and Richard Epstein, takes this position. It would reject all redistribution, even when such action achieves an overall enhancement of utilitarian welfare, because it violates core moral principles. Anyone convinced by these arguments would have an a priori basis for rejecting redistributive litigation. The violence that redistribution does to the moral basis of property is not ameliorated by the use of judges as the state’s agents.

For my purposes, the Nozick-Epstein attack on redistribution is uninteresting, because it ignores what may be distinctive about the litigation process. Rather than close down the discussion with a general attack on redistribution, I want to explore the special prob-

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lems and opportunities that innovative litigation may present. I argue that the international-law strategy, with its core concern about predatory localism, has more to teach us about the cases and cures of redistributive litigation, whatever position one takes on redistribution generally.

Consider first a possible case for redistribution, whether through litigation or by other means. Unless one has made the kinds of commitments that Nozick and Epstein advocate, at least some arguments for redistribution seem appealing. Once one concedes the moral arbitrariness of the existing set of outcomes, an effort to do better—to align access to resources with qualities we would regard as sympathetic—seems appealing. Yet the case for any particular redistribution remains problematic, at least in moral terms. We as a society have achieved nothing like a consensus about even transparent issues such as the optimal degree of progressivity in our tax system. We may enjoy a general commitment to ameliorating the most extremes instances of deprivation, but I cannot detect a parallel consensus to eradicate the greatest concentrations of wealth.

My preferred response to this difficulty is to ask a different question. Rather than arguing from moral insights, I would rely on the conventional artillery of utilitarianism. On the one hand, a redistribution that contributes to overall wealth (in technical terms, Kaldor-Hicks optimality) is at least plausibly desirable, pending consideration of the claims of the losers and the availability of compensatory strategies. On the other hand, a redistribution that diminishes welfare by foreclosing enriching opportunities, as well as destroying existing wealth, seems presumptively dubious. It would take a very strong justice argument to maintain that satisfaction of particular moral imperatives requires diminishing our society as a whole.

I am aware of problems implicated by a focus on social welfare. The risk of circularity is great, given the dependence of what we value on what social choices we make. The illusions of quantification and specious scientific authority also exist. But welfare analysis helps us answer some questions, these questions can be interesting, and there is no imperative to try to answer every question.

In considering the welfare effects of redistributive litigation, I will isolate a subset of all possible interests that this activity might
Redistributive Litigation

Disturb. Many instances of redistribution seem inherently ambiguous, where rearrangement of property rights might produce benefits that offset the reliability losses that the rearrangement necessarily incurs. As a positive matter, U.S. society, as well as those of most other prosperous countries, tolerates a wide range of regulatory, tax, and other government interventions that have redistribution as their justification. In general, we leave it to the political process to sort these matters out. Our commitments to constitutional checks on such redistribution have waxed and waned, but even in the heyday of the Court's free-market sympathies, a considerable amount of economic legislation intended to alter the status quo passed muster. We generally seem confident that the risk of successful rent-seeking coalitions generating welfare losses diminishes when seen with a sufficiently long-term perspective, and we fear that external, judicially enforced checks on redistribution may become sticky and counterproductive in the face of changed circumstances.

But where interests and expectations result from mobility—where an investor comes from outside the local community and, as an outsider, presumptively lacks an effective way of influencing the community's deliberations—redistribution, including that achieved through litigation, may present particular problems that demand a specific response. Where decisionmakers have the ability to externalize the costs of redistribution, because those who will bear those burdens have limited capacity to retaliate or otherwise to share their losses with those who will benefit from the redistribution, rational decisionmakers will redistribute even if the overall impact on welfare is negative. In other words, situations that present substantial risks of cost externalization present the greatest likelihood of


overall welfare losses. Here, unlike instances of redistribution, a presumption in favor of some kind of constraint seems desirable.\textsuperscript{114}

The argument for protecting outside investors can be illustrated by modeling a dynamic set of interactions between potential investors and jurisdictions that would serve as hosts for that investment. Consider the incentives these parties face. In a world of mobile property rights and local political decisionmaking, sovereigns may find themselves in the position of hosting property owned by persons who have no direct right of participation in local politics. In many cases, those persons with participation rights ("voters") also might own property outside the locality. The voters might prefer a world in which no locality can divest outsiders of their property, but absent some form of coordination, localities would have no way to bind themselves to this outcome. Without a binding commitment, each locality would have no reason not to divest outsiders for the benefit of insiders.\textsuperscript{115}

A numerical example may help. Assume that Investor can build a factory at a cost of $10,000,000 that will be part of an enterprise having a going concern value of $19,000,000.\textsuperscript{116} The creation of the factory requires that Host Jurisdiction extend benefits to Investor (debt guarantees, road improvements, trade secrets such as geological data, monopoly rights, or comparable inducements) that will cost Host $6,000,000. Investor must sink $4,000,000 in the site, creating an asset worth $2,000,000, before Host Jurisdiction extends any benefits. At that point, Host must extend the benefits. Assume these benefits are sufficiently fungible that Investor can derive $6,000,000 from them even if Investor makes no further progress on the project. The value of these fungible benefits ex-

\textsuperscript{114} The symmetrical point is also true: Situations where the risk of benefit externalization is high will result in insufficient changes to the status quo. The analysis in this Article of collective action problems applies to these circumstances as well.

\textsuperscript{115} This is only one possible variation in the array of incentives that investors and hosts might face. For a more elaborate analysis of the problem, see Guzman, supra note 94; David W. Leebron, A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation, 60 U. Cin. L. Rev. 305 (1991).

\textsuperscript{116} The $19,000,000 figure represents the discounted present value of all future returns from the project, ignoring taxes or other regulatory interventions that might reduce the project's value. As I discuss below, the host state might carve out its share of these returns though direct ownership or indirect regulatory or fiscal intervention.
ceeds the cost to Investor of obtaining them by $2,000,000; Host has a net cost of $4,000,000, because it can seize the factory if Investor runs off with the fungible assets. Assume that if the enterprise is brought to fruition, Host’s stake will be worth $7,500,000 (as a result of either equity ownership or anticipated tax revenues). Investor’s share thus will be worth $11,500,000 obtained at a total of $10,000,000. Also assume that simply by entering into the commitment to undertake the project, neither Investor and Host will incur any opportunity costs, i.e., either can back out at no cost.

Both Investor and Host will be better off seeing the project through, as each will realize a profit of $1,500,000. At the same time, each has an incentive to defect. If Host can induce Investor to make an investment before releasing any of the benefits, Host will have control over an asset (an unfinished factory, for example) worth $2,000,000 for which it paid nothing. If Investor acquires the benefits extended by Host and does nothing further to develop the project, it will have rights worth $6,000,000 for which it expended only $4,000,000. If neither does anything, neither loses anything (disregarding Investor’s sunk costs). Table 1 illustrates the payoff matrix for both, with the left integer indicating Investor’s return, the right Host’s.
Astute readers will recognize this as the Prisoner's Dilemma, a staple heuristic of game theory, as well as of the various social sciences that exploit the theory. It represents what generically is called a collective action problem. The players maximize combined wealth by pursuing some collective goal through cooperation, but each has an incentive to defect so as to frustrate the realization of that goal. Both parties, under conditions of ignorance about the other's strategy, do better by defecting than by cooperating. Both, anticipating that the other will choose a strategy based on ignorance, will predict that the other will defect. Absent some means of signaling a commitment to cooperate, these parties will find themselves backing out of all transactions that have comparable incentive structures. Without some way of coordinating their behavior, each party's rational choice is to engage in opportunistic behavior. This is a world where predatory localism and investor...
fickleness exist side-by-side, each contributing to the impoverishment of society.118

In the classic version of the Prisoner’s Dilemma, the players engage in only one iteration of the game and have no means of signaling a precommitment to a particular strategy. Relaxing these conditions leads to possible solutions of the collective action problem. Sufficient iterations of the game provide both players with an opportunity to acquire a reputation that will induce reliance (or the opposite). Alternatively, players may make credible precommitments, such as by exposing themselves to independently administered penalties upon defection. Within the confines of the Prisoner’s Dilemma, both strategies have evolutionary advantages. Each allows parties to undertake more and greater beneficial projects than they could otherwise.

Under what conditions can one reasonably expect host countries and investors either to invest in reputation or to design institutions that enhance the credibility of their commitments so as to increase investment? Under some scenarios, the expropriation problem might solve itself. Outside investors, who presumably lack a political voice to dissuade local authorities from seizing their property, might forego investing in localities that acquire a reputation for inhospitality. Faced with the resulting economic hardship, authorities may seek to make credible commitments to future investors. Alternatively, host states that have limited power to influence an outside investor’s behavior might refuse to do business with firms that have cut and run in the past. In Professor Albert O. Hirschman’s classic formulation, exit and voice may operate symmetrically to discipline decisionmakers subject to either sanction.119

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118 I elide the question of whether commitments to cooperate, while adaptive in the sense that they increase global welfare, may decrease the welfare of some class of parties (for example the Third World) because they impede opportunities to extract rents through cartelization. For the suggestion that the distribution of benefits from investment might go disproportionately to First-World investors, see Guzman, supra note 94, at 671–74. For evidence that investment protection might redound to the benefit of host Third World countries, see Paul G. Mahoney, The Common Law and Economic Growth: Hayek Might be Right, 30 J. Legal Stud. 503, 514–23 (2001).

119 Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 3–5 (1970). Alternatively, we can describe such results as demonstrating Tiebout outcomes. This theory posits that, in the absence of significant third-party effects, consumers can affect the array of government-provided services through their ability to migrate. Charles M. Tiebout, A Pure Theory of Local
With both businesses and states, however, neither the acquisition of a reputation nor exposure to independently administered penalties is straightforward. Collective bodies necessarily face a turnover in their decisionmakers, whether through takeover, generational change, coup d’état, or democratic choice. The knowledge that decisionmakers will change encourages observers to discount the value of information based on past conduct. Both businesses and states find it more difficult to acquire and to maintain a reputation than do individuals.

As for precommitments, the problem lies in the ability of collective bodies to become judgment-proof. Firms can do this by siphoning assets out of the entity subject to prospective liability; states can simply invoke sovereign immunity. While sovereign immunity may not shield offshore assets, it provides a justification for a state not to cooperate with respect to property on its own territory.

But these problems are not insurmountable. First, a state can adopt and sustain institutions that make government expropriation more difficult. In the United States, the pairing of takings jurisprudence with an independent judiciary, bolstered by the availability of the federal courts for some classes of disputes, serves this function. Second, both firms and states can structure their transactions to make backing out more costly, thus providing credible reassurance that they will carry through with their commitments. As a variation on this strategy, they can link their promise to cooperate to some broader benefit that they would forfeit upon breach. Examples of this last technique include the tying of the investor protection provisions of the European Charter on Human Rights to the economic liberalization promoted by the European Union and the nesting of Chapter XI’s investor protection rules in the North American Free Trade Agreement.\(^{120}\)

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Expenditures, 64 J. Pol. Econ. 416, 422–24 (1956); see also Donald H. Regan, The Supreme Court and State Protectionism: Making Sense Out of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1160–67 (1986) (forcing states to internalize the interests of outsiders robs them of the power to engage in autonomous decisionmaking on behalf of their constituents).

\(^{120}\) In Europe, the strongest protections against expropriation are not found in the treaties that underlie the European Union (EU), but in the international law structure that has as its foundation the European Charter on Human Rights. See Lithgow v. United Kingdom, App. No. 9006/80, 8 Eur. H.R. Rep. 329, 397 (1986). European countries, however, attach great value to membership in the EU, and good standing in
Either strategy—developing internal institutions or making externally enforceable precommitments—has costs. Both internal and external enforcers can make mistakes or use their authority to pursue self-aggrandizing objectives at the expense of their putative mission. In technical terms, no institution or mechanism devised to protect outside investors can be free of agency costs.\textsuperscript{121} To justify the use of investor-protective strategies, then, one must have a plausible explanation as to why the benefits they would produce should exceed their costs.

In the case of domestic institutions, substantial evidence supports the proposition that an independent judiciary inclined to protect private interests against government encroachments results in an overall increase in material well being.\textsuperscript{122} Proof of the general proposition that judicial protection of property rights makes society better off does not, of course, amount to proof that any particular instance of protection enhances welfare. But we at least have some reason to believe that independent courts, and the federal courts in particular, have some ability to detect and resist especially egregious instances of exploitative expropriation. It does not require too great a leap to suggest that the federal courts also may play a beneficial role in monitoring the use of the state judiciary for similar ends.

As for externally enforceable commitments, much depends on the design of the enforcement mechanism. Embedding the mechanism in a comprehensive and valuable set of agreements, such as NAFTA, strengthens the credibility of the investor-protective commitment but also makes it harder to withdraw in the event that the enforcer manifests higher-than-expected agency costs.\textsuperscript{123} Grounding the mechanism on express international commitments, rather than shadowy perceptions of custom, also makes it more likely

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that club requires, as a matter of custom rather than legal obligation, adherence to the Charter.


\textsuperscript{122} See Mahoney, supra note 118 (providing evidence).

that, at least ex ante, the governments concerned plausibly could have believed that the mechanism would produce benefits in excess of costs. Recent calls to renegotiate the investor-protection provisions of NAFTA indicate, however, that what governments claim to expect may not reflect what they believe they get. Perhaps the most one can say is that international regimes voluntarily entered into have a valid basis in theory, and may function beneficially in practice.

To summarize, whenever a locality or a nation serves as a host for investments by outsiders, the possibility of a collective action problem exists. Both governments and investors face risks of opportunism that might discourage them from entering into valuable transactions. Reputation alone may not suffice to surmount this difficulty. Precommitments, as exemplified by the Takings Clause in the U.S. Constitution and the investment-protection obligations contained in various international regimes, may provide a mechanism for increasing the likelihood that welfare-enhancing investments will take place. If these precommitments function as a successful adaptation to an uncertain environment, we should expect them to increase in scale and scope over time.

A cautionary note is in order. I have used the general structure of collective action problems to illustrate why particular commitments to respect property rights may advance welfare. But, using different assumptions, one also can demonstrate why a commitment not to recognize property rights may serve as a welfare-enhancing solution to a collective action problem. Under certain conditions, a commons may prove to be an optimal property regime, but, absent a collective commitment to respect the commons, individuals might have an incentive to carve out private rights. In other words, a commons may produce positive externalities, not negative ones. Professor Ronald Gilson has made exactly this argument in explaining why California’s refusal to enforce covenants not to compete gives that state a superior capacity to foster innova-

124 In response to earlier arbitration decisions enforcing the investor protection provisions of NAFTA, the governments agreed to a "reinterpretation" of the scope of Chapter XI's protection. Free Trade Comm'n, U.S. Dep't of Commerce, Clarifications Related to NAFTA Chapter 11, at http://www.mac.doc.gov/nafta/ar-july31%232.htm (July 31, 2001). Implicit in this response was a critique of those decisions, which treat various regulatory rules as compensable expropriations.
tion through job mobility. The general point is that, depending on considerations such as production functions, network effects, and background expectations, either respect for private property rights or the opposite might serve as the desired end-state that a Prisoner's Dilemma thwarts.

This qualification does not detract from the main point. There is, to be sure, something important, and perhaps even disturbing, in the insight that a certain symmetry exists between predatory localism and excessive specification and enforcement of property rights. Yet this symmetry suggests only a meta-principle, that from a general welfare perspective society can have too much property. This does very little to help us understand what, on the margin, our existing commitments might mean. In particular, we need both a fuller theory of the differences, if any, between positive and negative externalities and the likelihood of one or the other producing informal adaptations, and empirical evidence to confirm such theories. My intuition is that negative externalities resulting from inadequate property protection remain a more tractable problem. Institutional responses, such as judicial enforcement and third-party arbitration, are likely to produce more benefits than would informal adaptations when addressing these issues, while over-specification of property rights leads more readily to informal adjustments. So understood, the collective action problem provides a useful analytical framework for considering the function and scope of both domestic and international investor protection mechanisms. And by identifying the kinds of benefits the designers of these mechanisms seek, this analysis brings us closer to understanding whether, and in what contexts, redistributive litigation presents a problem.

V. AN INSTRUMENTAL ANALYSIS OF REDISTRIBUTIVE LITIGATION

I have no intention of developing a general critique of judicial innovation. The use of the courts to prod the legislature and the public toward a more noble and just society remains one of the great stories of contemporary U.S. legal culture. Accounts grounded in civic republicanism, natural law, or a more focused celebration of the judiciary’s peculiar high ground pervade the literature. But as long as present accounts of redistributive litigation beg important questions, yet another effort to explain the phenomenon remains worthwhile. I continue with an approach that focuses on social welfare, while conceding its shortcomings.

I first consider what factors may induce the judicial system, in comparison to state and local legislatures and administrative agencies, systematically to produce redistributive outcomes. Then, drawing on Part IV, I focus on characteristics that increase the risk that litigation may lead to predatory localism. In each case, litigation operates in a dynamic relationship with the legislature, which may have its own redistributive preferences.

A. Redistributive Legislation and Litigation—A Dynamic Analysis

There exists a literature analyzing choices made by rent-seekers between litigation and legislation, but to my knowledge, no one has explored the dynamic relationship between the judiciary and legislators in the face of rent-seeking. To do this, one first must explore the incentives affecting the choices of rent-seekers, legislators, and the judicial system. Then one must account for the ways in which these three groups interact in a dynamic process. The reality is dense and obscure: I offer a stylized account that draws on the mainstream of the political economy literature.

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Rent-Seekers and Their Incentives

If rent-seeking involves the pursuit of a benefit or the avoidance of a cost that results from governmental action, then the class of potential rent-seekers is virtually limitless. In reality, however, only some members of the polity participate in rent-seeking coalitions. Participation in group action is costly. It takes time and money to identify persons with a common interest, to organize them, and to devise a decisionmaking and monitoring structure so that agents can act effectively on behalf of the group. The public choice literature rests on two powerful insights about these costs. First, groups will not engage in rent-seeking unless the benefits from collective action exceed their costs. Second, even among those that would find rent-seeking cost-effective, different groups have different cost structures, enabling some groups to act more effectively than others. A major task of the literature is to identify those group characteristics—homogeneity, compactness, issue salience—that reduce organizational costs and thereby increase the potency of groups in influencing governmental action.\(^{127}\)

Most of the public choice literature looks at the impact of private groups on legislative decisionmaking. In a democracy, groups can influence legislators in a variety of ways. They can contribute funds to legislators, provide them information about the potential impact of legislation, maintain a disciplined voting bloc, and influence public discussion through some combination of informative presentation and cultivation of the organs of mass media. In cases where legislation involves multiple steps—a good example is drafting by a standing private group, such as the American Law Institute, followed by legislative adoption—private groups exert influence through some combination of information provision and professional inducements (employment, commissions, and the

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like). Holding all else constant, a better organized but numerically smaller group can succeed at these activities to a greater extent than numerically larger, but more difficult to organize, groups. The result, the public choice literature explains, is legislation that benefits minorities, including a subset of enactments that entail naked redistribution, that is, that enrich small groups to the cost of society as a whole.

Scholars have paid less attention to the influence of rent-seeking interest groups on litigation. Yet in some instances litigation presents rent-seeking groups with an alternative means to their desired end. Moreover, groups seeking litigated rents face different organizational problems than do those addressing legislatures. Campaign donations and disciplined voting become less of a factor, except in jurisdictions that hold contested elections for judges. The ability to influence public opinion also matters less, because judges do not have to face the voters as often as legislators. The ability to generate and present information may matter more. And to a greater extent than legislation-directed groups, litigation-oriented groups must deal with problems of agency costs, in particular exercising effective influence over their litigators' decisionmaking. This last problem is especially acute when litigation takes the form of a class action, where the conventional ability of the client to exert control through its ability to replace its lawyers no longer effectively exists.

129 See authorities cited supra note 127.
131 Although focusing on ideological rather than material conflicts between lawyer and client and not employing economic analysis, much less the stylized concept of
To summarize, the public choice literature predicts that private groups will pursue rent-seeking legislation where, relative to their adversaries, they have relatively lower organizational costs. The same literature implies that groups with higher organizational costs but lower agency costs respecting litigation or lower costs in influencing litigation decisionmakers (that is, judges and juries) will choose to seek rents through litigation. The first part of these hypotheses—those involving the legislative process—has received significant empirical confirmation. The second part—that involving litigation—only recently has been tested, but the results we have sustain the theory. Two studies, for example, have demonstrated that lawyers, a group with distinctly low agency costs with regard to litigation and distinctly low costs with regard to influencing litigation decisionmakers, use litigation to enhance their own wealth, probably to the detriment of society.

There is, of course, much more to this story than these simple points. Any dynamic account of rent-seeking has to consider the extent to which competition among interest groups dissipates the rents from government action, as well as the possibility that the threat of competition may deter rent-seeking behavior. Because of the adversarial structure of litigation, such competition may have an especially significant impact on this form of rent-seeking. Still, the basic propositions seem clear. Some, but not all, groups engage in rent-seeking. Where they do, the choice between legislation and litigation will turn on the characteristics of the group, in particular its relative costs in influencing litigation decisionmakers compared to legislators. Any rule designed to constrain redistributive litigation must rest on some hypothesis about these characteristics.

agency costs, the leading account of attorney interests in the context of class action litigation remains Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976).

132 See authorities cited supra note 127.

133 Rubin & Bailey, supra note 126, at 827–28; Rubin et al., supra note 126, at 303–06. These studies establish that lawyers successfully engage in redistribution on their own behalf through litigation, but do not address the question whether this redistribution is welfare-diminishing, as opposed to Kaldor-Hicks welfare-enhancing.

134 See generally Becker, supra note 127.
2. Legislatures and Rent-Seeking

The core premise that the public choice literature makes about legislators is, at its heart, Darwinian. Legislators care about getting elected and reelected, and those who perform that task well crowd out those who do not. Legislators who care about other things, such as obtaining private benefits from their office (in its crudest form, extortion payments) or sponsoring legislation that conforms to the legislator's idiosyncratic sense of social good and justice, will find themselves displaced over time by those who do not. All other things being equal, legislators have an incentive to respond to groups that can enhance their prospects of election. While enactment of laws that increase overall welfare may redound to the credit of the legislators who sponsor such actions, this is not the only means by which legislators can augment their electability. In particular, they will support redistributive legislation, even that which reduces overall welfare, if the beneficiaries can enhance their electability more than the victims can detract from it. In the case where the costs to the victims of organizing their opposition exceed the costs they bear from the redistribution, legislators will face no penalty and some rewards for enacting such legislation.

To what extent does this account of legislative process correspond to reality? We know that sometimes legislatures solve collective action problems, which increases overall welfare, and sometimes they exacerbate them by using their power to transfer wealth from one group to another. Whether any particular legislative act has aspects of welfare-enhancing solutions to collective action problems, or to what extent it rewards favored groups at the expense of the disfavored and overall welfare, almost always is controversial and problematic. For my purposes, it suffices to assert that some legislative actions are both redistributive and welfare-reducing. A substantial body of literature, generally characterized as public choice or political economy, documents this assertion. While plenty of debate exists around the edges, it is too late in the day to contest the core point that legislatures on occasion engage in wealth-reducing redistribution.

135 Indeed, the very determination implies some baseline as to what counts as a welfare-enhancing solution, and the choice of any baseline requires normative judgments about legislative outcomes generally. See Elhauge, supra note 130, at 48–66.
3. The Agency Theory of the Judiciary

Legislatures might redistribute wealth directly or through an agent. A familiar pattern involves a legislative decision to delegate to the judiciary the power to make law within rather capacious limits.\textsuperscript{136} Much of federal antitrust, communications, and environmental law looks like this, with Congress directing rent-seekers to the courts.\textsuperscript{137} Conventional analysis suggests that legislatures will tend to make such delegations in cases where effective interest groups oppose each other as to outcomes but prefer further competition for the agent's choices to the status quo.\textsuperscript{138} But while litigation under such statutory schemes might redistribute wealth, the legislature sets the boundaries and suggests the broad direction in which transfers of wealth should run. The enactment of such schemes often means that the legislature will keep its hand in, and will respond to dissatisfaction with, the agent's choices more readily than it would in the face of a \textit{tabula rasa}.

The agency relationship on which these statutory schemes rely resonates with the dominant conception of the judiciary in the law-and-economics literature. Scholars have portrayed judges as the instrument through which legislators can ensure that deals struck at the time of enactment will continue to have future effect.\textsuperscript{139} An independent judiciary, according to this analysis, maximizes the value of legislative choices, and therefore the return to legislators. Implicit in this literature, but not fully explored, is the assumption that the legislature not only will prefer judges to act in this fashion, but will discipline the judiciary to ensure its loyalty to past legislative commands. Judicial independence, in this perspective, means not unconstrained decisionmaking authority, but rather obedience to authoritative legislative pronouncements in the face of pressures

\textsuperscript{136}The alternative is to delegate to an administrative agency. While much redistribution doubtlessly takes place behind the veil of agency decisionmaking, and a literature exists regarding the incentives bureaucrats face to disregard their obligations to the legislature, these issues are collateral to our inquiry.

\textsuperscript{137}See Goetz & Brady, supra note 126, at 226–29.


from either interest groups or later legislators to unmake validly enacted legislative choices.

If the judiciary always were to act as a faithful agent, it does not follow that redistributive litigation disappears as a concern. Legislatures might enter into commitments, whether constitutional or international, that they might come to regret. If the commitment did not symmetrically constrain the judiciary, courts might provide an avenue for chiseling. Recall the Films By Jove dispute discussed in Part I, where the Russian state arguably tried to use the courts to take back intangible property from a foreign investor after rejecting a legislative expropriation. The Russian state plausibly might have wished to engage in a bait-and-switch game, where it first induced foreign investment through a credible commitment to protect investors and then, when the prospects for further gains seemed limited, pursued opportunist expropriations. A loyal judiciary would fulfill this wish.

The agency theory does not completely explain the problem. It argues that the legislature would want judges to act independently of interest groups and current political pressures to maximize the return to legislators from their actions. Yet it does not explain why judges would want to behave in this fashion, or whether legislatures have the capacity or desire to create a system of incentives that will maximize this sort of judicial independence. And the scope of the phenomenon of redistributive litigation suggests that another dimension of judicial activity exists.

4. Litigation and Agency Costs—The Incentives of Judges, Litigants, and Juries

What explains judicial decisions to promote redistribution in the face of legislative silence or even opposition? Why do judges freelance when it comes to transferring assets in or out of the public domain and among private persons? That they sometimes do seems evident, if the examples given in Part I of this paper have any force. What would lead judges to such indifference to their obligations as agents of the legislature?

140 See supra text accompanying notes 27–29.
141 See Gary M. Anderson et al., On the Incentives of Judges to Enforce Legislative Wealth Transfers, 32 J.L. & Econ. 215 (1989).
Two possible explanations suggest themselves. First, something in the judicial selection process may produce judges with tendencies or preferences that do not conform to those of the legislature. Especially where constitutions prescribe the process for selecting judges, as is the case in most U.S. jurisdictions, legislatures may find themselves selecting less than faithful agents. Alternatively, aspects of the litigation process might generate decisions that deviate from legislative preferences. Case selection by litigants might provide one explanation. The civil jury, which again in most U.S. jurisdictions has a constitutional basis, is another likely source of such departures. I consider each in turn.

a. Judicial Selection

In recent years, a literature on judicial incentives has appeared, but the topic remains underdeveloped.\textsuperscript{142} Only recently have scholars begun to consider possible connections between judicial selection procedures and court decisionmaking.\textsuperscript{143} Differences in the constitutional structures of the federal government, the several states, and various countries preclude any powerful conclusions, but some observations are salient. For our purposes, the most interesting is a comparison of the size of trial judgments against out-of-state defendants in three categories of lawsuits: those before judges chosen through contested partisan elections; those before judges chosen through nonpartisan elections; and those before judges chosen in some other manner. The Tabarrok and Helland


study indicates that judgments are significantly higher in the first category (judges chosen through contested elections) than in the other two, and that no significant difference exists between the second and third categories.  

What should we make of the enhanced home-court advantage that exists where judicial selection involves partisan competition among candidates for popular votes? First, it seems unlikely that such judges are more responsive to legislative preferences than are other judges. To be sure, partisan popular elections may subject these judges to exactly the same localist preferences that legislators face, while judges chosen in a less transparent fashion may enjoy a degree of independence that allows them to counter localist biases expressed through legislation. But why would judges selected by means other than contested elections systematically resist the mandate of the legislature? It seems more plausible to suppose that, all other things being equal, independent judges produce about the amount of localism that the legislature desires, given the trade-off between enriching locals and discouraging outside investment.  

An alternative hypothesis, consistent with casual empiricism if not systematic research, would assert that local lawyers have a greater impact on contested judicial elections than they do on the content of legislation, and that, on the whole, these lawyers prefer more predatory localist litigation than does the legislature. The first part of the hypothesis—disproportionate lawyer influence—reflects the general observation that local lawyers traditionally have been the largest source of campaign funding in contested judicial elections and that ratings by local bar associations have an impact on the outcome of these contests. The second part is more speculative, but not outlandish. It rests on two hypotheses: that lawyers' interests reflect both a desire to maximize the value of their services and to please their clients, and that local clients have a greater influence on most lawyers than do outsider clients. The

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144 Tabarrok & Helland, supra note 143, at 168-69, 186-87.
145 I am using the term "independent judges" here only as a means of designating judges not chosen through contested partisan elections. I do not mean to suggest that these judges might be indifferent to incentives such as local prestige or that they would run trials free from the special-interest biases I discuss in the following sections.
first hypothesis assumes that the value of a lawyer's services depends on the amount of money at stake, so that raising the likely value of claims benefits plaintiffs' and defendants' attorneys symmetrically. The second assumes that local clients are more likely to choose to sue locally, as well as to be sued locally, and thus are more likely to employ local lawyers. If these guesses come close to capturing the reality of lawyers' preferences, then they may explain why lawyers would prefer judges who increase the mean payoff from litigation (something that enhances the value of legal services) in cases where outsiders must pay (a class of clients that will have relatively less impact on lawyers' preferences). Whether these suppositions capture reality poses an empirical question, for which more data is needed.

In summary, judicial selection processes seem to have some effect on the disposition of judges. Where judges face contested popular elections, as they do in roughly half the states, their decisions seem more prone to predatory localism than where they arrive at the bench by other means. This tendency toward localism may exceed what legislatures typically prefer but may match the preference of local lawyers.

b. Structural Biases in Litigation

In adversarial proceedings, judges depend heavily on the interests of the litigants to get at information about the dispute. This information includes not only retrospective accounts about what happened, but also data and analysis about the likely ex ante consequences of the litigation's outcome. In shaping the law, judges to a large extent rely on the parties to inform them about what their decisions will accomplish.\textsuperscript{146}

The interests of the parties are not likely to coincide with either general welfare or the preferences of the legislature. In theory, the adversarial process addresses this problem by giving each side an incentive to correct the other's errors. We think of litigation as analogous to a marketplace, where contesting interests function as information-forcing mechanisms. But the marketplace analogy

\textsuperscript{146} Experience and academic guidance also matter, but even there the parties have a disproportionate role in shaping the judge's perception about how experience and academic reflection bear on the matter at hand.
breaks down where structural impediments to market entry exist. In the case of litigation, we can detect at least two such barriers.

First, litigation as we understand it in the United States requires an ex post dispute, even though the outcome may have ex ante consequences. We allow precedents to emerge out of cases where the parties' interest in the existing dispute may differ significantly from their interests in the precedential impact of the case. Standing doctrine and its constitutional fellow traveler, the case-and-controversy requirement, keep persons who care about the precedent, but not about the disposition of the dispute, from participating in the litigation.\(^{147}\) As a result, judges and juries systematically will lack significant information about the implications of their decisions. Contrast this approach to well-functioning markets, where the only barrier to entry is the capacity to bid or to ask.

Second, our reliance on private, as opposed to public, litigants in the production of legal outcomes results in a skewing of precedent in favor of discrete interest groups. Private actors can control the access of courts to disputes through the parallel devices of suit-filing and settlement. A person who would run the risk of setting an unwanted precedent would pass up the opportunity to bring a claim, even if the claim otherwise has positive value. Conversely, someone faced with a suit that would create a precedent against their interests might choose to settle the suit for an amount in excess of the discounted value of the plaintiff's interest. As long as a group has the capacity to absorb the cost of obtaining favorable precedents, and avoiding unfavorable ones, by buying out unwanted cases, it can constrain the choices faced by judicial decisionmakers to a range reflecting the group's interests. And well-organized homogenous groups that can meet standing rules, all other things being equal, will have a superior ability to make such investments.\(^{148}\)

Just as it seems plausible to suspect that contested elections of judges might promote anti-outsider bias, the likelihood that precedent skewing due to structural aspects of private litigation may


\(^{148}\) Cf. Cross, supra note 130, at 366–68 (describing the mechanism of precedent selection by repeat players).
produce anti-outsider outcomes seems substantial. Lawyers and litigants seeking results that favor locals will confront opportunities to sue or to settle more frequently than will outsiders, and thus they will have more opportunities to shape the array of choices that judicial decisionmakers face. Lawyers contribute significantly to decisions whether to sue and whether to settle, and reasonably may be expected to exercise their influence in ways that reflect the broad interests of their clients (and themselves) collectively, rather than the narrow interest of the client at hand. Choosing when to litigate in ways that maximize the value of local claims against outsiders seems a reasonable strategy for such lawyers to pursue, for the reasons discussed in the previous Section.

c. Jury Biases

An enigmatic and poorly understood factor in judicial decision-making is the jury. Systematic assessment of the impact of jury biases on civil litigation is difficult, if not impossible, because of selection problems. A direct comparison of jury and judge verdicts gives an incomplete picture, because it fails to consider filing and settlement choices as well as separating plaintiff and defendant demands for a jury trial. We thus cannot say with confidence what the pool of cases that result in jury verdicts represents. The absence of any significant discrepancy between jury and judge trial verdicts, for example, might mean only that lawyers for plaintiffs and defendants tend to have symmetrical risk assessments and risk preferences, and chose to try, rather than settle, only cases that are genuinely unpredictable along a fairly constricted range. Alternatively, defendants may be systematically more risk averse than plaintiffs and thus more likely to settle riskier claims, and jury claims might be systematically riskier than those tried to a judge.

The basic point is that we lack good empirical evidence whether juries discriminate against certain classes of litigants, and in particular, whether juries disfavor outsiders in disputes with local parties.

In the absence of solid evidence, we must fall back on anecdotal observations. It is commonplace among trial lawyers (not just the popular press) that juries favor local parties against outsiders, especially if the outsider is a profitable corporation. There are some reasons to believe this perception rests on a factual foundation. Limitations on the jury pool—local availability of the jurors—and the power to exclude outliers through peremptory challenges may create an appreciable tendency to tolerate, if not actively pursue, redistribution against deep pocket outsiders. Insiders, by contrast, might possess attributes—community standing, job prospects—that blunt this tendency.

One narrow but intensive study of litigation practices in Alabama bolsters this anecdotal supposition with suggestive, although not conclusive, evidence. Professor George Priest looked at tort claims filed in three rural, sparsely populated Alabama counties that lacked substantial industry. In these counties, virtually all such suits involve claims against outsiders, as there are no local pockets of wealth to be picked. Priest found that virtually all filed suits included a punitive damages claim, even though by law such recoveries are meant to occur only under extraordinary circumstances. Priest lacked data on the settlement value of the claims filed, but did document remarkable jury verdicts.

The Priest study points to a phenomenon that pervades the anecdotal assertions about extravagant jury awards in the United States: A disproportionate number of extraordinarily large judgments occur in a small number of poor rural counties located in states where the appellate courts take a passive role in supervising the size of awards. The Loewen litigation arose in exactly such a county in Mississippi; Texas also produces oversized judgments in a

151 Id. at 828-30.
152 Id. at 834-37.
few counties with similar demographics. It may be the case, in short, that jury involvement in predatory localism is limited to a few jurisdictions, but that in those venues the problem is acute.

d. Summary

Judicial selection, the structure of litigation, and the composition of juries all can make it likely that litigation will result in some outcomes that legislatures might not prefer. Whether these factors produce systematic, as opposed to random, departures from legislative preferences is more difficult to determine. Casual empiricism and some scholarly studies suggest that litigation manifests an observable tendency to transfer resources to lawyers in ways that may harm society as a whole. Less well documented, but plausible, is a bias in favor of local interests. This may result in undercutting of commitments to protect outside investors.

One should note that the second potential bias—susceptibility to predatory localism due to structural biases—explains a phenomenon that the agency theory of the judiciary also predicts. Court decisions that expropriate from outsiders might occur either because the legislature wishes to circumvent commitments against this kind of predation, or because the litigation process tilts against outside investors to a greater extent than a legislature may wish. As an analytical matter, this confluence of stories may be troubling: We cannot look at instances of predatory litigation and determine whether the action reflects or transgresses legislative preferences. More generally, we cannot look at litigation-based attacks on outsiders and generalize what this reveals about the incentives facing the judicial system.

At the same time, the confluence of the two theories points toward a common policy response. If a legislature can make commitments to protect outsiders but has the freedom to chisel these commitments, its ability to reach optimal solutions of collective action problems is impaired. External constraints on redistributive litigation then would function as a means of making such commit-

\footnote{On Loewen, see Harr, supra note 42. For a discussion of strategic forum selection in Texas, see Gregory B. Westfall, The Nature of This Debate: A Look at the Texas Foreign Corporation Venue Rule and a Method for Analyzing the Premises and Promises of Tort Reform, 26 Tex. Tech L. Rev. 903 (1995).}
ments more credible, and thus more valuable. Conversely, if structural aspects of the judicial system and litigation produce biases against outsiders, external constraints may be the most effective means of implementing a legislative desire to suppress predatory localism. Even though they rest on inconsistent premises, either theory provides a justification for using both constitutional and international law doctrines to constrain local courts in instances where outsider interests seem at risk. Neither justifies using these constraints with respect to other instances of redistributive litigation.

B. Legislative Responses to Redistributive Litigation

There is, then, plausibility, if not unassailable proof, in the assertion that the judicial process exhibits some biases that will attract rent-seekers not otherwise able to obtain comparable rewards from other branches of government. But this alone is insufficient to justify external restraints on litigation. Potential beneficiaries will invest in redistributive litigation only if the payoffs justify the costs of litigating. Large one-time wealth transfers might suffice, but at least some of the kinds of redistributive litigation discussed in Part I—for example, the displacement of a private property right with a public access right—will justify the effort only if they prove enduring. And for a benefit to endure, it must not face a reasonable prospect of legislative reversal.

Consider the beach easement cases, which have sought to force owners of beachfront lots to open up their property to the general public. If the wealth transfer that these cases pursue were to have a significant effect on local property owners, would not one expect the owners to obtain redress from the legislature? What systematic obstacles would bar a legislative response?

I do not mean to say that the prospect of legislative reversal always serves as an adequate safeguard against redistributive litigation. The status quo, including a status quo attained through judicial fiat, always enjoys the benefit of those institutional features that deter legislative action. The legislative process entails costs; otherwise we would care only about the ex post effects of judicial

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154 See supra text accompanying notes 35–37.
lawmaking and never worry about bad precedents. Opponents of corrective legislation, having seized victory in the courts, may bottle up any bill that threatens their gains. And the threat of expropriative outcomes prevailing, notwithstanding the possibility of legislative action, might diminish social welfare.

This argument for erecting some general constraints on judicial redistribution is weaker than it might first appear. External constraints also involve costs. The tribunals may make mistakes, overturning just and socially desirable rulings. The possibility of intervention by such bodies might deter courts from reaching welfare-enhancing rulings or providing reasonable guidance through their opinions. People with valid legal claims might not pursue them because they expect an external constraint to kick in. More fundamentally, an external solution relieves local decision-makers of the responsibility for confronting and rectifying local problems. Externally imposed constraints may not only demoralize local lawmakers, but they may also teach them to test the limits of those constraints and otherwise to take risks at the expense of the general welfare.

These concerns do not suggest that external constraints should never apply. Rather, they clarify the burden that a proponent of such constraints should bear. Part of the case for allowing external bodies to police local law, whether it be federal courts exercising constitutional review or international arbitrations bodies enforcing treaties, must include an explanation why local legislatures cannot provide sufficient supervision over their courts. Systematic, rather than anecdotal, explanations of legislative inadequacy are required.

In addressing these difficult questions, it may be helpful to return to the categories of redistributive litigation developed in Part I, using predatory localism as a lens for understanding when a constraint on litigation might produce benefits in excess of costs. The kinds of lawsuits I consider involve litigation on behalf of the state, claims against the state, private suits to create a commons, private suits to carve property rights out of a commons, and suits to rearrange rights among private owners. None of these categories comprises exclusively predatory localism, but some present a greater likelihood of that dynamic than do others.

First, where the state is the claimant, as in the tobacco and gun suits, the legislature normally can supervise the government agents
asserting the claim as well as it can oversee the courts in which the case is brought. Budget constraints set by the legislature normally would limit rent-seeking outlays (ignoring special arrangements, such as when private attorneys take on the case under contingency fee arrangements).\textsuperscript{155} The only systematic deficiency in legislative supervision may occur in situations that present significant externalities, that is, where losses fall on outsiders. In all other instances, the risk of provoking the legislature probably is sufficient to deter overreaching.

Second, where the State is the defendant, the legislature normally is in a good position to supervise the case and, where appropriate, to enact rules that forestall surprising applications of preexisting law. Moreover, this category presents the least risk of externalities. Any payout must come out of the locality's budget, and presumably all parties involved in the local government would have an incentive to prevent that from happening. The marginal benefits to be obtained by adding an alternative check on this category of redistributive litigation seem nonexistent.

Third, where the litigation has as its object the conversion of a private right into a public right, the incentives seem similar to those in the first category (suits brought by government). If the litigation achieves its purpose, the benefits will accrue to the general public. The legislature normally should be in as good a position as any external entity to determine whether the benefits of such transfers justify the costs. The exception again is the case where the costs are externalized to outsiders.

Fourth, where the litigation seeks to convert a public right into a private one, the analytics resemble those applicable to the second category. In both instances, the question is whether the agent chosen to represent the interests of the general public will have appropriate incentives for doing so. Where the State is sued directly, one asks whether the legislature will ride herd on the government lawyers handling the case. Where a private person seeks to wrest something away from the general public, the issue becomes whether the person chosen to represent the public inter-

\textsuperscript{155} Such arrangements do exist. In one case with which I am familiar, the government plaintiff transferred a percentage of its claim outright to the private attorneys who represented the government in the litigation.
Redistributive Litigation

(whether selected by the private litigant or by the court) will function as an adequate representative, as well as whether the legislature will act on behalf of the (perhaps dispersed) group of persons who derive real benefits from access to the challenged commons. These may present hard cases, but the externality problem should not be present. Accordingly, as with the second category, there is no good argument for erecting a special, external constraint on this sort of lawsuit.

Fifth, where the litigation results in a direct transfer from one private party to another, the risks of losses attributable to investments in rent-seeking and undesirable transfers of rights are at their peak. But even here, if the potential losers have equal access to the legislature with the rent-seekers, there is no a priori reason why an external check would do a better job of deterring undesirable efforts than would the risk of legislative reversal. As in categories one and three, the exception involves outsiders.

In summary, once one concedes to legislatures a capacity to supervise the judiciary, the case for external constraints on suits against the state and litigation that would convert rights held in common into private interests cannot be made. In other cases, we keep coming back to the problem of outsiders. I discussed above two theories that provide a systematic accounting for legislative failures to address redistributive judicial behavior that victimizes strangers. Under the agency theory, legislatures might prefer to renege on commitments to resolve collective action problems if they can do so without full accountability. Using the judiciary as a means of chiseling satisfies this need. Alternatively, under an interest-group theory of litigation, legislatures may be unable, except at an unacceptable cost, to counteract the anti-outsider biases that litigation contains. Each theory points toward discrete steps to limit redistributive litigation.

C. The Shape of External Constraints

External constraints on unwanted judicial outcomes can come in two forms. An outside body can review the outcomes of litigation, as a federal court does when it intervenes in a state lawsuit and an international arbitration body does when it holds a government liable in damages for the consequences of judicial action. Alternatively, the constraint can forestall unwanted outcomes by
permitting the transfer of litigation to a more neutral forum. The United States can pursue each of these strategies with only minor adjustments in its contemporary legal practice.

1. Revisiting Takings and Expropriation Law

Empowering an outside body to review local court decisions requires some kind of commitment, whether constitutional or statutory. In the United States, one can locate the constitutional antecedents for federal court review of redistributive state litigation in the Takings Clause and a mixture of due process and constitutional common-law cases going back to the nineteenth century. The statutory commitments involve treaties (approved by a supermajority of the Senate, rather than majorities of both Houses as with ordinary legislation) and enactments implementing international agreements.\(^{156}\) I offer a brief account of how the present commitments, as currently interpreted, may extend to redistributive litigation.

With respect to constitutional doctrine, Justice Stewart’s suggestion about application of the Takings Clause to judicial outcomes provides an entry to the problem, but not a solution.\(^{157}\) There are at least two impediments to a straightforward translation of contemporary takings doctrine to litigation. First, the core instability of current doctrine makes a wholesale extension to the judiciary unattractive.\(^{158}\) Until we have a better sense of what it is that constitutes a taking, we should refrain from a path that would rob a wide range of litigated outcomes of their finality. Second, throughout its history, takings doctrine has revealed a tension between a felt need to protect property \textit{qua} property, as in the “vested rights” line of


\(^{157}\) See supra text accompanying notes 78–83.

\(^{158}\) On the instability, see supra text accompanying note 17.
cases, and an effort to limit federal intervention to instances where local action threatened the national common market. It seems unlikely that we can entirely strip contemporary doctrine of the precedents that reflect the first impulse, but only the second responds to the considerations that justify imposing external constraints on local litigation.

Still, Stewart’s insight that courts should not get a pass when they act in ways that are unconstitutional for other state actors remains sound. If takings doctrine remains too problematic to apply wholesale to the courts, it still can serve as a medium for bringing in other constitutional constraints. The most salient substantive check for present purposes is the enduring principle that the states may not act in ways that discriminate against interstate or foreign commerce. Although adding flesh to this principle has proven challenging—What counts as discrimination? What state purposes justify otherwise discriminatory action?—there is an irreducible core that could apply to litigation as much as legislation or administrative action. One can imagine the position of Justice Scalia—that state action violates the Constitution "if, and only if, it accords discriminatory treatment to interstate [or foreign] commerce in a respect not required to achieve a lawful state purpose"—as informing federal supervision of state litigation undertaking through the Takings Clause. Such supervision would not require a radical disruption of the relations between federal and state courts, but rather rests on the well-established, if seldom applied, idea that state courts may not twist local law to defeat a federal interest.

I do not mean to neglect the other problems that expanded constitutional supervision of state court judgments would entail. The move presents technical as well as deep political problems. But none of the obstacles is insurmountable.

159 Bendix Autolite Corp. v. Midwesco Enters. 486 U.S. 888, 898 (1988) (Scalia, J., concurring). Justice Scalia’s stance is controversial, and has not enjoyed the support of the full Court, but only because others regard it as underinclusive. As a minimalist position, it seems the most likely to underlie an extension of the takings clause to state court actions.

160 See authorities cited in supra note 8.

161 The technical questions include determining when a takings question first arises in a state suit that produces a surprising application of a legal rule, cf. Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923); Reynolds v. Georgia, 640 F.2d 702 (5th Cir. 1981); Williams v. Adkinson, 792 F. Supp. 755 (M.D. Ala. 1992), aff’d without
As for international law, the issue is one of nonretrocession, not extension. The Loewen case embraces the principle that the standard terms of protection against expropriation found in international agreements that the United States endorses apply to litigation as much as to other governmental actions. To be sure, we do not have much experience applying this principle to actual cases, and thus do not have any sense of what it means in practice. At a minimum, however, my arguments about the scope of collective action problems, the purposes of investment protection treaties, and the incentives involved in litigation suggest that the Loewen principle is both defensible and desirable. By definition it applies only to outsiders, because only foreign investors can claim the benefit of international law's protection against expropriation.  

2. Federal Court Removal Jurisdiction as a Procedural Alternative

During both the nineteenth and twentieth century, the Supreme Court not only engaged in substantive review of state court decisions that it regarded as hostile to federal interests, but tweaked the rules governing federal court jurisdiction to make it easier for persons likely to suffer at the hands of state judges to obtain a federal hearing. When the Court believed that the state courts would discriminate against out-of-state investors, it adopted interpretations of diversity jurisdiction that made it easier for these investors to assert their claims in federal court. In the last century, convinced that state courts would not fully implement the revolution in constitutional procedure it had mandated, the Court radically

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162 There may be conceptual arguments in favor of recognizing a broader norm protecting citizens from their own governments with respect to investments. See Paul B. Stephan, Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation, 27 Stetson L. Rev. 1341 (1998) (describing the argument for broadening protection). These arguments, however, turn on premises other than those raised by collective action problems, in particular, substantive claims about human dignity, freedom, and flourishing. They thus have no bearing on the issues raised by this Article.

163 See supra note 67 and accompanying text.
broadened federal habeas jurisdiction to permit full relitigation of a wide range of state criminal cases. In both instances, the Court saw state courts as the problem and federal court jurisdiction as the solution.

A few relatively recent lower court opinions have employed a comparable strategy with respect to lawsuits brought against outsiders that involve international transactions. Typical is *Sequihua v. Texaco, Inc.*, a suit brought by Ecuadorians in a Texas state court under Texas law claiming that out-of-state U.S. corporations had caused significant environmental damage in Ecuador. Because the plaintiffs had joined at least one Texas defendant, the defendants could remove the case to federal court only if they could characterize the plaintiffs' claim as presenting a federal question. The district court ruled that the case implicated the federal common law of federal relations, even though the plaintiffs asserted no rights derived from federal law. Having upheld removal jurisdiction, the court proceeded to dismiss the case under the forum non conveniens doctrine, something that a state court would not have done. One has difficulty suppressing the suspicion that the court saw its principal obligation as rescuing a large out-of-state corporation from the depredations of the Texas state courts, even though the plaintiffs (although not their attorneys) also were outsiders.

The difficulty that cases such as *Sequihua* present is the indeterminacy of the standard used to federalize the question presented. As Professor Jack Goldsmith has argued persuasively, we no longer live in a world where foreign relations provides a meaningful basis for sorting among cases. In a global economy, it is hard to find a private dispute that does not implicate foreign relations in

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164 See supra note 76 and accompanying text.
166 The federal removal statute, 28 U.S.C. § 1441 (1994), permits defendants to remove a state case to federal court if either the claim presents a federal question or if diversity exists and no defendant is a citizen of the forum state. Id. § 1441(a)–(b).
168 Id. at 63–65.
some respect. At its core, the invocation of foreign relations as a means of federalizing a dispute is essentially lawless, and therefore profoundly unsatisfactory.

This critique does not mean that all instances of supplanting state court jurisdiction necessarily are illegitimate. It maintains only that the language of the removal statute, which refers to a "civil action ... founded on a claim or right arising under the Constitution, treaties or laws of the United States," cannot reasonably reach claims resting on state law that happen to have implications for the foreign relations of the United States. But, were Congress to enact specific legislation authorizing removal in certain cases, a different issue would arise.

Recall the prior discussion of the different theories explaining judicial incentives and anti-outsider tendencies. If the agency theory provides a comprehensive account of how judges behave, then we should not expect Congress to enact a statute that reduces the risk that cases like Loewen will arise in the future. Under this theory, Congress wants the state courts to help our country chisel on the commitments embodied in Chapter XI of NAFTA. If, on the other hand, Congress would prefer that state courts not engage in litigation that threatens investors from Canada and Mexico, but finds direct interference too costly, it might enact a specifically tailored removal statute as a form of prophylactic.

Imagine that Congress did enact a statute giving all persons claiming Canadian or Mexican citizenship, or businesses owned or controlled by Canadian or Mexican persons, the right to remove litigation brought against them in a state court to the corresponding federal court and to choose to bring suits against U.S. persons in federal courts. The obvious analog is the Foreign Sovereign Immunities Act, which entitles foreign sovereigns to have essentially all claims to which they are a party heard in federal court. Just as

171 Under Title 28 § 1330 (2000) federal courts have jurisdiction over all civil actions brought against a foreign sovereign. This provision does not bar a foreign sovereign from consenting to suit in state court. Under Title 28 § 1332(a)(4) (2000) a foreign sovereign has the right to bring a suit against U.S. citizens (but not against foreign persons) in federal court. Again, the sovereign has the right to elect to sue instead in a state court, and, if the claim is not founded on or does not arise under federal law, the
the Foreign Sovereign Immunities Act safeguards against local hostility to foreign governments by affording them the federal jurisdictional option, Congress might conclude that the commitments made under NAFTA to Canadian and Mexican investors require giving them the power to transfer their lawsuits to federal courts.

As an initial matter, it seems reasonably clear that Congress has the constitutional authority to enact such a statute. The Supreme Court in Verlinden B.V. v. Central Bank of Nigeria172 upheld the analogous provisions of the Foreign Sovereign Immunity Act against a claim that federal diversity jurisdiction did not extend to suits by an alien against another alien. The Court held that Congress could regard suits brought by and against foreign sovereigns as "arising under" federal law within the meaning of Article III of the Constitution, even if no claim in the litigation "arose" under federal law.173

Verlinden has both technical and jurisprudential aspects that inform discussion of my hypothetical NAFTA-jurisdiction statute. As a technical matter, the Court consistently and plausibly has distinguished the question of what constitutes a federal question under Article III from the issue of what part of that jurisdiction the enacted statutes exercise, even though the constitutional and statutory language largely overlaps.174 The distinction rests on an important insight about the respective decisionmaking capacity of courts and legislatures. Deliberate choices by Congress about the jurisdiction of federal courts typically do not present the prospect of open-ended discretion and merit respect absent a strong structural reason to oppose them.175 Efforts by courts to capitalize on the unbounded text of the jurisdictional statutes, by contrast,

defendants must abide by that choice, unless none of the defendants is a citizen of the forum state.

173 Id. at 491–97.
175 The strongest objection to the extension of federal court jurisdiction under discussion would rest on federalism grounds. My colleague, Professor Bradley, has argued persuasively that the existence of an international agreement should not insulate enactments from federalism constraints. Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390 (1998). Professor Tribe has argued, although to my mind not persuasively, that NAFTA encroaches excessively on areas of state prerogatives. Tribe, supra note 156, at 1249–78.
smack of results-oriented adjudication that undermines confidence in the litigation process. The kind of discretion Congress exercises when it frames a statute is ex ante, and Congress must live with the results. The kind of discretion courts may exercise when they aggressively interpret a statute, by contrast, too often implicates prejudgment of the case before the court.

To summarize, the external constraint to which the United States currently binds itself—Chapter XI of NAFTA, enforceable through binding arbitration—may prompt a form of internal constraint, namely an extension of federal court jurisdiction over private lawsuits to which persons protected by NAFTA are parties. This extension would not eliminate the risk of Chapter XI liability, but would address an important source of the risk. Whether Congress takes this step might shed some light on the relative validity of the agency and interest-group theories of judicial behavior described in the prior Section of this Article.

CONCLUSION

If one is prepared to view the international law norm against uncompensated expropriation of foreigners as generally beneficial, then a lot follows. The extension of this norm to judicial activity seems logical, even if not ineluctable. The norm resonates with an intuition that the welfare argument for rules seems especially strong where rules solve collective action problems with relatively low agency costs. The norm also identifies the cases where collective action problems are likely to exist, namely where investors, however wealthy or sophisticated, remain vulnerable to local decisionmaking processes to which they have only incomplete access. And there are good reasons to believe that litigation can be such a decisionmaking process.

The negative pregnant of this intuition also is significant. It suggests that redistribution, including redistributive litigation, that does not target outsiders presents a weak case for external intervention. Absent a strong moral commitment to protecting those interests that property and contract rights embody, we can comfortably leave these kinds of disruptions of settled expectations to the realm of politics.

But embracing the international law norm requires countries with independent and activist judiciaries to reconsider what re-
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Constraints their judges should face. For the United States, this means in particular contemplating the use of the Takings Clause as a check on judicial behavior, and at the same time using expropriation law as a template for determining the content of that constitutional regime. Each of these tasks is challenging, but does not pose a sharp break with the status quo.

That takings doctrine might supplement international commitments against expropriation seems sensible, if not inevitable. The argument for the extension rests on a core commitment of the U.S. constitutional system, namely the unification of the national market in the context of local decisionmaking. Once we recognize that many persons may be insiders as to the United States but outsiders of the communities in which they invest, the relevance of the international law norm and the need to extend it to this class of outsiders seems obvious. But once one embraces a rule that protects U.S. persons against U.S. localities, one has difficulty not extending the protection to foreigners. Regardless of whether the U.S. Constitution requires that the property of foreigners receive protection comparable to that bestowed on U.S.-owned property, strong nondiscrimination norms of international law long advocated by the United States demand this result. The outcome is a legal regime that marries constitutional and international commitments, each setting boundaries on and informing the other.

The idea that takings doctrine might look to expropriation law to clarify its content may strike some as bizarre. A century ago the Supreme Court may have borrowed norms from international practice to inform its interpretation of the Constitution, but today we can dismiss that practice as the product of empty formalism and an outmoded understanding of judicial lawmaking.\textsuperscript{176} Now that we understand international law as a body of rules and standards premised on state practice and consent, we can assert its irrelevance to a state system designed to promote ordered liberty and the flourishing of the individual.

\textsuperscript{176} Perhaps the most prominent example where the Supreme Court transposed patterns it perceived in international law onto the domestic Constitution is Pennoyer v. Neff, 95 U.S. 714 (1877). For the argument that this kind of decisionmaking rested on what we now see as outmoded conceptual architecture, see Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395 (1995).
But this argument confuses lawmaking process with a law's function. Granted, the means by which we fabricate international and constitutional law are so different as to constitute separate universes. They rest on completely different bases of authority and legitimacy, and to the extent such considerations matter, we should not confuse them. But function can overlap, and, I have argued throughout this Article, in the case of takings and expropriation law, they do. Both make sense, within the context of welfare norms, as a precommitment designed to overcome a collective action problem. Expropriation law does this obviously, while takings doctrine seems more confused. If the present confusion in takings law is undesirable—and I am not aware of anyone willing to defend the status quo—then we can do worse than look for clarity to a body of law that has a common history, addresses common problems, and has adapted to comparable evolutionary pressures.

Any response to the problem of redistributive litigation, whether doctrinal or statutory, also suggests broader themes embedded in judicial lawmaking. It is appropriate, and even necessary, to consider judges as lawmakers, and this consideration must extend to the forces and interests that influence what these lawmakers do. Such an inquiry may put popular perceptions of judicial legitimacy at risk, to the extent our collective faith in what judges do rests on magical thinking rather than cold analysis. But it also can give us a better sense of how judicial decisionmakers, operating under conditions of bounded rationality, can serve us even while they sometimes serve themselves.