

FEDERALISM AND REGULATORY TAKINGS

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In the area of regulatory takings, federal courts often confront issues of state law. This is because property is largely a regime of positive state law, while the Takings Clause is a federal constitutional guarantee. This Note deals with the standard of review to be applied by federal courts as to questions of state property law in the takings context. This Note explores two regulatory takings decisions by the Supreme Court—Lucas v. South Carolina Coastal Council and Stop the Beach Renourishment v. Florida Department of Environmental Protection—in which the Court conducted independent assessments of state property law. This Note argues that a more deferential standard of review, known as the fair support rule, is more appropriate for state-law issues arising in takings disputes. To arrive at this conclusion, this Note draws on principles of federalism and positivism expressed in Erie Railroad Co. v. Tompkins and by scholars in the legal process school.

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INTRODUCTION

“Property rights serve human values. They are recognized to that end, and are limited by it.”

—*State v. Shack*, 1971¹

The law of regulatory takings operates at the confluence of state and federal law. While the Takings Clause of the Fifth Amendment² protects private property, the Supreme Court has consistently held that the Constitution itself does not create property interests.³ Courts adjudicating takings claims are therefore put in the awkward position of administering a federal guarantee whose object—property—is largely a creature of positive state law. This tension gives rise to what Professors Thomas Merrill and Jerry Mashaw have called the “positivist trap,” which describes the precarious nature of constitutional guarantees that are tied to non-constitutional bodies of law.⁴ The positivist trap “arose because the Court’s method [of defining property rights] effectively ceded the domain of constitutional property to governmental actors over which the Court, in its capacity as constitutional interpreter, had no control.”⁵ The Court can define what amounts to a constitutional taking of property, but state law defines what constitutes property in the first instance.

This Note concerns the allocation of authority between state and federal courts in the realm of regulatory takings. It explores two cases in particular—*Lucas v. South Carolina Coastal Council*⁶ and *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*⁷—in which the Court, speaking through Justice Scalia, attempted to resolve the positivist trap by expanding its own role in defining state property law. To carve out this expanded role, the Court

¹ *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

² “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

³ See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”).

⁴ See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888–89 (1981); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922–23 (2000).

⁵ Merrill, *supra* note 4, at 923 (footnote omitted).

⁶ 505 U.S. 1003 (1992).

⁷ 560 U.S. 702 (2010).

diminished the amount of deference that federal courts owe to state institutions in matters of property law. As Part I details, prior to *Lucas* and *Stop the Beach* the Court accorded significant deference to articulations of state property law offered by state institutions. But *Lucas* and *Stop the Beach* call for independent assessments of state property law by federal courts adjudicating takings claims. This means that federal courts in the takings context now have the authority to redefine property interests that were created by state law—an authority that did not exist before *Lucas*. The significance of this change was amplified by the Court's recent decision in *Knick v. Township of Scott*,⁸ which overturned the state-litigation exhaustion requirement previously established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.⁹ By opening the federal court doors to many more takings claims, *Knick* will increase the frequency with which federal courts will be called upon to resolve issues of state property law.

I argue that the Court's approach in *Lucas* and *Stop the Beach* disrupts the division of labor between state and federal decisionmakers—and runs afoul of the principles of federalism and positivism enshrined in *Erie Railroad Co. v. Tompkins*¹⁰—by giving federal courts too much authority to shape the law in an area of traditional state concern. Federal courts in regulatory takings cases should not override state court applications or redefinitions of state property law unless the State has thereby attempted to evade federal law or pursue some improper purpose (that is, a purpose that is not in the public interest or is only pretextually so). This more deferential standard of review, known as the fair support rule,¹¹ would better comport with the approach the Court has historically taken when reviewing state law judgments that are antecedent to—and potentially determinative of—federal claims. The fair support rule would also better respect *Erie*'s vision of the U.S. federalist system in which federal courts deciding state-law questions are bound by state law, both statutory and decisional. Lastly, this deferential standard is especially

⁸ 139 S. Ct. 2162 (2019).

⁹ 473 U.S. 172 (1985). The state-litigation requirement of *Williamson County* held that an aggrieved property owner could not bring a takings claim in federal court until she exhausted all adequate remedies in state court. *Id.* at 195; see also *Knick*, 139 S. Ct. at 2167. Combined with the Court's holding in *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 326–27 (2005), that state-court takings decisions have preclusive effect in federal court, the state-litigation requirement had the effect of limiting the number of takings challenges in federal court.

¹⁰ 304 U.S. 64 (1938).

¹¹ For a more detailed definition and applications of the fair support rule, see *infra* notes 118–19 and accompanying text.

appropriate in the dynamic context of property law because it allows a federal forum to accommodate the innovations of state courts and legislatures, innovations driven by local knowledge and fact-finding that elude the common law. While others have suggested that antecedent state-law questions be reviewed deferentially according to the fair support rule,¹² this Note—drawing support from *Erie*, the legal process school, and the dynamic nature of property law—argues that the fair support rule is especially apt with regard to property law issues.

This Note proceeds as follows: Part I describes the state of the law prior to *Lucas* and *Stop the Beach*, focusing on the so-called nuisance exception to takings liability and the question of who decides what constitutes harm prevention. Part II demonstrates the novelty of *Lucas* and *Stop the Beach*, in which the Court broke from precedent by conducting independent assessments of state property law rather than according deference to the evolving judgments of state courts and legislatures. Part III argues that this development is at odds with *Erie*'s commitments to positivism and federalism. Such principles are properly brought to bear on an analysis of *Lucas* and *Stop the Beach* because these cases deal as much with where law-speaking authority should reside as they do with what the content of law should be. Part III proceeds to offer an alternative solution to the positivist trap in the form of the fair support rule, a more deferential standard of review that was created to help deal with the precise problem that regulatory takings cases pose for federal courts: how to review determinations of state law that are antecedent to constitutional guarantees. As compared to independent assessments of state property law, the fair support rule is a preferable standard of review because it is grounded in Supreme Court precedent and better respects the appropriate division of labor between states and federal courts in the domain of property law. Moreover, the fair support rule better accommodates the decentralized innovation that is needed to address disparate and fast-changing environmental challenges throughout the country.

I

THE LAW BEFORE *LUCAS*: CATEGORICAL TAKINGS DEFENSES

Vagueness has plagued the law of regulatory takings since its inception. The first case to recognize regulatory takings, *Pennsylvania*

¹² See generally E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 *YALE L.J.* 1192, 1197–98 (2011) (contending that a federal court's application of the fair support rule to general state-law questions provides a critical "check on the Court's scrutiny of state courts and state law").

Coal Co. v. Mahon,¹³ articulated the standard thus: Just compensation is owed under the Fifth Amendment if a government regulation of land “goes too far.”¹⁴ The Court sought to clarify matters fifty-six years later in the landmark *Penn Central* decision with a multi-factor balancing test,¹⁵ conceding that regulatory takings cases are “essentially ad hoc, factual inquiries.”¹⁶

Since the *Penn Central* decision in 1978, two categories of *per se* regulatory takings have emerged. If a landowner can show that a government regulation results in a permanent physical occupation of her land,¹⁷ or that a regulation deprives her property of all of its economic value,¹⁸ just compensation is automatically owed. The creation of this latter “total takings” category raised the stakes of what has long been referred to as the denominator problem¹⁹—the often thorny task of determining the precise property interest that a litigant had prior to the enactment of the challenged government regulation. Asking what a landowner owned to begin with is a crucial step toward determining whether a regulation “took” *all* of the landowner’s property.

Of course, a landowner cannot claim that the government has taken a property interest that she did not have in the first place (that is, prior to the challenged regulation’s enactment). If a government regulation merely enforces a preexisting limitation on the landowner’s title, the government has not taken anything, as the landowner’s denominator would be zero. The denominator question therefore generates a subsidiary inquiry that can itself decide a regulatory takings claim: Is the landowner’s purported property interest defeated by an inherent limitation on her title?

The quintessential inherent limitation on title is the law of nuisance: One has no right to use one’s land to commit a nuisance, so the government does not “take” one’s property if it merely prevents a

¹³ 260 U.S. 393 (1922).

¹⁴ *Id.* at 415.

¹⁵ There is not even consensus as to the number of factors in the test. See Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 612 (2014) (arguing for a four-factor approach, despite the fact that the *Penn Central* decision and those working within its framework usually refer to three factors).

¹⁶ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹⁷ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

¹⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).

¹⁹ See generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967) (“[T]o determine compensability one is expected to focus on the particular ‘thing’ injuriously affected and to inquire *what proportion* of its value is destroyed by the measure in question.”); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964) (“Because the diminution test turns on the degree of quantitative diminution of value, it is necessary that the property at issue be precisely defined, so that we can determine how great the impairment of value is. But this is no easy task.”).

nuisance. Long before *Lucas*, the Supreme Court recognized that government regulations of land did not require compensation if they merely prevented a landowner from engaging in a nuisance.²⁰ This sort of nuisance carveout to takings liability stretches at least as far back as 1887.²¹ While some expected that *Lucas* would have the effect of inundating federal courts with “total takings” claims, the case’s most enduring legacy has in fact been its redefinition of the nuisance exception to takings liability—an affirmative defense that is potentially available to the government in every regulatory takings case.²²

A. Harm Prevention and Statutory Nuisances

In *Mugler v. Kansas*, the Court rejected takings challenges to a Kansas constitutional amendment that declared the production of alcoholic beverages to be a nuisance.²³ The plaintiffs received no compensation even though their breweries were rendered almost valueless by the regulation.²⁴ Justice Harlan, writing for the Court, reasoned that since the State was acting to abate a nuisance, the amendment fell comfortably within the police power and thus was not an exercise of eminent domain. “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.”²⁵

It did not matter to the Court that the plaintiffs purchased or built their respective breweries prior to the amendment’s passage. Although the production of alcoholic beverages was legal when the plaintiffs invested in their breweries, “the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.”²⁶ To the contrary, the govern-

²⁰ See, e.g., *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (holding that the application of a Virginia nuisance statute to prevent the spread of cedar rust, a destructive tree disease, did not constitute a taking).

²¹ See *Mugler v. Kansas*, 123 U.S. 623 (1887) (denying a takings challenge to a Kansas constitutional amendment that identified alcohol manufacturing as a nuisance).

²² See generally Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 328–29 (2005) (characterizing the *Lucas* holding as equipping the State with an affirmative defense to takings challenges when the State has crafted the statute at bar to prevent some nuisance or other public ill).

²³ *Mugler*, 123 U.S. at 670.

²⁴ *Id.* at 664.

²⁵ *Id.* at 668–69; see also *id.* at 663 (“No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.”).

²⁶ *Id.* at 669.

ment's power to supervise public health and morals is "continuing in its nature" and must be exercised "as the special exigencies of the moment may require."²⁷ In other words, the State's police power—in 1887 largely confined to the prevention of nuisance-like harms to the public—amounted to an inherent limitation on the plaintiffs' property rights. That the Kansas legislature declared the production of alcoholic beverages to be a nuisance was the end of the takings inquiry, as the Court claimed no role in scrutinizing ordinary health and morals legislation.²⁸

In *Mahon*, the case that gave rise to regulatory takings doctrine, Justices Holmes and Brandeis—who were so often allied²⁹—sharply disagreed on the extent to which the police power justified what would otherwise be a taking. The case arose when a state law (the Kohler Act) was construed to prevent a coal company from mining beneath land in which it owned a property interest—namely, the support estate, or the pillar of coal necessary to support the surface. The owners of a residence on the land's surface argued that, although the Kohler Act prevented the coal company from mining land that it rightfully owned, no taking had occurred because the Act was a legitimate exercise of the State's police power; the Pennsylvania Supreme Court agreed.³⁰

The Court reversed, finding that the Kohler Act could not be justified as an exercise of the State's police power. Writing for the majority, Justice Holmes did not dispute that the police power amounted to an inherent limitation on a landowner's title,³¹ but he concluded that the Kohler Act's salutary effects were too localized—and thus too private—to obviate the need for just compensation. The

²⁷ *Id.* (quoting *Stone v. Mississippi*, 101 U.S. 814, 819 (1879)).

²⁸ *See id.* ("[F]or [the purpose of supervising public health and morals], the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." (quoting *Stone*, 101 U.S. at 819)). A notable qualification to this deferential approach came in *Lochner v. New York*, 198 U.S. 45 (1905), when the Court invalidated maximum hour legislation directed at New York bakers. The Court concluded that the law "involve[d] neither the safety, the morals nor the welfare of the public." *Id.* at 57. Rather, the Court viewed the law as a naked effort to regulate labor market competition and to constrain the "liberty of contract." *Id.* at 61.

²⁹ *See, e.g.*, John R. Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. PA. L. REV. 608, 630 (1949) (discussing Justice Brandeis's influence on Justice Holmes's First Amendment jurisprudence). *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) is also a testament to the pair's jurisprudential kinship. While Justice Holmes had retired from the Court by the time *Erie* was decided, Justice Brandeis's majority opinion draws heavily on Justice Holmes's positivist rejection of the regime of *Swift v. Tyson*, 41 U.S. 1 (1842). *See id.* at 79; *see also infra* note 172 and accompanying text.

³⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

³¹ *See id.* at 413 ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.").

threat of land collapsing due to subjacent mining did not amount to a public nuisance because “[t]he damage [was] not common or public;”³² it was limited to surface owners who had failed to bargain for the support estate. Justice Holmes expressed concern that the police power, if its scope was construed too broadly, would swallow the protection offered by the Takings Clause. Put differently, he perceived what came to be called the positivist trap: “When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”³³

Justice Brandeis was unpersuaded. To him, the threat of land collapse amounted to a public nuisance, and since the Kohler Act prevented a nuisance it was not a taking by definition.³⁴ It did not matter to Justice Brandeis whether the restriction eliminated all profitable use of the affected property.³⁵ Justice Brandeis likewise found it irrelevant that the Pennsylvania legislature could have achieved the same end by using its power of eminent domain, declaring that “it is for a State to say how its public policy shall be enforced.”³⁶

The two opinions differ most fundamentally in their willingness to second-guess the state legislature’s assessment of the public interest and how it is best pursued. Before determining whether the Kohler Act was justified by the police power, the majority engaged in its own analysis of the interests at play and the means available to the legislature in securing its goal. The dissent, on the other hand, treated the nuisance determination as a threshold inquiry. After concluding that subsidence was indeed a public nuisance, Justice Brandeis deferred to the judgments of Pennsylvania’s legislature and courts as to how the public interest should be pursued, citing those institutions’ “greater knowledge of local conditions.”³⁷

³² *Id.* Ironically, this logic is reminiscent of that employed by the majority in *Lochner*, the case in which Justice Holmes penned what may be his most acclaimed dissent. See *supra* note 28.

³³ *Mahon*, 260 U.S. at 415.

³⁴ See *id.* at 417 (Brandeis, J., dissenting) (“[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.”).

³⁵ See *id.* at 418 (“Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put.” (first citing *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); then citing *Powell v. Pennsylvania*, 127 U.S. 678, 682 (1888))).

³⁶ *Id.* at 421; see also *id.* at 418 (“Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense.”).

³⁷ *Id.* at 420.

In its next seminal regulatory takings decision, *Penn Central*, the Court acknowledged that, within its new balancing test framework,³⁸ harm-preventing regulations are less likely to be deemed takings: Justice Brennan noted that the determination of whether a regulation is harm-preventing is made by state courts in the first instance, and that those decisions are owed deference.³⁹ Indeed, the Court had previously upheld harm-preventing regulations in the face of takings challenges even if the regulations had prohibited “the most beneficial use” of the affected property.⁴⁰ Thus cases upholding regulations “reasonably related to the promotion of the general welfare[] uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking.’”⁴¹ But *Penn Central* did not resolve the question that divided the Court in *Mahon*: When does harm prevention become a total bar to takings liability?

For a brief moment, the Court’s answer seemed expansive and deferential to legislative judgment. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,⁴² a takings challenge was brought against another Pennsylvania anti-subsidence law that was remarkably similar to the Kohler Act, the law at issue in *Mahon*. The Court, speaking through Justice Stevens, paid homage to *Mahon* but effectively adopted Justice Brandeis’s deferential framework, advancing a broad understanding of the nuisance carveout to takings liability. But before it did so, the Court clarified that the nuisance exception is not coterminous with the scope of the State’s police power, recognizing an important departure from the era of *Mugler* and *Mahon*.⁴³ That departure was necessary in light of the huge expansion of local governments’ functions and powers over the course of the twentieth century.⁴⁴

³⁸ See *supra* notes 15–16 and accompanying text.

³⁹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (“[I]n instances in which a state tribunal reasonably concluded that the ‘health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.” (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928))).

⁴⁰ *Id.* (first citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592–93 (1962); then citing *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 674 n.8 (1976)).

⁴¹ *Id.* at 131 (citations omitted).

⁴² 480 U.S. 470 (1987).

⁴³ The broad reach of the police power is instead coterminous with the “public use” requirement of the Takings Clause. *Id.* at 491 n.20 (citations omitted). The public use requirement must be broader than the nuisance exception, otherwise every state regulation even tangentially related to public health would be immune from takings challenges.

⁴⁴ See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952) (“[T]he police power is not confined to a narrow category; it extends . . . to all the great public needs.”).

Justice Stevens reiterated that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”⁴⁵ Thus a “‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁴⁶ If a regulation has the effect of abating a public nuisance, the *Keystone* Court concluded that no compensation should be owed, even if the landowner’s property value was completely destroyed.⁴⁷ As two commentators noted, “[t]he sweeping language of *Keystone*, insulating harm-preventing regulations from takings liability, was the apex of the traditional nuisance exception, but the moment was short-lived.”⁴⁸ In the two cases explored in Part II, the Court significantly curtailed the nuisance exception and undertook a broader effort to expand federal courts’ supervisory authority over state property law.

II

LUCAS AND STOP THE BEACH

As seen in Part I, the nuisance exception has been a staple of the Court’s regulatory takings jurisprudence. But it is not without its drawbacks. Indeed, the most vexing pitfall of the nuisance exception—the positivist trap—was recognized by Justice Holmes in *Mahon*⁴⁹: If states were freely allowed to determine what constitutes a nuisance, then the nuisance exception would swallow the takings rule. By redefining property rights as it regulated, the State could ensure that it was never taking a property interest that was part of a landowner’s title, thereby avoiding takings liability. *Lucas* and *Stop the Beach*, in which the Court sought to give federal courts greater oversight authority over state property law, are responses to this problem. The Court moved in this direction by conducting independent assessments of state property law, abandoning the deferential posture that—as demonstrated in Part I—historically characterized the Court’s approach to state-court pronouncements of state property law. This Part explores *Lucas* and *Stop the Beach* in turn.

⁴⁵ *Keystone*, 480 U.S. at 491–92 (quoting *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)).

⁴⁶ *Id.* at 488 n.18 (citation omitted) (quoting *Penn Cent.*, 438 U.S. at 124).

⁴⁷ *Id.* at 492 n.22 (collecting cases rejecting takings challenges to regulations that “stop[pe]d illegal activity or abat[ed] a public nuisance”).

⁴⁸ Blumm & Ritchie, *supra* note 22, at 331.

⁴⁹ See *supra* note 33 and accompanying text.

A. Lucas v. South Carolina Coastal Council

In 1986, David Lucas purchased two residential lots on the Isle of Palms, South Carolina. Two years later, South Carolina's legislature enacted the Beachfront Management Act, which sought to protect critically eroding portions of the State's beach/dune system by curtailing coastal development.⁵⁰ Lucas brought a takings claim, arguing that his property was rendered valueless by the new law, and he prevailed in the trial court.⁵¹ The South Carolina Supreme Court reversed, analogizing the case to *Keystone* and finding that no taking had occurred because the state legislature had acted to prevent serious public harm.⁵² The United States Supreme Court reversed again,⁵³ and Justice Scalia's opinion redefined the process by which courts are to determine whether a challenged regulation abates a nuisance. Although *Lucas* came only five years after *Keystone*, Justice Scalia dismissed *Keystone's* broad formulation of the nuisance exception as the product of a bygone era:

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.⁵⁴

But in justifying his choice to retire harmful-use logic, Justice Scalia conflated prior formulations of the nuisance exception with the scope of the State's police power. In fact, "prevention of harmful use" was a very recent formulation of the nuisance exception, one that was expressly distinguished from the police power justification of the *Mugler* era.⁵⁵ *Keystone* had made clear that only a subset of regula-

⁵⁰ *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 895–97 (S.C. 1991).

⁵¹ *Id.* at 896.

⁵² *See id.* at 896–99.

⁵³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992).

⁵⁴ *Id.* at 1026.

⁵⁵ *See supra* note 43 and accompanying text. Justice Scalia also acknowledged that Justice Blackmun, dissenting in *Lucas*, stood by the "harm-preventing" formulation of the nuisance exception, even in total takings cases. *Lucas*, 505 U.S. at 1025 n.12. It is unlikely that this amounts to an accusation that Justice Blackmun overlooked the distinction made in *Keystone* between the scope of the police power and the harm-prevention formulation of the nuisance exception, especially given that Justice Blackmun was part of the majority in *Keystone*. More likely, by equating the harm-prevention rationale with the scope of the police power, Justice Scalia was seeking to call attention to what he perceived to be a distinction without a difference.

tions enacted pursuant to the State's police power can be characterized as harm-preventing. While any exercise of the State's police power satisfies the Takings Clause's public use requirement, only regulations that prevent public harm are wholly immune from takings liability regardless of their economic impact.

Lucas changed the method of determining whether a use limitation inheres in the landowner's title. Legislative determinations of nuisance, even if supported by factfinding and changed circumstances, are no longer accorded deference by courts adjudicating takings claims.⁵⁶ Instead, states must turn to "background principles of nuisance and property law" in order to sustain a land use regulation without paying compensation.⁵⁷ The common law, as a matter of constitutional law, now provides the relevant framework for determining whether a given land use constitutes a nuisance. Positive legislation is given no weight in this determination.⁵⁸ A regulation is therefore only immune from takings liability if the State can affirmatively show that the land use being regulated "was *always* unlawful."⁵⁹

Justice Scalia reasoned that such background principles were an appropriate measuring stick for the nuisance exception because their invocation would "do no more than duplicate the result that could have been achieved in the courts" under the law of private or public nuisance.⁶⁰ Justice Scalia cited several sections of the Restatement of Torts to illustrate the factors judges should consider in a common-law nuisance inquiry. Such factors include the degree of harm caused by the claimant's activities to public resources and/or nearby private property, "the social value of the claimant's activities and their suitability to the locality in question," and the level of difficulty associated with avoiding the alleged harm.⁶¹

⁵⁶ *Lucas*, 505 U.S. at 1029–31.

⁵⁷ *Id.* at 1030. Of course, a claimant who does not allege a *per se* taking will still have to make out her case under the *Penn Central* balancing test.

⁵⁸ A court reviewing a takings claim may ultimately endorse a legislative nuisance determination but would have to justify such an endorsement in terms of judge-made common law. In remanding *Lucas* to the South Carolina Supreme Court, Justice Scalia analogized the State's burden to that of a plaintiff bringing a nuisance claim. The State could not bolster its case by invoking recent statutory definitions. *See id.* at 1031 ("[A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.").

⁵⁹ *Id.* at 1030.

⁶⁰ *Id.* at 1029.

⁶¹ *Id.* at 1030–31 (citing RESTATEMENT (SECOND) OF TORTS §§ 826, 827, 828(a)–(c), 830, 831 (AM. LAW INST. 1979)).

But this recitation of familiar factors ought not to conceal the novelty of *Lucas*. In the context of nuisance determinations, *Lucas* dramatically expanded the power of courts at the expense of legislatures. The choice to abandon the harm-prevention rationale was explained by its perceived susceptibility to the positivist trap: "Since such a [harm-preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."⁶² Justice Scalia feared that the legislature, simply by reciting a regulation's harm-preventing purpose, could define away the property it sought to regulate.⁶³ Put differently, states would capitalize on the positivist trap in order to avoid takings liability, resulting in the existence of "too little property relative to social expectations," in Professor Merrill's formulation.⁶⁴ Faced with the specter of the positivist trap in the form of too little property, *Lucas* expanded the Court's reach as constitutional interpreter and, concomitantly, contracted the power of state legislatures to define property interests through positive law.

Justice Scalia believed that it was unprincipled to tie the Takings Clause's guarantee to legislative determinations of harm prevention because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."⁶⁵ But a nuisance determination is merely a determination of whether a landowner is causing some requisite amount of harm.⁶⁶ *Lucas* did not change a subjective inquiry into an objective one; it simply changed which institution is authorized to apply and articulate nuisance concepts, which are inherently "vague and indeterminate."⁶⁷ Justice Scalia evidently believed that if judges alone performed nuisance determinations, and if they did so only with reference to preexisting common-law standards, then the inquiry would become an objective

⁶² *Id.* at 1025 n.12.

⁶³ This argument amounts to attacking a straw man. Properly administered, the harm prevention formulation of the nuisance exception "instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) (interpreting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922)). Assuming that legislative staffers are bound to invoke fraudulent claims of harm prevention, the pre-*Lucas* nuisance exception tested only whether judges were "stupid" enough to fall for them.

⁶⁴ Merrill, *supra* note 4, at 950.

⁶⁵ *Lucas*, 505 U.S. at 1024.

⁶⁶ *Id.* at 1054 (Blackmun, J., dissenting) ("In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful."); see also William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966) ("*Nuisance* is a French word which means nothing more than harm.").

⁶⁷ *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

one, free of partisan jostling and opportunistic overreaching. But as Justice Blackmun pointed out in dissent, “[t]here is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today.”⁶⁸

The choice to displace positive state law in favor of common-law standards cannot be regarded as a neutral or objective one. Twelve years before *Lucas*, in *Pruneyard Shopping Center v. Robins*,⁶⁹ the Court rejected a similar approach in the context of state trespass law. Faced with the “suggestion that the common law of trespass is not subject to revision by the State,” Justice Marshall wrote in concurrence that such an approach would be unwise because it “would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance.”⁷⁰ Justice Marshall believed that such an approach to constitutional law would hark back to the infamous *Lochner* era, when the Court used the Constitution to insulate common-law rights from legislative revision.⁷¹

Lucas’s approach to nuisance law is similarly unwise. The development of the common law has long embodied a partnership between legislatures and courts. As the Court recognized nearly 150 years ago, “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”⁷² And as Professor John Humbach notes, legislative primacy in the land use context is not accidental: “Legislatures are set up to address complex issues comprehensively, to deal with diverse interrelated issues programmatically, and to codify rather than merely to decide controversies case by case.”⁷³ These institutional strengths make the legislature well positioned to develop nuisance law. Indeed, one impediment to the common law’s development in the area of nuisance has been the judiciary’s recognition of its own institutional

⁶⁸ *Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting).

⁶⁹ 447 U.S. 74 (1980).

⁷⁰ *Id.* at 93 (Marshall, J., concurring).

⁷¹ *See id.*; Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (“The received wisdom is that *Lochner* was wrong because it involved ‘judicial activism’: an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”).

⁷² *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (“A person has no property, no vested interest, in any rule of the common law.”).

⁷³ John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 25 (1993); *see also* *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 262–63 (1918) (Brandeis, J., dissenting) (discussing why legislatures are better equipped than courts are to create new rights of action “in [an] effort to meet the many new demands for justice incident to a rapidly changing civilization”).

shortcomings.⁷⁴ Courts lack the enforcement mechanisms, investigative power, and democratic accountability that legislatures possess, and they can only address the claims of parties to the litigation regardless of the far-reaching implications of any particular case.⁷⁵ Thus the common law of nuisance is not responsive to the fact-finding and changing societal values that inform legislation and decentralized innovation.⁷⁶ After *Lucas*, neither is the nuisance carveout to takings liability.

Lucas itself exemplifies the significance of this change. On remand from the United States Supreme Court, the South Carolina Supreme Court could no longer rely on its prior conclusion that the challenged legislation “sought to prevent serious public harm and thus was a permissible restriction of the use of Lucas’s property.”⁷⁷ The court had to narrow its analysis in scope and bring it down to a lower level of abstraction. Instead of looking to the broader effects of coastal development and the purpose of the Beachfront Management Act writ large, the court had to determine whether common-law principles prohibited Lucas from building habitable structures on his lots. As Justice Scalia had predicted, the answer to this inquiry was all but preordained: “It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.”⁷⁸ Sure enough, the South Carolina Supreme Court held that there was no common-law basis for preventing Lucas from building on his land.⁷⁹ The case was remanded further for a determination of “just compensation.”⁸⁰

The South Carolina Supreme Court’s about-face illustrates what is lost by tying the nuisance carveout to the common law: the ability to look at land uses and their impact in the aggregate, over the long run,

⁷⁴ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) (“[T]he judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution.”).

⁷⁵ See Humbach, *supra* note 73, at 25 (“Courts . . . are purposely insulated from such a diversity of views. No matter how widespread the potential impact of a pending case, only the parties to the litigation have the right to address the judge, or provide perspective on the issues.”).

⁷⁶ Cf. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 165–66 (2000) (noting that Justice Brandeis, in the mold of Progressivism, “identified the judiciary with social ignorance and doctrinal rigidity and the legislature with factual investigation, expert planning, and scientific reform”).

⁷⁷ *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 485 (S.C. 1992).

⁷⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992); see also *infra* note 201 and accompanying text.

⁷⁹ *Lucas*, 424 S.E.2d at 486.

⁸⁰ *Id.*

and in light of recent experience.⁸¹ This ability lies with the legislature. Thus, when the state court first heard Lucas's case, it deferred to the legislature's findings and cited them at length.⁸² At that point, the court was not confined to a search for precedent that found a private nuisance on similar facts; it was able to reference legislative fact-finding and take notice of the diffuse environmental interests at play. But after the Supreme Court's decision, the court's hands were tied by a body of common law best suited to two-party litigation between neighbors—a body of law whose development was stunted by its inability to tackle large-scale environmental problems. Indeed, the inadequacy of the common law of nuisance is what motivated legislative intervention in the first place.⁸³

Lucas represents a significant reallocation of decisionmaking authority in the takings context, giving courts greater authority to define state property law in the first instance. By tethering the nuisance carveout to the preexisting body of state common law, *Lucas* ensured that judges, rather than legislatures, would decide which land uses amount to nuisances in this context. This approach dramatically curtailed the ability of state legislatures to define nuisance law. Eighteen years later, a plurality of the Court again aimed to increase federal judicial oversight over state property law, when Justice Scalia sought to rein in another institution that he feared would manipulate property interests for partisan ends—the very institution that is normally entrusted with articulating and applying the common law of nuisance: state courts.

B. Stop the Beach Renourishment v. Florida Department of Environmental Protection

*Stop the Beach*⁸⁴ posed the slightly convoluted question of whether the Florida Supreme Court committed a Fifth Amendment taking when it ruled that the state's Beach and Shore Preservation Act (the Act)⁸⁵ did not effect a taking under Florida law. But the broader significance of the decision lies in the proposition that a court can

⁸¹ See *supra* notes 72–75 and accompanying text (describing the perspective, dynamism, and ability to fashion generally applicable solutions that legislatures have but that the judiciary lacks).

⁸² *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896–98 (S.C. 1991); see also *id.* at 900 (“This Court is in no position to, *sua sponte*, take issue with these legislative findings.”).

⁸³ See *infra* note 205 and accompanying text.

⁸⁴ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010).

⁸⁵ FLA. STAT. ANN. §§ 161.011–45 (West 2012) (regulating the development and preservation of coastal land in Florida).

potentially effect a taking through the application of preexisting state laws, doctrines, or constitutional provisions.

The Act had authorized state administrative agencies and local governments, working in concert, to restore and maintain critically eroded beaches through deposits of sand.⁸⁶ To take advantage of the Act's provisions, a locality had to apply to the state Department of Environmental Protection for the funds and permits necessary for beach restoration. The restoration process would trigger a redefinition of the line between public and private lands that was at the root of the beachfront owners' takings challenge. Under preexisting Florida law, the state owns all land submerged beneath navigable waters and up to the mean high tide line, or what is known as the foreshore, as part of the public trust.⁸⁷ That line could change over time, especially with erosion. Once a restoration project was undertaken, however, the government would set a fixed "erosion control line" at the then-existing mean high tide line; that line would replace the fluctuating mean high-water line and become the new permanent boundary between private and state-owned property.⁸⁸ This relocation of the boundary line could effectively terminate littoral, or beachfront, property's contact with the water and the accompanying property interests in accretions—additions to waterfront land in the form of sand or other deposits that accumulate slowly and imperceptibly. Because the permanent erosion control line marked the new boundary of beachfront property, affected littoral property could no longer be increased by seaward movements of the mean high-water line. Once the fixed erosion control line was set, any seaward additions to the beachfront belonged to the government.⁸⁹

In 2003, seeking to restore several miles of beach that had been eroded by storms, the city of Destin and Walton County applied for the necessary permits.⁹⁰ The permits and the erosion control line were approved.⁹¹ Stop the Beach Renourishment, a nonprofit corporation made up of affected beachfront property owners, challenged the Act as effecting a taking of their property—specifically a taking of their littoral rights to contact with the water and to accretions—under

⁸⁶ See *Stop the Beach*, 560 U.S. at 709 (plurality opinion).

⁸⁷ *Id.* at 707 (citing FLA. CONST. art. X, § 11).

⁸⁸ *Id.* at 710.

⁸⁹ *Id.* ("Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line . . .").

⁹⁰ *Id.* at 711.

⁹¹ *Id.*

Florida constitutional law.⁹² The Florida Supreme Court concluded that there was no taking because the right to accretions under Florida law is a future contingent interest, not a vested property right, and because littoral owners have no independent property right to contact with the water.⁹³ The plaintiffs then invoked federal law for the first time, and sought rehearing on the grounds that the Florida Supreme Court's decision itself constituted a taking under the Federal Constitution. The request for rehearing was denied, and the Supreme Court granted certiorari.⁹⁴

The Florida Supreme Court's decision could not effect a taking unless antecedent state property law gave the plaintiffs the rights they claimed were eliminated by the Act and its application to their property. Thus the Court had to decide whether to accept the state court's interpretation of antecedent state property law or undertake an independent analysis of state law. After ascertaining the plaintiffs' baseline property rights, the Court then had to decide whether a state court's deviation from that baseline could itself violate the Fifth Amendment. This latter question implicated the nascent—and controversial⁹⁵—doctrine of judicial takings.

1. Judicial Takings

Before *Stop the Beach*, the concept of judicial takings was largely an academic exercise. While the idea was mentioned by Justice Stewart in *Hughes v. Washington*,⁹⁶ the first comprehensive treatment of the subject came in a 1990 law review article by Professor Barton Thompson.⁹⁷ Professor Thompson advanced a straightforward standard for judicial takings: “[A] judicial taking is any judicial *change* in property rights that would be a taking if undertaken by the legislative

⁹² *Id.* at 711. The relevant clause of the Florida Constitution is similar to the Takings Clause of the Fifth Amendment, yielding a similar takings analysis. *See id.* at 712 n.3 (first citing FLA. CONST. art. X, § 6, cl. (a); then citing U.S. CONST. amend. V).

⁹³ *Id.* at 712.

⁹⁴ *Id.*

⁹⁵ *See generally, e.g.,* Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203 (2011) (arguing against the notion of judicial takings).

⁹⁶ 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

⁹⁷ Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1449–50 (1990) (“The issue in this Article is whether the taking protections also limit the degree to which courts can change property law and, if they do, whether the federal courts should actively review the decisions of state courts to ensure that state court decisions remain within constitutional bounds.”). *See generally* Webb, *supra* note 12, at 1226–27, 1226 n.154 (explaining that Thompson's publication first analyzed the largely unexamined topic of judicial takings).

or executive branch of government.”⁹⁸ The plaintiffs in *Stop the Beach* advocated for an unpredictability test, which would find a judicial taking whenever a state court decision amounts to a sudden and unpredictable change in state property law.⁹⁹ But under either standard two questions remain: What counts as a judicial change in property rights, and who decides that question?

All eight members of the *Stop the Beach* Court¹⁰⁰ agreed that the Florida Supreme Court’s decision did not amount to a taking.¹⁰¹ Justice Scalia sought to explicate a standard for judicial takings and to lay down a marker for future litigants, but on this mission he could only command a plurality of the Court. In creating this standard, the *Stop the Beach* plurality, per Justice Scalia, rejected the unpredictability test as “cover[ing] both too much and too little.”¹⁰² Justice Scalia concluded that the test covered too much because a judicial property decision does not need to be predictable in order to be constitutional, “so long as it does not declare that what had been private property under established law no longer is.”¹⁰³ The test covered too little because the judicial elimination of established property rights is a taking even if it is foreshadowed by precedent.¹⁰⁴ The plurality’s preferred test is one of entrenchment: A decision that merely clarifies property rights that were previously unclear is not a taking; a decision that eliminates established property rights is a taking.¹⁰⁵ As for how to determine whether a given property right is established, the plurality provided limited guidance: “A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.”¹⁰⁶

The plurality’s standard thus hews rather closely to Professor Thompson’s formulation: A judicial takings analysis should mirror a

⁹⁸ Thompson, *supra* note 97, at 1455.

⁹⁹ See *Stop the Beach*, 560 U.S. at 728 (plurality opinion) (quoting *Hughes*, 389 U.S. at 296 (Stewart, J., concurring)).

¹⁰⁰ Justice Stevens recused himself from the case because he owned beachfront property in Florida. See Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, A.B.A. (Apr. 5, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/september/uncertainties_remain_judicial_takings_theory.

¹⁰¹ *Stop the Beach*, 560 U.S. at 733.

¹⁰² *Id.* at 728 (plurality opinion).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* (“What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established.”).

¹⁰⁶ *Id.* at 726 n.9.

traditional takings analysis; the only difference is the identity of the state actor.¹⁰⁷

2. *Whose Interpretation of Antecedent State Property Law Controls?*

In order to determine whether an established right has been eliminated, a federal court must start with an understanding of what property rights were firmly established under state law prior to the challenged state court decision. To ascertain this baseline, the plurality in *Stop the Beach* conducted its own assessment of state law. Such an exercise “accords no deference” to state court interpretations of what property rights existed before the challenged decision.¹⁰⁸ Justice Scalia attempted to paint this independent assessment of state law as unremarkable: “[F]ederal courts must often decide what state property rights exist in nontakings contexts.”¹⁰⁹ In an effort to provide an example of this phenomenon, Justice Scalia invoked a case most commonly cited for its positivist conception of property rights: *Board of Regents v. Roth*.¹¹⁰

In *Roth*, the Court had to determine whether Roth, an assistant professor at a public university, had a property interest in continued employment for purposes of the Due Process Clause. Because “[p]roperty interests . . . are not created by the Constitution,” the Court looked to positive state law to ascertain whether Roth had a “legitimate claim of entitlement” to continued employment as opposed to a mere “unilateral expectation of it.”¹¹¹ The Court found that Roth’s terms of appointment made no provision for contract renewal and also that no state statute or university policy created any legitimate interest in re-employment.¹¹² Therefore Roth had no property interest in continued employment within the meaning of the Due Process Clause.

Such an exercise—taking notice of the relevant positive law and applying it to the facts at hand—can be characterized fairly as inter-

¹⁰⁷ See *supra* notes 97–98 and accompanying text.

¹⁰⁸ Webb, *supra* note 12, at 1231.

¹⁰⁹ *Stop the Beach*, 560 U.S. at 726 (plurality opinion) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577–78 (1972)).

¹¹⁰ In *Lucas*, Justice Scalia cited to the same passage of *Roth* for the proposition that property rights are created by state law. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (citing *Roth*, 408 U.S. at 577).

¹¹¹ *Roth*, 408 U.S. at 577; see also *id.* at 578 (“Just as the welfare recipients’ ‘property’ interest in welfare payments [in *Goldberg v. Kelly*, 397 U.S. 254 (1970)] was created and defined by statutory terms, so the respondent’s ‘property’ interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment.”).

¹¹² *Id.*

preting state law. By contrast, as noted by Brantley Webb, the *Stop the Beach* plurality “relie[d] on legal concepts that the state court did not mention” when it affirmed the judgment of the Florida Supreme Court, placing emphasis on a 1927 state case that the Florida Supreme Court did not cite once.¹¹³ This process is better characterized as *deciding* state law: The plurality articulated a new rule of Florida property law—namely that state-created avulsions (sudden, perceptible losses or additions to land caused by water) should be treated like natural ones—that the Florida Supreme Court neither relied upon nor considered.

Telling is the plurality’s characterization of the rule that Florida’s highest court *did* rely upon. Since the Takings Clause of the Federal Constitution applies fully to littoral rights, the plurality concluded that it “need not resolve whether the right of accretion is an easement, as petitioner claims, or, as Florida claims, a future contingent interest.”¹¹⁴ But the Florida Supreme Court had explicitly held that the right to accretions is a future contingent interest under state law.¹¹⁵ It is odd to characterize this legal principle as a “claim” given that state high courts have ultimate authority over state law.¹¹⁶ How the Florida Supreme Court classifies accretion rights under Florida law is an authoritative pronouncement of state law, not a claim.

But if the plurality adopted wholesale the Florida Supreme Court’s articulation of state property law, it would run headlong into the positivist trap—the same problem the Court faced in *Lucas*. A state court could hardly be found to have committed a taking if it could simply define property interests out of Fifth Amendment protection: “A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.”¹¹⁷

The *Stop the Beach* plurality, like the Court in *Lucas*, sought to resolve the positivist trap by conducting an independent assessment of

¹¹³ Webb, *supra* note 12, at 1236; see also *Stop the Beach*, 560 U.S. at 731–32 (plurality opinion) (citing *Martin v. Busch*, 112 So. 274, 1120–21 (Fla. 1927)) (noting that the Florida Supreme Court did not cite *Martin* in the opinion below).

¹¹⁴ *Stop the Beach*, 560 U.S. at 713 n.5 (plurality opinion).

¹¹⁵ See *supra* note 93 and accompanying text.

¹¹⁶ See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (“This Court . . . repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here.” (citations omitted)). The “extreme circumstances” the Court had in mind were instances in which the “state-court interpretation of state law . . . appears to be an obvious subterfuge to evade consideration of a federal issue.” *Id.* at 691 n.11. State-court interpretations of state law that are merely “novel” do not amount to such obvious subterfuge. *Id.*

¹¹⁷ *Stop the Beach*, 560 U.S. at 727 (plurality opinion).

state property law. But there was an available middle ground for Justice Scalia, for which he had to look no further than his own Court's precedents.

III

THE FAIR SUPPORT RULE, *ERIE*, AND LEGAL PROCESS

Where “the existence or the application” of constitutional guarantees “turns on a logically antecedent finding on a matter of state law,”¹¹⁸ the Court has traditionally relied upon the fair support rule.¹¹⁹ The rule holds that, when the adequacy of a state-law judgment antecedent to a federal claim is in question, the Court looks to whether the state court had “fair support” for its ruling or whether it instead acted with the purpose of evading federal law.¹²⁰

This Part argues that the fair support rule, not independent assessments, is the appropriate standard of review for state-law questions in takings cases. This conclusion is supported by a vision of the common law and the judicial function very different from Justice Scalia's—a vision, I argue, that is more faithful to the enduring insights of the legal process school and the U.S. system of federalism as expressed in *Erie*.¹²¹

States are sovereigns in the U.S. system of government. This structural truth suggests that federal courts should respect, at least in the first instance, pronouncements of state law that are properly committed to state institutions. Only a “deep distrust of discretionary gov-

¹¹⁸ Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977).

¹¹⁹ See, e.g., *Lee v. Kemna*, 534 U.S. 362, 375–76 (2002) (stating that procedural grounds for denying criminal defendant's continuance motion, raised for the first time by the state appellate court, were inadequate to bar federal habeas review); *Howlett v. Rose*, 496 U.S. 356, 365–66 (1990) (finding that the state appellate court's expansion of sovereign immunity in a § 1983 action violated the Constitution's Supremacy Clause and presented the risk of the state court “evading federal law and discriminating against federal causes of action”); *Mullaney*, 421 U.S. at 691 & n.11 (acknowledging that, “[o]n rare occasions[,] the Court has re-examined a state-court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal issue,” but finding that the Maine Supreme Judicial Court's construction of state homicide law, “even assuming it to be novel, does not frustrate consideration of the due process issue”); *Johnson v. Risk*, 137 U.S. 300, 306 (1890) (finding that a state statute of limitations defense “called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decisions of the highest court of the State”); see also *Webb*, *supra* note 12, at 1205 & n.44 (collecting applications of the fair support rule).

¹²⁰ See *Webb*, *supra* note 12, at 1205.

¹²¹ See *infra* Section III.B.

ernment power”¹²² can justify federal courts in proceeding directly to an independent assessment of state law. But absent a showing of extreme circumstances, such distrust of the constitutionally-prescribed decisionmaker is inappropriate. The fair support rule strikes the ideal balance in the takings context: providing a way out of the positivist trap while preserving the integrity of the dual federalist system and allowing state institutions to innovate in response to local challenges.

But instead of applying this longstanding rule of deference, the *Stop the Beach* plurality engaged in an independent assessment of Florida property law; it second-guessed the Florida Supreme Court without any inquiry into whether that court had purposefully evaded federal law.¹²³ Indeed, the plurality did not even call into question the Florida Supreme Court’s ruling; it merely relegated that ruling to a “claim” before conducting its own interpretation of state property law. Interestingly, this approach to resolving the positivist trap was employed ten years earlier in another Supreme Court decision overturning a judgment of the Florida Supreme Court, a decision outside the domain of property law.

A. Bush v. Gore

Many readers will recall that the Court was called upon to settle a recount dispute in Florida during the 2000 presidential election.¹²⁴ The Court’s per curiam opinion focused on equal protection deficiencies in the recount process ordered by the Florida Supreme Court.¹²⁵ But the Court also faced the structural question of whether the Florida Supreme Court had established new standards for resolving

¹²² J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 751 (2017).

¹²³ See *supra* Section II.B.1.

¹²⁴ *Bush v. Gore*, 531 U.S. 98 (2000). Initially, the Florida Division of Elections reported that then-Governor Bush had defeated then-Vice President Gore by 1784 votes. Because President Bush’s margin of victory was less than one-half of one percent of the 5,816,486 votes cast, an automatic machine recount was conducted per FLA. STAT. § 102.141(4). *Id.* at 100–01. After that recount showed President Bush winning by an even smaller margin, Vice President Gore sought a manual recount in four counties. Following manual recounts and one trip to the Supreme Court, Vice President Gore brought suit in Florida state court, arguing that a sufficient number of legal votes were rejected as to cast doubt on the election’s results. *Id.* at 101 (citing FLA. STAT. § 102.168(3)(c)). The Florida Supreme Court ultimately held that Vice President Gore had met this burden of proof with respect to Miami-Dade County, and ordered a hand recount of the 9000 votes that remained uncounted. *Id.* at 102. The court, citing the broad discretion vested in the circuit judge under state law to “provide any relief appropriate under such circumstances,” also held that the Circuit Court could order manual recounts in all counties that had not already manually recounted the undervotes (ballots on which the machines did not detect a vote for President). *Id.* (quoting FLA. STAT. § 102.168(8)).

¹²⁵ See generally *id.* at 103–10.

Presidential election contests in contravention of Article II of the U.S. Constitution and 3 U.S.C. § 5.¹²⁶

Chief Justice Rehnquist's concurring opinion confronted this latter question head on. The opinion began with a nod to state sovereignty:

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co. v. Tompkins*.[.]¹²⁷

But this was no ordinary case. Rather, it was one of "a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."¹²⁸ That duty, set out in Article II, Section 1 of the Constitution, requires States to "appoint, in such Manner as the Legislature thereof may direct,"¹²⁹ electors for President and Vice President. In light of this constitutional requirement, Chief Justice Rehnquist concluded that it would be inappropriate to accord deference to the Florida Supreme Court's interpretation of state election law: "[T]he text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."¹³⁰ Deferring to state-court interpretations of the election law might allow state courts to rewrite the manner in which electors are appointed. Lo and behold, the positivist trap.

Ultimately, Chief Justice Rehnquist found that the Florida Supreme Court had misinterpreted Florida's election statutes, transgressing intra-state separation-of-powers principles in the process.¹³¹ In justifying his independent inquiry into Florida law (and into the structure of Florida's government), Chief Justice Rehnquist invoked three cases in which the Court had found the sort of "obvious subterfuge" that deprives state-court decisions of deferential treatment under the fair support rule.¹³² But as Justice Ginsburg noted in dissent, the evasion of federal law in the three cited cases was so egregious that "one would be hard pressed . . . to find additional cases that fit the mold."¹³³

¹²⁶ *Id.* at 103.

¹²⁷ *Id.* at 112 (Rehnquist, C.J., concurring, joined by Scalia & Thomas, JJ.).

¹²⁸ *Id.*

¹²⁹ U.S. CONST. art. II, § 1, cl. 2.

¹³⁰ *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

¹³¹ *See id.* at 115–20.

¹³² *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1976); *see also supra* notes 118–19.

¹³³ *Bush v. Gore*, 531 U.S. at 140 (Ginsburg, J., dissenting).

The historical contexts in which those prior cases arose are revealing, for all of them raised the specter of overt state-court defiance of federal constitutional supremacy—something that was not found or even hinted at in *Bush v. Gore*. The oldest of the three cases—*Fairfax's Devisee v. Hunter's Lessee*¹³⁴—arose when the Virginia Court of Appeals manipulated state forfeiture laws in order to deprive a British subject of lands granted to him by federal treaty. The case “occurred amidst vociferous States’ rights attacks on the Marshall Court.”¹³⁵ The other two cases—*NAACP v. Alabama ex rel. Patterson*¹³⁶ and *Bouie v. City of Columbia*¹³⁷—stemmed from Southern recalcitrance in the face of the civil rights movement. *Patterson* was decided only three months after *Cooper v. Aaron*,¹³⁸ in which the Court finally put its foot down against delay in the implementation of desegregation decrees. *Patterson* centered on the Alabama Supreme Court’s irregular application of state procedural rules as part of an effort to force the NAACP to disclose its membership lists.¹³⁹ *Bouie* overturned the South Carolina Supreme Court’s ruling that participants in a lunch counter sit in were guilty of trespassing based on their having remained on the property after being asked to leave, even though the trespass statute only literally prohibited “entering” after being warned against doing so.¹⁴⁰ The Court deemed that expansion of state trespass law so unforeseeable as to violate due process.¹⁴¹

For further support of his independent inquiry into Florida election law, Chief Justice Rehnquist cited to *Lucas*, noting that the Takings Clause “would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.”¹⁴² But it is misleading to conflate *Lucas*’s methodology with that employed in *Fairfax’s Devisee*, *Patterson*, and *Bouie*. The latter three cases arose in sociopolitical contexts where the state was known to be acting to subvert federal rights, contexts that justified the Court taking

¹³⁴ 11 U.S. 603 (1813).

¹³⁵ *Bush v. Gore*, 531 U.S. at 140 (Ginsburg, J., dissenting).

¹³⁶ 357 U.S. 449 (1958).

¹³⁷ 378 U.S. 347 (1964).

¹³⁸ 358 U.S. 1 (1958).

¹³⁹ *Patterson*, 357 U.S. at 455–56.

¹⁴⁰ *Bouie*, 378 U.S. at 355.

¹⁴¹ See *id.* at 353 (unanimous opinion) (“[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids.”).

¹⁴² *Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

a skeptical view of state-court pronouncements of state law.¹⁴³ This does not mean, however, that the Chief Justice's conflation of *Lucas's* methodology with that of *Fairfax's Devisee*, *Patterson*, and *Bouie* was an oversight. Rather, painting the latter three cases as part of a larger pattern was a means to a clear doctrinal end: expanding the universe of state-law decisions that are amenable to searching federal judicial scrutiny.

The Court's treatment of the positivist trap in *Bush v. Gore* contains two important lessons: First and foremost, the positivist trap is not limited to the realms of property law and regulatory takings; it can rear its head whenever resolution of a state-law issue has the potential to dispose of a federal right. Secondly, at least in Chief Justice Rehnquist's eyes, *Lucas's* approach has legs. *Lucas* helped the Chief Justice get out from under *Erie* and *Mullaney v. Wilbur*, which together hold that state-court pronouncements of state law are authoritative.¹⁴⁴ Escaping the dictates of these seminal cases was necessary in order for the Chief Justice to embark on an independent inquiry into state law. *Lucas* not only served as a recent example of the Court independently evaluating state law; it also served to normalize a practice that had previously been confined to extreme circumstances. Citing *Lucas* in the same footnote as *Fairfax's Devisee*, and immediately following a discussion of *Patterson* and *Bouie*,¹⁴⁵ was likely meant to blunt Justice Ginsburg's criticism that the Court only independently assessed state law in rare and extreme cases.

This Part argues that the approach taken in *Lucas*, *Stop the Beach*, and *Bush v. Gore*—namely, broadening the use of independent assessments of state law—is contrary to the principles of federalism and positivism expressed in *Erie*, and, at least in the takings context, is wrong as a matter of policy. First, however, I attempt to articulate the arguments in favor of this approach in order to understand the ways in which it responds to the positivist trap and embodies a distinct view of the common law. These arguments counsel against what this Note suggests—adopting the fair support rule when a takings case requires a federal court to decide a matter of state law.

¹⁴³ See *id.* at 139–41 (Ginsburg, J., dissenting) (noting the unique historical contexts of *Fairfax's Devisee*, *Patterson*, and *Bouie*, and arguing that the Florida Supreme Court in the case at bar “surely should not be bracketed with state high courts of the Jim Crow South”).

¹⁴⁴ See *id.* at 112, 114 (Rehnquist, C.J., concurring); *supra* notes 116, 142 and accompanying text.

¹⁴⁵ *Bush v. Gore*, 531 U.S. at 114–15, 115 n.1 (Rehnquist, C.J., concurring).

1. *Against Adopting the Fair Support Standard*

One could justify the path from *Bouie* to *Lucas* to *Bush v. Gore* and, eventually, to *Stop the Beach* on one of two basic grounds: Either federal courts need not find extreme circumstances to justify an independent assessment of state law, or a finding of extreme circumstances is necessary but is present in all these cases.

The first ground has the advantage of embodying the most robust response to the positivist trap. Since the positivist trap arises when federal courts cede control of non-constitutional bodies of law to state institutions, the most direct response to the problem is for federal courts to take control over those bodies of law, at least in contexts implicating federal rights. This is the impulse that drove Justice Holmes and the Court in *Mahon* to find that the Kohler Act fell outside the scope of the police power. While the police power is an “inherent element of sovereignty”¹⁴⁶ and its confines are usually defined by the State, the *Mahon* Court displaced Pennsylvania’s definition of its police power to resolve a perceived conflict with the Constitution, the supreme law of the land.¹⁴⁷ The same impulse led Justice Scalia in *Lucas* to reject the South Carolina Supreme Court’s approach to the state-law nuisance issue, which deferred to the state legislature’s findings.¹⁴⁸ Justice Scalia wrote that such a deferential approach “would essentially nullify *Mahon*’s affirmation of limits to the noncompensable exercise of the police power”¹⁴⁹ (i.e., would nullify regulatory takings doctrine writ large, and the protection it offers landowners). Lastly, the same concern drove the plurality in *Stop the Beach* to declare that the Takings Clause would be “insusceptible of enforcement by federal courts” if they lacked the authority to decide issues of state property law,¹⁵⁰ a similar formulation to that offered in Chief Justice Rehnquist’s *Bush v. Gore* concurrence.¹⁵¹

Most of these arguments focus on the baseline contention that state-law issues should be *reviewable* by federal courts when federal rights are implicated—a contention this Note does not dispute. But to the extent the cases in the preceding paragraph address the proper

¹⁴⁶ *Bourgeois v. Live Nation Entm’t, Inc.*, 3 F. Supp. 3d 423, 445 (D. Md. 2014); *see also* *Lochner v. New York*, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting) (noting that certain limitations on the right to contract are a lawful imposition of the state’s police power and “this power is inherent in all governments” (citation omitted)).

¹⁴⁷ *See* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922); *see also supra* note 55 and accompanying text.

¹⁴⁸ *See supra* note 82 and accompanying text.

¹⁴⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

¹⁵⁰ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 727 (2010) (plurality opinion); *see also supra* note 117 and accompanying text.

¹⁵¹ *See supra* note 142 and accompanying text.

standard of review of antecedent state-law questions, they embrace independent judicial assessments of state law as opposed to the fair support rule. The intuitive appeal of this more searching standard of review is straightforward and flows from the same impulse that led the Court to deem these state-law questions reviewable in the first place: If a federal court must decide a question of state law en route to deciding a constitutional issue, it should decide that issue itself to ensure compliance with the federal right. Deferring to state-court pronouncements of state law in these circumstances could lead to the frustration of constitutional guarantees, an unacceptable result.

The alternative ground for opposing the fair support standard in the takings context is narrower: One might concede that the fair support rule is an appropriate standard of review with regard to certain antecedent questions of state law but argue that takings cases represent the sort of extreme circumstance where deferential review is inappropriate. Property may simply be different. Professor J. Peter Byrne notes that Justice Scalia's property jurisprudence "turns from conceiving property as a bundle of rights that can be adjusted to achieve socially desirable legal contours, to classical property rights with clear and impermeable outlines."¹⁵² When property rights are viewed in this way, changes to state property law—even changes that seek to abate a public harm—are more easily characterized as constitutionally suspect. Those who conceive of property as a "bundle of sticks" contend that property rights are malleable and dynamic, responsive to changed circumstances and societal ends.¹⁵³ But Justice Scalia and others would resist and argue that property rights are fixed and traceable to the common law.¹⁵⁴ Thus any state-law definition or decision that threatens these clear and stable lines raises the specter of obvious subterfuge of federal law and calls for heightened judicial scrutiny.

This view of property rights can be seen in *Lucas* and the *Stop the Beach* plurality. In *Lucas*, Justice Scalia wrote that a nuisance determination must be traceable to background common-law principles, such that a use limitation must have *always* been present to inhere in

¹⁵² Byrne, *supra* note 122, at 750.

¹⁵³ See, e.g., Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247, 251 (2007) (describing the bundle of sticks metaphor as "an abstract notion that analytically describes property as a collection of rights vis-à-vis others, rather than rights to a 'thing,'" and noting that early proponents of the metaphor sought to "expose[] the social and political character of private property" (emphasis omitted)).

¹⁵⁴ See, e.g., *id.* at 262–63 (noting that the Court's approach in *Lucas* "resembles the classical liberal view of property, which focuses on the right to exercise absolute dominion and control within the physical borders of the property itself, and allocates power to landowners based on a fixed set of rights").

the landowner's title.¹⁵⁵ In *Stop the Beach*, Justice Scalia doubled down on this common-law baseline, and went so far as to assert that judicial deviations from this baseline can amount to a constitutional taking.¹⁵⁶ This view promotes a specific vision of the common law and the judicial role, a view that this Note argues is too static. Justice Scalia claims that "courts have no peculiar need of flexibility."¹⁵⁷ But judging is an inherently innovative and adaptive task, not simply an ongoing effort to preserve the status quo distribution of entitlements. As Professor Byrne writes: "Maintaining that judicial innovations in the common law of property present takings problems misconstrues the nature of the judicial function. Courts have and must evolve law in a tension that preserves legitimate expectations of owners and adapts the rules to changing social, economic, and environmental conditions."¹⁵⁸ To ascertain the norms of decisionmaking that guide this evolution and preserve the federal-state division of labor, the remainder of this Part looks to *Erie* and the legal process school.

B. Federalism, Positivism, and Erie

The Framers envisioned a Federal Government of limited powers.¹⁵⁹ Thus when the Supreme Court increases its own role in defining state law, especially in an area of traditional state concern such as property law, it should bear a burden of justification. Both *Lucas* and the *Stop the Beach* plurality can be understood as responses to the positivist trap: In both cases, the Court sought to prevent the State (whether acting through its legislature or its courts) from undermining the protection of the Takings Clause.

Lucas ensured that legislative findings of harm prevention would be insufficient to protect the State from a takings claim (indeed, *Lucas* made legislative findings of harm prevention *irrelevant* in takings inquiries).¹⁶⁰ But there remained the possibility that state courts would manipulate the law of nuisance—or other legal doctrines

¹⁵⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992); see also *supra* notes 57–61 and accompanying text.

¹⁵⁶ See *supra* note 105 and accompanying text.

¹⁵⁷ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 727 (2010) (plurality opinion).

¹⁵⁸ Byrne, *supra* note 122, at 758.

¹⁵⁹ See THE FEDERALIST NO. 45, at 223, 227 (James Madison) (Terence Ball ed., 2003) ("The powers delegated . . . to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . [The powers that remain in the State Governments] concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."); see also U.S. CONST. amend. X.

¹⁶⁰ See *supra* notes 57–59 and accompanying text.

defining preexisting limitations on title¹⁶¹—in order to save legislation they regarded as desirable. The *Stop the Beach* plurality can be read as an attempt to head off such efforts and to prevent judicial circumvention of takings doctrine, including the Court's decision in *Lucas*.¹⁶²

After *Lucas*, nuisance law can protect the State from liability “only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.”¹⁶³ Objectivity was said to be the line demarcating legitimate judicial decisionmaking from illegitimate partisan jostling. If a state-court interpretation of state nuisance law was not “objectively reasonable,” it was political. Justice Scalia portrayed state legislatures and courts as two arms of the same political actor.¹⁶⁴ “[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.”¹⁶⁵

Lucas and the *Stop the Beach* plurality seek to interpose takings law as an impediment to the political revision of preexisting state property law, whether through the legislative process or unprincipled judicial decisionmaking. These cases rest on an assumption that federal courts are uniquely capable of providing a principled resolution to the positivist trap by conducting independent inquiries into state law; resolutions offered by state courts and legislatures must be subject to review by federal courts, chiefly by reference to the common law.¹⁶⁶ But such an assumption contradicts the vision of the federalist

¹⁶¹ A judicial taking could plausibly be found when a state court reinterprets any preexisting limitation on title. Indeed, Justice Scalia first sought to take up the issue in a case from the Oregon Supreme Court dealing with the scope of public prescriptive easements and the arcane law of custom. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1332–34 (1994) (Scalia, J., dissenting from denial of certiorari).

¹⁶² *See* William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 25 n.115 (2011) (detailing the Court's focus in preventing a judicial “end run” around the holding of *Lucas*).

¹⁶³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992).

¹⁶⁴ *See* Marshall, *supra* note 162, at 19 (“To Justice Scalia, a judicial decision that upsets an owner's settled property interests is a political one, not a legal one. His rhetorical move of ascribing both judicial and legislative action to the ‘State’ only reinforces this proposition.” (footnote omitted)).

¹⁶⁵ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion); *see also id.* at 714 (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” (citing *Stevens*, 114 S. Ct. at 1334 (Scalia, J., dissenting from denial of certiorari))).

¹⁶⁶ Per the *Rooker-Feldman* doctrine, *see Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415–16 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983), lower federal courts cannot review final state-court judgments. A plaintiff whose takings claim is rejected by a state supreme court only has recourse in the Supreme Court. However, similarly situated landowners affected by a state court decision could potentially bring a judicial takings

system expressed in *Erie*: State decisional law stands on equal footing with state statutes, and state law on the whole is not subject to federal revision merely on the basis that it is perceived to be wrong. Rather, to be overridden, state law must be preempted, unconstitutional, or—most relevant for our purposes—administered in a way that evinces intent to avoid the application of federal law.

1. *Erie's Second-Order Inquiry*

Erie began as a case about substantive law. Indeed, the case was initially filed in the Southern District of New York as a result of forum-shopping: Tompkins's lawyer, Bernard Nemeroff, knew that the case could be brought in New York or Pennsylvania, in federal or state court. Nemeroff chose the federal forum in order to avoid an unfavorable provision of Pennsylvania tort law—namely, that railroads owed no duty of care to pedestrians on their right-of-way and thus were only liable to such pedestrians for willfully inflicted injuries.¹⁶⁷ By contrast, the federal forum—through the vehicle of the general common law—imposed a broader duty of care under which Tompkins could recover for an injury that resulted from mere negligence.¹⁶⁸

But the initial framing of the case did not constrain Justice Brandeis's majority opinion. The Court recast the case as a second-order inquiry into the proper role of federal courts. It did so because it recognized that "adjudication was not, and could never be, wholly mechanical and apolitical."¹⁶⁹ As made clear by Nemeroff's forum selection process, the answer to the first-order question regarding the railroad's duty of care would prove consequential; the choice among competing alternatives, from the perspective of plaintiffs like Tompkins, would be the difference between redress and bupkis. Which substantive standard should apply was surely a legal question, but it was also one of policy. As Professor Akhil Reed Amar explains: "[B]ecause the Progressives and New Dealers had demonstrated that the particular choices made by federal judges in common law tort cases were politically controversial, the Court in *Erie* asked whether

claim in federal district court. Thus, the standard set forth by the *Stop the Beach* plurality may be applied by lower federal courts. This is increasingly likely after the Court's recent decision in *Knick*, which overruled the state-litigation exhaustion requirement of *Williamson County*. See *supra* notes 6–9 and accompanying text.

¹⁶⁷ See PURCELL, *supra* note 76, at 95–96.

¹⁶⁸ See *id.* at 96. Nemeroff chose a federal court in New York as opposed to Pennsylvania because he concluded that courts in the Second Circuit were more willing to diverge from state common law than were courts in the Third Circuit. *Id.* at 96–97.

¹⁶⁹ Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693 (1989) (book review).

federal judges ought to be in the business of fashioning a general federal common law.”¹⁷⁰

By embarking on this second-order inquiry into “who decides,” the Court tacitly acknowledged that the first-order question—what duty of care a railroad owes to passengers on its right-of-way—lent itself to multiple tenable answers. In other words, the substantive law of tort had to be made, not found in “a brooding omnipresence in the sky,”¹⁷¹ and the question was which sovereign had the authority to make it. Adopting the position that Justice Holmes expressed in dissent a decade earlier, the Court declared that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”¹⁷² Since a federal court adjudicating state law derives its authority from the State,¹⁷³ federal courts are bound by state law, whether statutory or decisional.¹⁷⁴ Therefore the Court had exceeded its constitutional role when it articulated a body of general federal common law binding on the states.

2. *The Legal Process School*

Erie is a monument to the legal process school. Recognizing that law is made rather than merely unearthed, the legal process school aimed to legitimate and cabin judicial decisionmaking through the use of jurisdictional and procedural “metanorms.”¹⁷⁵ “By paying strict attention to second-order rules allocating power between federal courts and other institutions, the legal process theorists sought to specify with precision the boundaries and purposes of federal judicial power.”¹⁷⁶ There is good reason to believe that agreement on *where* and *how* a decision is made can mitigate inevitable disagreement

¹⁷⁰ *Id.* at 695.

¹⁷¹ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Rather, the common law is “the articulate voice of some sovereign or quasi sovereign that can be identified.” *Id.*

¹⁷² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

¹⁷³ See PURCELL, *supra* note 76, at 181 (“[J]udges [are] ‘directors of a force that comes from the source that gives them their authority.’ If that source [does] not give them authority, they [can] not properly direct its force.” (footnote omitted) (quoting 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 822 (Mark DeWolfe Howe ed., 1953))).

¹⁷⁴ See *Erie*, 304 U.S. at 78 (“[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

¹⁷⁵ Amar, *supra* note 169, at 693–94 (describing “metanorms” as rules of “jurisdiction and procedure” that dictate which institution should determine disputed substantive law).

¹⁷⁶ *Id.* at 694.

regarding the outcome of the decision.¹⁷⁷ Of course, legal process rules are not always neutral or objective,¹⁷⁸ lest we forget the murky distinction between substance and procedure that has plagued *Erie's* progeny.¹⁷⁹ But adherence to second-order rules of procedure and jurisdiction nonetheless curbs "ad hoc judicial decisionmaking."¹⁸⁰

One such rule is institutional settlement, which stands for the principle that "decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."¹⁸¹ Knowing that the answers to some legal questions are "indeterminate," legal process theory urges us to at least agree on where decisionmaking authority should reside.¹⁸² If we agree in advance that a certain institution is the proper decisionmaker, we have principled grounds to accept the decision. Critically, this holds true even if we would have reached a different conclusion ourselves.

This principle is prevalent in the law. It can be seen, for instance, in the deferential standards governing appellate review of certain lower court judgments, and also in the deference accorded to agency interpretations of federal statutes under the *Chevron* doctrine.¹⁸³ The same principle underlies the fair support rule,¹⁸⁴ which is justified by a tenet of the federalist system—that state courts are the arbiters of state law.¹⁸⁵ The fair support rule calls for deferring to state-court rulings on matters of state law unless the court engaged in obvious subterfuge to evade federal law. Under this approach, the Court does not simply ask whether the state court got state law wrong; it asks whether

¹⁷⁷ In the context of public dispute mediation, people are more likely to judge a settlement as fair when they regard the process by which it was formulated as fair. LAWRENCE SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 27 (1987) ("[P]erceived fairness depends on participation. Those who participate feel that they 'own' the agreement, and are therefore more likely to support its implementation.").

¹⁷⁸ Amar, *supra* note 169, at 695.

¹⁷⁹ See, e.g., *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945) (rejecting a rigid substance versus procedure distinction in favor of an outcome determinative test to decide whether a federal court sitting in diversity must apply the state rule).

¹⁸⁰ Amar, *supra* note 169, at 695.

¹⁸¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

¹⁸² Ernest A. Young, *Erie as a Way of Life*, 52 AKRON L. REV. 193, 208 (2018).

¹⁸³ *Id.* at 209; see *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that when congressional intent is "ambiguous" in a statute an agency administers, courts must defer to an agency's "reasonable interpretation" of that statute).

¹⁸⁴ See *supra* notes 118–20 and accompanying text.

¹⁸⁵ See *supra* note 5 and accompanying text.

the state court got state law *unreasonably* wrong. The state-law judgment cannot be set aside simply because the Court would have decided differently;¹⁸⁶ rather, the state-court judgment is overruled only if it was plainly manufactured to evade federal review. In such circumstances, the decision is so erroneous as to cast second-order doubts on the judgment's validity—doubts regarding which institution (or, at least, which institution's law) should have answered the question in the first instance. When a state court manipulates state law in this way, it invokes institutional settlement that is not there. The Supreme Court therefore lacks a principled reason to accord deference to such judgments.

Admittedly, principled deference by federal courts to state law-making institutions poses a particular challenge when state law potentially determines federal constitutional claims. But the fair support rule embodies the best answer to this challenge: It preserves the deference due to state institutions on matters of state law yet also ensures that federal courts are not without recourse when they confront decisions clearly manufactured to end-run a federal guarantee.

C. Lucas and Stop the Beach Revisited

How would the two cases at the center of this Note have come out if the Court had employed the fair support rule? While this inquiry is inherently speculative, I believe the cases would have come out differently.

As seen in Part II, *Lucas*'s disposition provides a helpful contrast between the fair support rule and the Court's more exacting independent assessment standard. In actuality, the Supreme Court remanded the case to the South Carolina courts with instructions to conduct a nuisance inquiry by reference to the common law, notwithstanding the recent nuisance determination by the state legislature.¹⁸⁷ But if the Supreme Court had instead adopted the fair support rule with regard to questions of state property law, it likely would have affirmed the South Carolina Supreme Court's initial ruling, which deferred to the state legislature's findings in determining that the Beachfront Management Act, as applied to David Lucas, merely prevented a nuisance and did not effect a taking.¹⁸⁸

¹⁸⁶ The novelty of *Lucas*, the *Stop the Beach* plurality, and Chief Justice Rehnquist's concurrence in *Bush v. Gore* lies in the fact that those opinions were willing to set aside state-court judgments for exactly this reason: They would have decided the issue of state law differently from the court below. See *supra* Section III.A.1.

¹⁸⁷ See *supra* notes 77–80 and accompanying text.

¹⁸⁸ See *supra* notes 52–55 and accompanying text.

Under the fair support rule, the Court would have asked whether the state legislature's findings were arguably supported by the factual record, and whether the state court applied state law in an anomalous way in order to frustrate a federal right. I think the answers to these questions are clearly yes and no, respectively. First, as noted by the South Carolina Supreme Court in its initial *Lucas* decision, the state legislature found that: The state's beach/dune system serves as a critical storm barrier which "contributes to shoreline stability in an economical and effective manner;" "Many miles of South Carolina's beaches [had] been identified as critically eroding;" "[W]ithout adequate controls," development close to the beach/dune system had "jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property;" and "A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and effectively manage the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system."¹⁸⁹ Lucas did not challenge these legislative findings or the legislature's conclusion that "new construction would cause serious public harm."¹⁹⁰

With regard to the second question, the state court's deference to these legislative findings in its nuisance determination cannot be classified as an obvious subterfuge of federal law. Indeed, as Justice Blackmun noted in dissent from the United States Supreme Court's ruling, this deference to unchallenged legislative determinations is perfectly consistent with "one of [the] Court's oldest maxims: '[T]he existence of facts supporting the legislative judgment is to be presumed.'"¹⁹¹ Therefore, if the Supreme Court had applied the fair support rule in *Lucas*, it would have affirmed the state supreme court's ruling: The state court's nuisance determination was supported by the legislative record, and its deference to the legislature's findings comported with longstanding Supreme Court precedent. Yes, Lucas would have lost a property right to which he believed he was entitled, but the state court ruling was by no means manufactured to frustrate a federal right.

In *Stop the Beach*, the Court's application of the fair support rule would not have changed the outcome of the case (recall that the Court unanimously held that no taking, judicial or otherwise, had

¹⁸⁹ *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 897-98 (S.C. 1991).

¹⁹⁰ *Id.* at 900.

¹⁹¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1045 (1992) (Blackmun, J., dissenting) (second alteration in original) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

occurred¹⁹²). But the fair support rule surely would have changed the nature of Justice Scalia's judicial taking inquiry, likely nipping it in the bud. In actuality, to determine whether the Florida Supreme Court had deprived the claimants of an "established property right[],"¹⁹³ Justice Scalia conducted his own assessment of beachfront property owners' rights under Florida common law. The plurality's analysis even included an in-depth look at Florida case law that the Florida Supreme Court considered inapposite.¹⁹⁴ Under the fair support rule, however, the Court would have asked whether the Florida Supreme Court's interpretation of Florida law was unreasonable, *not* whether the Court would have decided the question differently as a matter of first impression. Such an analysis likely would have started with an acknowledgment that very little about littoral rights is clearly established: At common law, as the Florida Supreme Court recognized, "littoral rights 'have been broadly and inexactly stated.'"¹⁹⁵ Further, littoral rights is an umbrella term referring to several distinct property rights of beachfront property owners, including not only the right to accretions but also rights to access, use, and view.¹⁹⁶

The Florida Supreme Court distinguished the right to accretions from the rights to access, use, and view on the basis that the latter rights relate to "*present* use of the foreshore and water" while the right to accretions "only becomes a possessory interest if and when land is added to the upland by accretion."¹⁹⁷ This distinction drove the court's conclusion that the beachfront owners had not been deprived of a vested property interest, but rather had lost only the possibility that these contingent future interests would become possessory.¹⁹⁸ While this distinction may have been novel, it cannot be deemed unreasonable or an attempt to frustrate a federal right. On the con-

¹⁹² See *supra* note 101 and accompanying text.

¹⁹³ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 733 (2010) (plurality opinion); see also *supra* note 105 and accompanying text.

¹⁹⁴ See *supra* note 113 and accompanying text.

¹⁹⁵ *Walton Cty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) (quoting *Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955)), *aff'd sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010).

¹⁹⁶ See *id.* at 1111–12.

¹⁹⁷ *Id.* at 1112 (emphasis added) (first citing *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); then citing RESTATEMENT (FIRST) OF PROP. § 153 (AM. LAW INST. 1936)).

¹⁹⁸ See *id.*; see also Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 732 (2011) (summarizing that the court interpreted that as the right to accretion is a future contingent interest, the beach restoration would mean that this interest would never vest). In rejecting the remainder of the landowners' claims, the court further held that: (1) the common-law doctrine of avulsion allowed the State, as the original owner of the shoreline, to reclaim storm-damaged shoreline, and (2) there is no independent right of contact with the water under Florida law. *Walton Cty.*, 998 So. 2d at 1117, 1119.

trary, just as Supreme Court precedent lent support to the state court's approach in *Lucas*, the Florida Supreme Court had support from Supreme Court case law when it stated that: "The nature of upland owners' littoral rights is considered a matter of state law."¹⁹⁹

In sum, the analysis of the takings questions in *Lucas* and *Stop the Beach* would have looked very different had the Supreme Court employed the fair support rule instead of conducting independent assessments of state property law. More importantly, the analysis would have better respected the central insights of *Erie* and the legal process school: State law questions should be answered in the first instance by state institutions, and those answers should only be disturbed if they are clearly calculated to frustrate a federal right. Especially in the property context, such a deferential framework is needed to ensure that the law is responsive to the diverse and ever-changing environmental circumstances of communities across the United States and the expertise of institutions closest to those communities.

CONCLUSION

Lucas and *Stop the Beach* call attention to a legitimate dilemma: If federal courts wholly lacked the ability to scrutinize articulations of property law offered by state institutions, the Takings Clause would be an empty promise, as Justice Scalia writes, "insusceptible of enforcement."²⁰⁰ But that does not lead inexorably to the conclusion that federal courts should perform independent assessments of state property law. As detailed in this Note, there is another option. The fair support rule, grounded in Supreme Court precedent, provides a principled method of resolving the positivist trap. State court rulings should be accorded deference unless they were manufactured to frustrate a federal right. This approach is preferable because it better respects the decentralized innovation that the U.S. federalist system is designed to foster and better accommodates changing perceptions regarding what the role of government should be, perceptions that are informed by new experience. Justice Scalia's approach, by contrast, stymies the common law and ties the hands of contemporary institutions dealing with contemporary problems. This approach is especially unwise in the context of property law, which should be informed by local condi-

¹⁹⁹ *Walton Cty.*, 998 So. 2d at 1111 n.9 (citations omitted) (noting states' varying conceptions of littoral rights); see also *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918) ("[I]t is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." (citations omitted)).

²⁰⁰ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 727 (2010) (plurality opinion).

tions, changed circumstances, and the changing needs of a dynamic society.

In *Lucas*, Justice Scalia asserted that land is only as good as the profits it produces.²⁰¹ While this may have been true when the Fifth Amendment was ratified, “[t]he very existence of extensive legislated land use restrictions is strong evidence of the common law’s inadequacy to meet changing needs.”²⁰² Such restrictions are acknowledgments of the modern consensus that certain land is most useful to society in its natural state. *Lucas* and *Stop the Beach*, tethering the Takings Clause to common-law property rights, rely on the assumption that exploitation remains the default use of land—the neutral baseline separating action from inaction. But this assumption is belied by contemporary efforts to preserve certain aspects of nature such as wetlands, vulnerable coastlines, and endangered species. These efforts not only serve ecological purposes, but also protect human life and existing property.²⁰³

Lucas and *Stop the Beach* sought to curb the ability of state legislatures and courts to change state property law because the Court thought such changes were driven by special interests; their validity depended on “whose ox is gored.”²⁰⁴ But these decisions fall victim to the same criticism: They are similarly indeterminate, depending on value judgments about how land ought to be used and about which institutions are best equipped to define property rights. Fealty to the common law does not ensure objectivity. “The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.”²⁰⁵ Hindering the implementation of such learning cannot be done under the guise of neutrality.

The Court should allow property rights to reflect modern values.²⁰⁶ To that end, state legislatures and courts should be allowed

²⁰¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (quoting 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, § 1 (1812) (“[F]or what is the land but the profits thereof[?]”) (alterations in original)).

²⁰² Humbach, *supra* note 73, at 7 n.34.

²⁰³ See *Lucas*, 505 U.S. at 1075 (Stevens, J., dissenting) (noting that the challenged South Carolina statute sought to bolster the protective function of the state’s beach/dune system, which acts “as a buffer from high tides, storm surge, [and] hurricanes,” in the wake of the twenty-nine deaths and over six billion dollars in property damage caused by Hurricane Hugo (alteration in original) (quoting S.C. CODE ANN. § 48-39-260(1)(a) (2018) (effective June 25, 1990))).

²⁰⁴ Sunstein, *supra* note 71, at 879.

²⁰⁵ *Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting).

²⁰⁶ Cf. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“[A constitution] is made for people of fundamentally differing views, and the accident of our

to define state property law in the first instance. Federal courts adjudicating takings claims should look first to those definitions of property rights, displacing them only if they evince a purpose to contravene federal law or are based on some improper purpose, such as transferring property between private parties²⁰⁷ or making private property public for no reason at all.²⁰⁸

finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

²⁰⁷ This would be a violation of the Takings Clause’s public use requirement. *See supra* note 43.

²⁰⁸ *See Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation [The Takings] Clause stands as a shield against the arbitrary use of governmental power.”). Recitation of a harm-preventing purpose is insufficient to shield a regulation from takings liability; a regulation’s operative provisions must also be scrutinized. *See supra* note 63.