

## JUDICIAL TAKINGS AND THE COURSE PURSUED

W. David Sarratt\*

GENERALLY, a line in the sand should not be crossed without considering the consequences. In Oregon, like most other states, the mean high tide line along the coast represented such a line, with private property on the upland side and public property toward the sea.<sup>1</sup> In the case of *State ex rel. Thornton v. Hay*, however, the Oregon Supreme Court granted the public the right to cross that line for its enjoyment based on the English common law doctrine of custom, and, as a corollary, prohibited property owners from constructing any improvements on the dry sand beach between the mean high tide line and the vegetation line that might interfere with the public's right of access.<sup>2</sup> While the Oregon Supreme Court admitted that custom was doctrinally "unprecedented" in Oregon case law, the court looked to William Blackstone's exposition of that doctrine and found, without any specific factual inquiry, that the *entire Oregon coastline* met the articulated requirements.<sup>3</sup> Satisfied

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\* Law Clerk to the Honorable Douglas H. Ginsburg, Chief Judge, United States Court of Appeals for the District of Columbia Circuit; J.D., University of Virginia School of Law, 2004; B.A., University of Virginia, 2000. I wish to thank Professor Lillian BeVier and Professor Caleb Nelson for their thoughtful guidance and encouragement throughout this project. I am also indebted to Jennifer Glick for her tireless editorial assistance. All errors are my own.

<sup>1</sup> See *Borax Consol. v. Los Angeles*, 296 U.S. 10, 26 (1935) (holding that a federal patent conveyed land to the mean high tide line); see also Or. Rev. Stat. § 390.615 (2003) ("Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law.").

<sup>2</sup> 462 P.2d 671, 677-78 (Or. 1969).

<sup>3</sup> *Id.* The court cited only one other state that had recognized custom as a source of American law, *Perley v. Langley*, 7 N.H. 233 (1834). William Blackstone identifies seven requirements of customary rights in land; a customary right must be (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory (mandatory for landowners to acknowledge), and (7) consistent with other customs or law. 1 William Blackstone, *Commentaries*, \*75-\*78. Despite the vague contours of this doctrinal formulation, the court in *Thornton* needed less than two pages of the *Pacific Reporter* to find that the entire Oregon coastline satisfied these requirements. 462 P.2d at 677-78.

with this analysis, the court was careful to point out that its ruling “takes from no man anything which he has had a legitimate reason to regard as exclusively his,”<sup>4</sup> apparently referencing the takings protections of the Federal Constitution.

If, however, the Oregon legislature had passed a statute requiring a public right of access across this area of private property with the same effect, surely such action would have constituted a taking under current U. S. Supreme Court precedent.<sup>5</sup> Why should Oregon be able to avoid paying compensation simply by virtue of the fact that the judiciary, rather than the legislature, made the change in Oregon law?

#### INTRODUCTION

This Note will argue that the constitutional holding of *Erie Railroad Co. v. Tompkins*<sup>6</sup> requires that the takings protections of the Federal Constitution apply to state judge-made law as well as state statutes and administrative regulations. In order for federal courts to conduct takings review of dramatic judicial changes in property rights, as in *Thornton*, they must answer three questions: First, did the plaintiff have the property right claimed to have been taken in the first place? Second, did the state court decision amount to a taking of that property right? Finally, if it did amount to a taking, ought there be compensation?

The Supreme Court discussed the first of these questions in the now-famous case of *Lucas v. South Carolina Coastal Council*.<sup>7</sup> Petitioner David Lucas had purchased coastal property on one of South Carolina’s barrier islands, planning to build homes on the property as his neighboring property owners had done.<sup>8</sup> Subsequent to Lucas’s purchase of the property, the South Carolina legislature passed a law prohibiting any significant construction on

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<sup>4</sup> *Thornton*, 462 P.2d at 678.

<sup>5</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841–42 (1987) (holding that requiring public right of access across private property constitutes a taking). The very property at issue in *Nollan* was the beach area between the vegetation line and the mean high tide line. One wonders whether the beachgoers in California have historically been more respectful of private property rights so as not to create a custom of access to such areas.

<sup>6</sup> 304 U.S. 64, 77–78 (1938).

<sup>7</sup> 505 U.S. 1003 (1992).

<sup>8</sup> *Id.* at 1006–07.

Lucas's land, making his property effectively "valueless."<sup>9</sup> The South Carolina Supreme Court upheld the restriction, holding that the state was not required to compensate Lucas because it had simply acted within its lawful power to prevent a harmful or noxious use of the land.<sup>10</sup>

The U. S. Supreme Court reversed, holding that any state law that effectively denied an owner of private property all economically beneficial use of the property would constitute a per se taking under the Just Compensation Clause of the Fifth Amendment.<sup>11</sup> The Court, however, provided an exception to this per se rule; when a property owner never had the right to engage in the desired use of the property to begin with under "background principles" of the state's property or nuisance law, the state need not provide compensation.<sup>12</sup> As many commentators have pointed out, the *Lucas* Court left the exception rather ambiguous as to what rules of state law might constitute these "background principles."<sup>13</sup> This ambiguity has provided states with a loophole in the *Lucas* rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles.<sup>14</sup>

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<sup>9</sup> Id. at 1007.

<sup>10</sup> Id. at 1010.

<sup>11</sup> Id. at 1029.

<sup>12</sup> Id. Presumably this exception covers not just the rule in *Lucas*, but all takings cases. After all, how could a takings claim be established if the right claimed to be taken never existed?

<sup>13</sup> See, e.g., David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1378–79 (1996) ("[H]ere we have the nub of the . . . analytic and theoretical problem considered in this Article: does a public easement, created by custom of (assumptively) long-standing character, but only first recognized by a court much more recently, become part of the state's 'background principles of nuisance and property law that prohibit the [landowner's] uses?'" (quoting *Lucas*, 505 U.S. at 1031) (second brackets in original); Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. Cal. L. Rev. 1, 1–2 (1996) ("[In *Lucas*] the Court introduced an exception of unknown proportions to the per se rule."); David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 340 (2002) ("[I]t is not always easy to discern what comprises such background principles. . . . [And] once defined, the principles can, when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine . . .").

<sup>14</sup> See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari)(arguing that the *Lucas* rule would be a "nullity if

After *Lucas*, states may simply assert that the rule of property law upon which they rely in denying owners claimed property rights is not a new rule but merely an articulation (and perhaps new application) of one of the state's background principles of property law.<sup>15</sup> States may thus attempt to avoid compensation altogether by announcing that under their background principles of state law, the property owner never had the property right she claims has been taken. Of course, state courts can pull off this ploy better than state legislatures. The Supreme Court has long held that states may not "insulate a legislative taking from constitutional review by asserting that a property right never existed."<sup>16</sup>

So, what if the rule purportedly based on background principles originates wholly from the state courts, as in *Thornton*?<sup>17</sup> It is in the nature of courts to say what the law is and what it has always been.<sup>18</sup> A state legislature, though, would be stretching the bounds

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anything that a state court chooses to denominate 'background law'-regardless of whether it really is such-could eliminate property rights" in the context of the Supreme Court of Oregon's holding that background principles of the state's property law precluded owners of beachfront facilities from developing dry-sand portions of their property); see also *Bederman*, supra note 13, at 1381 (referring to the ability of state courts to circumvent *Lucas* with "custom-based rights" as "the precise problem left open in the Supreme Court's decision in *Lucas*").

<sup>15</sup> *Stevens*, 510 U.S. at 1211 (Scalia, J., dissenting from denial of certiorari).

<sup>16</sup> *Barton H. Thompson, Jr.*, *Judicial Takings*, 76 Va. L. Rev. 1449, 1464, 1467 (1990) (citing *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544 (1905) (McKenna, J., plurality opinion)); see *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42 (1944); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930), *aff'd on rehearing*, 282 U.S. 187, 191 (1930); *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657 (1927). For further explanation of this distinction, see *infra* Part II.

<sup>17</sup> For another striking example of a judicial "landgrab" (Justice Scalia's term from *Stevens*, 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari)), see *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), in which the Supreme Court of New Jersey held that under the doctrine of public trust, the public had a right to use the dry-sand portions of land owned by a quasi-public body as a means of accessing and further enjoying tidal lands. For a more extensive discussion of *Matthews*, see *infra* note 97.

<sup>18</sup> As Chief Justice Marshall would have it, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Under this theory, judges were thought to be like oracles, possessing special training and ability to decipher and discover the law, but not human lawmakers (that is, causal agents in the creation of law). This process of judges finding and announcing the law was thought to occur independent of the will of the judge as a human partisan. See G. Edward White, *The American Judicial Tradition* 21-25 (expanded ed. 1988).

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of credibility to write a new statute claiming that it intended solely to clarify one of the state's common law background principles of property where such a principle was unprecedented in the state's prior case law. Statutes are, generally speaking, assumed to be new rules replacing common law background principles.<sup>19</sup> Where background principles are changed, takings are possible. Courts, however, are generally granted the power to craft the contours of the state's common law in areas unaddressed by state statutes, with "refinements" occurring over time as background principles are applied to new circumstances. Are these "refinements" capable of being dramatic enough to constitute takings?

In general, legislatures are presumed to act prospectively, saying what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been.<sup>20</sup> In an era, however, when state courts are understood to wield the power not only to declare the law, but also to make it, the *Lucas* rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the state to avoid paying compensation for takings of property.

In describing the background-principles exception, the *Lucas* Court instructed:

A law or decree [effecting a total deprivation of economic value] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nui-

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<sup>19</sup> Even legislative attempts to codify common law rules necessarily result in changing them to some extent, as codification shifts the mission of subsequent courts from determining what the common law says to deciding what the legislature said.

<sup>20</sup> See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (noting that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535–36 (1991) ("[Retroactivity is] in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. It also reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it.") (citations omitted).

sance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>21</sup>

Justice Scalia, author of the *Lucas* opinion, has recognized the potential for circumvention of the takings protections through a state court's creative use of common law doctrines such as public trust and custom, and has stated that, "[t]o say that this . . . raises a serious Fifth Amendment takings issue is an understatement."<sup>22</sup> Justice Scalia commented on this possibility in *Stevens v. City of Cannon Beach*, an Oregon case challenging the rule in *Thornton*:

As a general matter, the Constitution leaves the law of real property to the States. But . . . a State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights.<sup>23</sup>

An example illustrates this point. Suppose that the next time South Carolina wishes to restrict the use of property like *Lucas*'s, instead of passing a new statute or issuing a new administrative regulation to accomplish the restriction directly, the legislature simply authorizes private law suits to be brought by the Coastal Council, or even private conservation groups, for the benefit of the public, to enjoin what the Council believes to be harmful or noxious uses of property under the state's background principles of property law. The state court, then, is free to take this winking and nudging from the legislature and effectively fashion new common law rules that restrict the owner's use of his property, denying compensation based on the claim that the new rule is merely a background principle of the state's law—that there was no property right there to begin with.<sup>24</sup> Let us further suppose, however,

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<sup>21</sup> *Lucas*, 505 U.S. at 1029.

<sup>22</sup> *Stevens*, 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari).

<sup>23</sup> *Id.* at 1211 (Scalia, J., dissenting from denial of certiorari).

<sup>24</sup> As Thompson notes, this set of facts is not altogether fanciful. Thompson, *supra* note 16, at 1507. It appears that the legislatures of both Texas and Oregon have passed statutes encouraging their state judiciaries to expand public beach access. See Or. Rev. Stat. §§ 390.610–.620 (2003); Tex. Nat. Res. Code Ann. §§ 61.001–.024 (Vernon 2001).

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that the state's background principles do not appear to have ever carried such a meaning as the state court imputes to them in restricting the owner's use of her property, and that any good lawyer in the state prior to the *Lucas* case would have felt confident in assuring the owner that she had every right to build on her property. What remedy would the owner then have? This problem is what I will call, only as a shorthand, the *Lucas* loophole.<sup>25</sup>

In order for this loophole to be closed, the Court would have to first decide that there can be federal question review as to whether a state court's holding about the content of its own background legal principles is objectively reasonable—at least as to whether the principle actually existed at the time the hypothetical owner's case arose.<sup>26</sup> Professor Michelman has pointed out that “giving federal judges the last word on questions of the meanings of laws emanating from state authorities . . . seems to be a gross contravention of Our Federalism.”<sup>27</sup> It seems fairly well settled, however, even from *Lucas* itself, that the Supreme Court can review state court decisions on the content of state law for objective reasonableness as interpretations of then-existing relevant state-law precedents.<sup>28</sup> Sig-

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<sup>25</sup> This shorthand may sound slightly misleading to the astute reader, since in *Lucas* itself the new rule originated with the legislature, rather than with a state court. This Note adopts this term, however, because it seems to be a course that the *Lucas* opinion invites, as *Lucas*'s author has suggested. See *supra* note 23 and accompanying text; see also *Lucas*, 505 U.S. at 1029.

<sup>26</sup> Of course, if the principle is new, the state is free to create it, but is required to pay just compensation.

<sup>27</sup> Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 Wm. & Mary L. Rev. 301, 305 (1993). The term “Our Federalism” was coined by Justice Black in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>28</sup> *Lucas*, 505 U.S. at 1032 n.18 (“We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.”); see also *James v. Kentucky*, 466 U.S. 341, 347–49 (1984) (reviewing Kentucky state law to determine whether an “admonition” versus an “instruction” is a “fatal procedural fault” in a criminal trial); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (noting that “our jurisdiction is not defeated if the nonfederal ground relied on by the state court is ‘without any fair or substantial support’”) (quoting *Ward v. Bd. of County Comm’rs of Love County*, 253 U.S. 17, 23 (1920)); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (emphasizing that on a question “primarily of state law, we accord respectful consideration and great weight to the views of the State’s highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and

nificantly, the Court has thus far proved willing to do so only when a legislative or executive taking is at issue and a state court has subsequently attempted to cover the other branch's tracks by finding that no property right existed in the first place. The Court has not been comfortable undertaking such review in cases like *Thornton* and *Stevens* where the new rule originates in the state courts.<sup>29</sup>

Beyond the initial question of whether federal courts can review such cases, a second issue is perhaps more controversial and unsettled. If the reviewing court finds that the rule articulated by the state court as a background principle is really a new rule upsetting settled expectations in property rights, could such a judicial change amount to a taking? Or, is the prohibition on takings without compensation only applicable to state legislative and executive actions?<sup>30</sup>

Scholars and courts have given this question, most commonly called the "judicial takings problem," sporadic attention.<sup>31</sup> While the seminal article on the judicial takings problem argues that state courts should be subject to the compensation requirement of the

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whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts.") (citation omitted).

<sup>29</sup> See *infra* notes 93–96 and accompanying text.

<sup>30</sup> Compare, for example, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930) ("[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment . . ."), with *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids . . . confiscation [of property without just compensation] by a State, no less through its courts than through its legislature . . .").

<sup>31</sup> It is worth noting at this point that the *Lucas* loophole is a subset of the judicial takings problem. For the *Lucas* loophole to be implicated, the state court must at least purport to be applying an old, background principle of property law. For the judicial takings problem to arise, the rule, whether claimed to be new or old, must simply originate from the state courts and somehow upset settled expectations in property rights. That is, to present the most clear judicial takings test case, a state court could admit that the rule it is announcing is a new rule that would amount to a taking if enacted by the state's legislature. The court could say, however, that because it is a court and not a legislature, it is not subject to the compensation requirement of the Fifth Amendment. Presumably, the Court would be uncomfortable with admitting that states are free to take property through their courts without *any* constitutional restriction. Most of the action, then, concerns answering the background principles question presented by the *Lucas* loophole.



Takings Clause,<sup>32</sup> the majority of the literature on the topic argues to the contrary.<sup>33</sup> A few lower federal courts have held that state courts are capable of effecting a taking of property under the Fifth Amendment, but these cases are outliers at best.<sup>34</sup> The judicial takings problem and the background principles exception in *Lucas* present fundamental issues of federalism and separation of powers. These questions press our conception of the sources of the common law (judge-found or judge-made) and how it changes. Yet no scholar on either side of this long-running debate has recognized and engaged the connection between the judicial takings problem and one of the best-known cases addressing these fundamental issues, *Erie Railroad Co. v. Tompkins*.<sup>35</sup>

In *Erie*, Harry Tompkins was injured by a passing train while walking alongside a railroad track in Pennsylvania. Tompkins brought a common law tort claim against the Erie Railroad in the federal district court for the Southern District of New York, with jurisdiction predicated on diversity of citizenship. The railroad argued that Pennsylvania law should control and pointed to Pennsylvania decisions indicating that the railroad owed Tompkins no duty of care, as he was an undiscovered trespasser. Tompkins, however, argued that under *Swift v. Tyson*,<sup>36</sup> a federal court should determine the proper rule of decision on its own as a matter of general law, since there was no Pennsylvania statute governing the issue. Tompkins pointed to several federal decisions tending to show that a higher duty of care was required of the Erie Railroad. The trial judge allowed Tompkins's case to go to the jury, which awarded

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<sup>32</sup> Thompson, *supra* note 16. A more recent treatment of the subject is Bederman, *supra* note 13.

<sup>33</sup> See, e.g., Williamson B.C. Chang, Unraveling *Robinson v. Ariyoshi*: Can Courts "Take" Property?, 2 U. Haw. L. Rev. 57, 90–91 (1979); Bradford H. Lamb, *Robinson v. Ariyoshi*: A Federal Intrusion Upon State Water Law, 17 *Env'tl. L.* 325, 353 (1987); Roderick E. Walston, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 *Utah L. Rev.* 379, 381. For a sampling of scholars who assume that the takings protections do not apply to state courts, see, for example, Louis Kaplow, An Economic Analysis of Legal Transitions, 99 *Harv. L. Rev.* 511, 517 n.10 (1986); Joseph L. Sax, Takings and the Police Power, 74 *Yale L.J.* 36, 51–52 (1964).

<sup>34</sup> See *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985); *Sotomura v. County of Haw.*, 460 F. Supp. 473, 482–83 (D. Haw. 1978).

<sup>35</sup> 304 U.S. 64 (1938).

<sup>36</sup> 41 U.S. (16 Pet.) 1 (1842).

Tompkins \$30,000, and the court of appeals affirmed.<sup>37</sup> The Supreme Court granted certiorari and reversed, overruling *Swift v. Tyson*.<sup>38</sup> The Court held that federal courts sitting in diversity may not ignore the decisions of state courts, but rather must acknowledge those decisions as the voice of a sovereign state articulating its law. As Justice Brandeis put it, “whether 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.”<sup>39</sup>

Most scholars have attributed our dominant positivist conception of law to the *Erie* regime.<sup>40</sup> This Note will argue, conversely, that *Erie* was the result of that conception on the state level rather than the cause on the federal level. The *Erie* Court’s reasoning in reversing *Swift v. Tyson* rested on no particular overarching jurisprudential theory, but rather on the Constitution itself.<sup>41</sup> The constitutional principle announced in *Erie* dictates that the federal government respect intra-state separation of powers decisions; that is, the Constitution leaves the states free, within the republican form, to distribute power among their coordinate branches however they see fit.<sup>42</sup> To implement this principle, *Erie* established a default rule that, absent a clear statement otherwise, states should be understood to intend that their courts have the power to make real law on behalf of the state, not simply to provide evidence of what the general law is.<sup>43</sup> It follows, this Note will argue, that *Erie*

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<sup>37</sup> The verdict in Tompkins’ favor would be roughly equivalent to \$375,000 today. See Robert Sahr, Conversion Factors in 2004 Dollars (Preliminary) for 1800 to Estimated 2014, at [http://oregonstate.edu/dept/pol\\_sci/fac/sahr/sahr.htm#\\_Convesion\\_Factor\\_Tables](http://oregonstate.edu/dept/pol_sci/fac/sahr/sahr.htm#_Convesion_Factor_Tables) (April 21, 2004) (on file with the Virginia Law Review Association).

<sup>38</sup> *Erie*, 304 U.S. at 77–79.

<sup>39</sup> *Id.* at 78.

<sup>40</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 852 (1997); Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805, 819–20 (1989). In grossly simplified terms, positivism holds that law comes from social customs and facts, like declarations of sovereign states, rather than external sources, like “a brooding omnipresence in the sky.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). For a historical account of positivism, see Anthony J. Sebok, Misunderstanding Positivism, 93 Mich. L. Rev. 2054 (1995).

<sup>41</sup> Jack Goldsmith & Steven Walt, *Erie* and the Irrelevance of Legal Positivism, 84 Va. L. Rev. 673, 673 (1998).

<sup>42</sup> *Erie*, 304 U.S. at 78–79.

<sup>43</sup> Professor Mitchell Berman has recently presented a helpful new taxonomy for constitutional rules, dividing them into “operative” propositions of constitutional

requires the federal government to apply the takings protections to all rules of state law that upset reasonably settled expectations in vested property rights, regardless of where they originate within the state government. When state courts are wearing their legislative hats, they must be treated as wielding real lawmaking power—including the ability to take property. In short, the state courts must accept the bitter repercussions of *Erie*'s constitutional implementing principle with the sweet.

Part I of this Note will briefly examine the constitutional text and address a few practical issues attendant to the implementation of a judicial takings doctrine. It will trace the history of the judicial takings problem, noting that the issue has become particularly important in recent years particularly in cases dealing with beach access, western water rights, and rights of access to private property for speech. Part II will offer an argument as to the central constitutional holding of *Erie*, and Part III will describe how that holding applies to the judicial takings problem, concluding that if *Erie* was indeed a constitutional decision, the principle on which it was based necessitates that the federal government apply the takings protections to all state law, regardless of whether that law has been articulated by the legislature or the judiciary. Such a regime is not without its conceptual and practical difficulties. The difficulties, however, are not necessarily particular to *judicial* takings cases, but rather are endemic to takings doctrine in general.

#### I. THE JUDICIAL TAKINGS PROBLEM

Beginning with *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized the idea that a taking of property might occur outside of the traditional eminent domain context.<sup>44</sup> This Note does not purport to enter the fray on the complicated issue of what does,

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meaning and “decision” rules implementing those “operative” principles. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1 (2004). As applied here, respect for state separation of powers is the “operative” rule; the presumption that states have delegated real lawmaking authority to their courts is the “decision” rule.

<sup>44</sup> 260 U.S. 393, 413-14 (1922). As it turns out, Justice Holmes, author of the *Pennsylvania Coal* majority opinion, was the seed of both of the modern doctrines at issue in this Note, regulatory takings and *Erie*. Of course, Justice Holmes was not the author of *Erie*, but his dissents leading up to *Erie* appear to have had significant influence on that decision.

would, or should constitute a taking under this line of cases.<sup>45</sup> Instead, this Note assumes that there are certain legislative and executive actions that require compensation of individual property owners. It then queries whether state courts can achieve precisely the same effect, with the same benefit to the public and deprivation of value to the property owner, without having to compensate the property owner.

### A. *The Constitutional Text*

There is no a priori reason why the takings protections should be thought not to constrain judges. As a starting point, let us examine the text of the Fifth Amendment.<sup>46</sup> By the context in which the Takings Clause appears, the takings protections cannot be understood as a limitation only on legislative and executive action. The other prohibitions in the Fifth Amendment explicitly and obviously constrain the judiciary.<sup>47</sup>

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<sup>45</sup> The leading case remains *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), which adopted an ad hoc multi-factor balancing test to determine when a regulation goes “too far.” *Pa. Coal*, 260 U.S. at 415. This balancing has been replaced with per se rules in several circumstances, including permanent physical invasions, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), and total deprivations of economic value, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). The Court’s most recent pronouncements on this issue are *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001), which held that the transfer of title does not necessarily extinguish a takings claim of a previous owner, and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342–43 (2002), which emphasized that courts must resist the temptation to adopt per se rules, holding that a temporary building moratorium does not constitute a per se taking under *Lucas*.

<sup>46</sup> The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

<sup>47</sup> Indeed a contextual reading might yield the opposite inference—that the Takings Clause is a limit on only the judiciary because the grand jury requirement, double jeopardy proscription, the right not to be a compelled to be a witness against oneself, and the Due Process Clause (understood as procedure) are all limitations on how courts can operate—although this Note does not argue as much.

Enlarging the context to the entire Bill of Rights, one might think, at first glance, that the First Amendment was originally intended as a limit on the legislature (“Congress shall make no law”), as was perhaps the Second. The Third and Fourth Amendments appear directed at restricting the executive (quartering of soldiers and search and seizure), and the Fifth, Sixth, Seventh, and Eighth Amendments seem directed at the judiciary (Sixth, right to counsel; Seventh, right to jury trial in civil matters; and Eighth, prohibition of cruel and unusual punishment). Given the overall structure of the Constitution, proceeding in this manner seems logical, addressing the first, second, and third branches in order.

Of course, the meaning we can glean from the structure of the Bill of Rights is somewhat limited with respect to the judicial takings problem, considering that the Fifth Amendment did not originally apply to the states at all. If one believes, however, that the substance of the Takings Clause is currently understood to be equivalent as applied to the federal government and the states, then a textual and structural argument that the drafters of that clause understood it, at least to some extent, as a limitation on the judiciary, still carries some derivative weight. As for the rest of the Constitution, it appears that when the framers intended to place a certain limitation only on legislatures, they knew how to do so. In addition to the First Amendment, the Ex Post Facto Clauses and the Contracts Clause all contain explicit language referring to passing laws.<sup>48</sup>

In response to this argument, it may be contended that the requirement of just compensation could not have been intended as a restriction on courts because courts then, as now, had no power over the purse—courts have nothing with which to pay compensation. This argument, though, as Professor Thompson has pointed out, does nothing to distinguish the judiciary from the executive, which also lacks the spending power.<sup>49</sup> Legislatures typically are thought to have the power to delegate some of their lawmaking and spending authority to the executive, from which the executive

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<sup>48</sup> The first Ex Post Facto Clause is in Article I, Section 9, Clause 3 of the Constitution, which applies to Congress. The second, along with the Contracts Clause, is in Article I, Section 10, Clause 1, providing that “[n]o State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts.”

<sup>49</sup> Thompson, *supra* note 16, at 1456 n.22.

can make rules and, when such rules amount to a taking, provide compensation. To the author's knowledge, it has not been contended that the takings protections do not apply to the executive when the executive is exercising authority delegated from the legislature. Accordingly, the legislature should not be able to evade the takings protections simply by delegating lawmaking power, but not the spending power with which to compensate takings, to the courts. If state courts have the lawmaking power to take property, states are obliged to establish some means of making compensation for such takings.

Perhaps more importantly, it may be incoherent to discuss judicial takings in terms of original intent, as it seems impossible to imagine that the drafters of the Fifth Amendment could have anticipated that amendment's incorporation against the states<sup>50</sup> and the shift in our understanding of judges as law-finders to judges as lawmakers.<sup>51</sup> The modern quandary of judicial takings is simply something that was outside of the Framers' legal frame of reference altogether. The textual observations here simply note that the Framers' selected language did not specifically exclude the possibility that the prohibition on taking property could apply to courts as well.

### *B. Implementing a Judicial Takings Doctrine*

Professor Thompson has outlined several alternatives for how a judicial takings doctrine might function in practice.<sup>52</sup> First, courts could simply be prohibited by statute or the state constitution from making changes in property rights that they feel would constitute a taking. Under this plan, any judicial action subsequently found to constitute a taking (either on state appeal or in a separate federal action) would be automatically invalidated. A second option, called the "automatic compensation" approach, allows courts to

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<sup>50</sup> The Fourteenth Amendment was ratified in 1868, seventy-seven years after the adoption of the Fifth Amendment, and it was not incorporated against the states until 1897. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233–34 (1897); see also William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694 (1985).

<sup>51</sup> See *infra* notes 130–32 and accompanying text.

<sup>52</sup> Thompson, *supra* note 16, at 1513–22.

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make whatever changes they feel appropriate, and whenever a reviewing court<sup>53</sup> finds that such changes amount to a taking, the reviewing court would enter an order requiring the state to compensate the property owner unless the legislature vetoes the decision. Finally, under the “legislative choice” approach, courts would make any change amounting to a taking contingent upon legislative authorization of payment within a certain period of time. Each state would be free to choose any of these options. Under the theory offered in this Note, out of deference to states’ individual separation of powers decisions (explained in Parts III and IV), federal courts would simply piggyback on the state system. In the absence of any articulated state system, federal courts reviewing state decisions should choose either of the latter two options, as flatly prohibiting a state court to make a change that would constitute a taking would contravene the constitutional principle of non-interference advanced here.<sup>54</sup>

Further, under the “automatic compensation” and “legislative choice” systems for judicial takings cases, reviewing courts serve a function nearly identical to their role in legislative takings cases. In the typical legislative takings case, a reviewing court evaluates whether a certain legislative action has amounted to a taking, and if it finds that it has, it orders the legislature either to abandon the rule or make compensation. Of course, the two types of cases are distinguishable in the sense that in legislative takings cases, the legislature or executive has generally already denied that compensation is required before the case arrives in court and is likely to be annoyed that a court has ordered it to pay compensation. As long as legislatures are comfortable with some of the sovereign state’s lawmaking power being vested in the judiciary (that is, the power to make and adjust common law rules, including unpredictable changes), a legislature should be no more upset to hear that a court itself has articulated a new rule of property law requiring compensation that the legislature did not expect to pay as when the legislature has made such a rule on its own. Either way, a court will be

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<sup>53</sup> As discussed here, a reviewing court could be either a federal court or a higher state court deciding whether the rulemaking court’s action amounted to a taking.

<sup>54</sup> See discussion *infra* Parts III, IV. This Note argues that denying that state courts are imbued with the power to make state law, as a matter of federal law, is contrary to the implementing principle of *Erie*.

requiring the legislature to afford compensation when the legislature believes it should not have to do so. The legislature will always have the option of abandoning the rule instead of paying compensation, so long as the state court's new rule effecting a taking is a common law rule rather than a constitutional one.<sup>55</sup>

Beyond the logistics of paying compensation, concerns about differences in the legislative and judicial processes might also cause one to be skeptical of a judicial takings doctrine. For example, the common law process of courts is understood to be one under which rules are subject to revision with changing circumstances, applications, and judges. All judicial decisions are implicitly subject to overruling by subsequent courts. All legislative rules, however, are also subject to repeal by subsequent legislatures. The fact that common law rules are subject to change does not distinguish judicial rules from legislative ones.<sup>56</sup>

Much more detailed analyses of the sort undertaken thus far in this Section have been thoughtfully articulated elsewhere, particularly by Professor Thompson.<sup>57</sup> There is no need for duplication here, as this Note offers a different and constitutionally based argument for a judicial takings doctrine. Before that argument can be properly understood, however, there remains a need for some background on the Court's apparent indecisiveness on this issue.

### C. History of the Judicial Takings Question

As noted above, a great deal of time and constitutional history have passed since the original drafting of the Fifth Amendment.<sup>58</sup> During this time, the Takings Clause has been held applicable

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<sup>55</sup> For an example of the latter situation, see *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 76 (1980), which reviewed the California Supreme Court's holding that the free speech provisions of the California Constitution required a right of access to private shopping centers. For an interesting debate on this controversial case, see Lillian R. BeVier, Give and Take: Public Use as Due Compensation in *PruneYard*, 64 U. Chi. L. Rev. 71 (1997); Richard A. Epstein, Takings, Exclusivity and Speech: The Legacy of *PruneYard v. Robins*, 64 U. Chi. L. Rev. 21 (1997); Frank Michelman, The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein, 64 U. Chi. L. Rev. 57 (1997).

<sup>56</sup> See Thompson, *supra* note 16, at 1527-29.

<sup>57</sup> See Thompson, *supra* note 16.

<sup>58</sup> For a discussion of the original understanding of the Takings Clause, see Treanor, *supra* note 50.



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against the states through incorporation in the Fourteenth Amendment.<sup>59</sup> Indeed, it was in the very case in which the takings protections were first incorporated that the Court, speaking unanimously on this point through the first Justice Harlan, approached the judicial takings idea for the first time:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.<sup>60</sup>

While this language might seem broad enough to put the issue to bed, the Court in *Chicago, Burlington & Quincy Railroad* seemed to reserve an exception to its broad statement prohibiting “action by a State by any of its officers and agencies . . . depriving a party . . . of valuable property without any, or at least only nominal, compensation.”<sup>61</sup> The verdict of the jury, in deciding the measure of compensation due the railroad, was for *one dollar* (the right was obviously worth more to the parties—the case did go to the Supreme Court), which the Court sustained.<sup>62</sup> More importantly, the Court was not dealing with a purely judicial change in the law, since it was the City Council of Chicago that had originally condemned the railroad’s right of way by ordinance.

The Court first confronted such a *judicial* change in the law in *Muhlker v. New York & Harlem Railroad Co.*, but it was unable to reach a consensus on whether a state court’s overruling of prior precedents could amount to a taking.<sup>63</sup> In that case, the New York Court of Appeals had departed from its prior precedents and denied the plaintiff an easement of light and air, a right the new ele-

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<sup>59</sup> *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233–34 (1897).

<sup>60</sup> *Id.* at 241.

<sup>61</sup> *Id.* at 259 (Brewer, J., dissenting).

<sup>62</sup> *Id.* at 259–60 (Brewer, J., dissenting); see also Thompson, *supra* note 16, at 1463 (discussing the application of takings protections to judicial proceedings).

<sup>63</sup> 197 U.S. 544, 570 (1905).

vated railway was alleged to disturb.<sup>64</sup> While Justice McKenna's plurality opinion reversing the Court of Appeals suggested that states could not skirt the compensation requirement through their courts, he ultimately grounded his decision in the Contracts Clause rather than the Takings Clause.<sup>65</sup> Justice Holmes's dissent more directly addressed the judicial takings question, understanding the case as one of property rights rather than contract.<sup>66</sup> Justice Holmes found nothing in the Constitution requiring "that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss."<sup>67</sup> For this reason, Justice Holmes's dissent has been cited in the literature for the proposition that "property law . . . could be changed at will by the courts without constitutional restrictions."<sup>68</sup>

Upon closer examination, however, Justice Holmes's position appears more nuanced. Justice Holmes first noted that in *Muhlker*, it did not appear that the New York Court of Appeals had "intended to evade constitutional limits," and he suggested that if it had, he would not have been so inclined to affirm.<sup>69</sup> This language implies that Justice Holmes perceived at least some "constitutional

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<sup>64</sup> Id. at 560–61.

<sup>65</sup> Id. at 570 ("We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.").

<sup>66</sup> Id. at 575 (Holmes, J., dissenting) ("What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution.").

<sup>67</sup> Id. at 574 (Holmes, J., dissenting). Holmes would later reiterate this general understanding, stated in broad terms, in *Patterson v. Colorado*:

There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . [I]n general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

205 U.S. 454, 461 (1907). Holmes did note, however, that "[e]xceptions have been held to exist." Id.

<sup>68</sup> Thompson, *supra* note 16, at 1465.

<sup>69</sup> *Muhlker*, 197 U.S. at 576 (Holmes, J., dissenting) ("If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this court think right.").

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limit,” even if it was no more well-defined than not going “too far.”<sup>70</sup> More importantly, Justice Holmes noted that he likely would not have found a taking in this case even if the change in law had been a result of legislative, rather than judicial, action.<sup>71</sup> Unfortunately, Justice Holmes did not indicate whether, if the state action would have amounted to a taking if inflicted by the legislature, he would have maintained that the state judiciary could produce the same effect without running afoul of the Constitution. Perhaps in such a case, like *Stevens v. City of Cannon Beach*<sup>72</sup> or *Matthews v. Bay Head Improvement Ass’n*,<sup>73</sup> he would have found that the state court had attempted to “evade constitutional limits” and he would have been less deferential to its judgment.

A few years later, Justice Holmes’s position apparently prevailed. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, Justice Brandeis made the following announcement in dicta:

The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.<sup>74</sup>

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<sup>70</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

<sup>71</sup> *Muhlker*, 197 U.S. at 576 (Holmes, J., dissenting) (“Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation. Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States.”).

<sup>72</sup> 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994). The judicial taking alleged in *Stevens* originated in *Thornton*; the relevant facts are largely the same.

<sup>73</sup> 471 A.2d 355 (N.J. 1984). For a discussion of *Matthews*, see infra note 97 and accompanying text.

<sup>74</sup> 281 U.S. 673, 681 n.8 (1930).

Justice Brandeis similarly noted that “the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment.”<sup>75</sup> In support of this statement, however, Justice Brandeis offered primarily precedents, respecting only claims of erroneous decisions of state courts, many authored by Justice Holmes,<sup>76</sup> as well as Contracts Clause and Ex Post Facto Clause cases.<sup>77</sup> In general, these cases establish firmly that the Supreme Court, and Justice Holmes in particular, was of no mind to become a court of errors for every erroneous state court decision affecting property where the rule adopted was at least plausible,

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<sup>75</sup> Id. at 680.

<sup>76</sup> Id. at 680 n.7. Justice Brandeis cites *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895), in which the plaintiff’s principal claim was under the Contracts Clause, buttressed by a claim of deprivation of property under the Due Process Clause. As to the Due Process claim, the Court stated: “When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States.” Id. Justice Brandeis also cites *Patterson v. Colorado*, 205 U.S. 454, 461 (1907) (noting that the Supreme Court is not obliged to correct all errors of local tribunals effecting pecuniary loss on the loser); *Willoughby v. City of Chicago*, 235 U.S. 45, 50 (1914) (“Even if the court had overruled earlier decisions it would have interfered with no vested rights of the plaintiffs in error. But it does not appear to have done so, and although its decision may have been unexpected, there was plausible ground for it in the statutes.”) (citations omitted); *O’Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26–27 (1916) (“It should be added that however strong the argument for a different interpretation, the one adopted also was strongly supported, so that there can be no pretence that a perverse reading of the law was used as an excuse for giving a retrospective effect to the law of 1903. The decision was absolutely entitled to respect. It is suggested that the cases cited established a rule of property and that any departure from it violated the plaintiff’s rights under the Fourteenth Amendment. But we already have said that the cases do not establish the rule supposed, and if they did something more would be necessary before the plaintiff could come to this court.”); and *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927) (“We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental ‘principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.’ . . . It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.”) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

<sup>77</sup> As noted, the Contracts Clause and Ex Post Facto Clauses have textual bases for limiting legislative action only. See *supra* note 48 and accompanying text.

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even if unexpected, and not obviously intended to circumvent or evade the compensation requirement.<sup>78</sup> These precedents, however, do appear to leave open room for certain exceptions where it seems that a state court has achieved disingenuously and evasively that which the legislature could not accomplish without the Fifth Amendment requiring compensation.<sup>79</sup> This point may appear slight, but it arguably casts doubt on Professor Thompson's assertion that "by the end of the New Deal, the concept of judicial takings seemed dead."<sup>80</sup>

For Professor Thompson, the case that apparently signaled the death knell of the judicial takings idea, at least temporarily, was *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*<sup>81</sup> There Justice Cardozo held that state courts were at liberty to "hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning."<sup>82</sup> Of course, this view of the common law, which Justice Cardozo acknowledged and Justice Holmes famously described as a "brooding omnipresence in the sky,"<sup>83</sup> is exactly the conception of law generally thought to have been disavowed in *Erie*. It is also the view of the common law that would, if permitted to persist, allow state courts to avoid the Takings Clause completely through the background principles exception in *Lucas*.<sup>84</sup>

At any rate, Professor Thompson identifies a somewhat distinct line of cases beginning with the plurality in *Muhlker*, which held that courts could not abandon their prior precedents in order to insulate what would otherwise be legislative or executive takings by simply stating that the property right claimed to be taken had

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<sup>78</sup> See supra note 76.

<sup>79</sup> See *Patterson*, 205 U.S. at 461.

<sup>80</sup> Thompson, supra note 16, at 1467.

<sup>81</sup> 287 U.S. 358 (1932).

<sup>82</sup> Id. at 365.

<sup>83</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .").

<sup>84</sup> See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari).

never existed in the first place.<sup>85</sup> It does appear that in both lines of cases, with changes in the law originating from judicial and legislative sources, the Court adopted a similar view that it was not its place to correct mere errors, so long as it did not appear that the state court was attempting to evade “constitutional limits,” presumably the requirement of compensation.<sup>86</sup> Reasonably, the Court became more suspicious of evasion, and applied somewhat closer scrutiny, when it seemed that the state legislature and state courts were working together toward the joint effect of denying compensation than when the two branches were acting independently of one another. There does not appear to be a case, however, that lies in the middle of the spectrum, between mere error and apparent collusion, wherein (1) the state court announced the new rule, (2) the United States Supreme Court admitted that if the state legislature had declared the rule it would amount to a taking, but (3) held that no compensation was required because the state courts adopted it instead. Perhaps this is not surprising; a court would have likely been uncomfortable with making such an admission openly, thereby exposing a hole in the takings protections and practically inviting states to take property with their courts instead of their other branches. Nonetheless, the actual scope and sub-

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<sup>85</sup> See, e.g., *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540–41 (1930) (“Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.”) (citations omitted); see also *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Nickel v. Cole*, 256 U.S. 222, 225 (1921) (“[W]hen as here there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.”).

<sup>86</sup> For example, compare Justice Holmes’s dissent in *Muhlker v. New York & Harlem Railroad Co.*, 197 U.S. 545, 576 (1905) (Holmes, J., dissenting), with his opinion for the Court in *Nickel*, 256 U.S. at 225, both indicating that, absent evidence of an intent to evade constitutional mandates, the decisions of state courts will be respected.

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stance of these “constitutional limits” remained largely unarticulated and unexplored.

The Court’s stance on the issue thus continued to be vaguely stated until *Hughes v. Washington* in 1967.<sup>87</sup> In *Hughes*, the Supreme Court of Washington had interpreted a state constitutional provision asserting the state’s ownership of “the beds and shores of all navigable waters . . . up to the line of ordinary high tide” to include all accretions (land gradually deposited by the ocean).<sup>88</sup> Under the federal common law existing at the time of the original grant of property, to which *Hughes* was a successor and which preceded Washington’s entry into the Union, title to all accretions vested in the adjacent upland property owner. The Court decided that the question of title to the accretions was a matter of federal law, rather than state law, and awarded title to *Hughes* under federal common law.

In his concurring opinion, Justice Stewart, recognized the judicial takings problem. He saw the question of title as one of state law, which Washington was surely free to change, given that “the law of real property is, under our Constitution, left to the individual States to develop and administer.”<sup>89</sup> The federal question was only whether Washington should have to pay just compensation under the Takings Clause. Writing only for himself, Justice Stewart reasoned:

We cannot resolve the federal question whether there has been . . . a taking without first making a determination of our own as to who owned the seashore accretions between 1889 [when Washington joined the Union] and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple

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<sup>87</sup> 389 U.S. 290 (1967).

<sup>88</sup> *Id.* at 296 (Stewart, J., concurring).

<sup>89</sup> *Id.* at 295 (Stewart, J., concurring).

device of asserting retroactively that the property it has taken never existed at all.

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... [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation [without compensation] by a State, no less through its courts than through its legislature . . . .<sup>90</sup>

Perhaps Justice Stewart's characterization of a "sudden," "unpredictable" change undeserving of deference is similar to what previous Courts had in mind when they talked about apparent attempts to evade the constitutional issue of compensation. But it is more detailed in its explanation of what federal courts should be looking for, and there was no appearance of collusion between the Washington legislature and the Supreme Court of Washington in this case to trigger heightened suspicion of evasion.<sup>91</sup> In this respect, Justice Stewart (re)introduced the possibility of a judicial takings doctrine with more teeth than had existed for most of the twentieth century. His concurrence, however, has never been followed by a majority of the Court, and the Court has since declined offers to take up the issue again,<sup>92</sup> most recently and notably in *Stevens v. City of Cannon Beach*.<sup>93</sup> The Court quoted Justice Stewart's concurrence with approval in *Bonelli Cattle Co. v. Arizona*, but only as a reason for avoiding resolution of this admittedly difficult constitutional issue.<sup>94</sup>

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<sup>90</sup> Id. at 296–98 (Stewart, J., concurring).

<sup>91</sup> See id. at 294–98 (Stewart, J., concurring).

<sup>92</sup> For example, the Court ignored the issue when it was presented in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82–85 (1980).

<sup>93</sup> 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994). Justice Scalia, who was joined by Justice O'Connor in his dissent from the denial of certiorari, cited Justice Stewart's *Hughes* concurrence for the proposition that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Stevens*, 510 U.S. at 1211–12 (Scalia, J., dissenting from denial of certiorari) (quoting *Hughes*, 389 U.S. at 296–97 (Stewart, J., concurring)).

<sup>94</sup> 414 U.S. 313, 331 (1973). *Bonelli* was reversed by *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977), but the Court ignored the judicial takings issue it had flagged in *Bonelli*. Only one circuit has tentatively adopted a doctrine of judicial takings with respect to water rights since *Hughes*. See *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) (holding that courts cannot deprive individuals of vested



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*D. The Current Landscape*

The primary question of concern here is whether the takings protections prevent state courts from inventing new common law rules, under the guise that they have always been there (that is, retroactively saying there was no property to take in the first place in such a way that upsets reasonably settled expectations), in order to take private property for public use without paying just compensation. As Professor David Bederman has pointed out, one common law doctrine particularly susceptible to this type of creative manipulation is custom, which has proved particularly useful and inexpensive for states wishing to provide increased beach access.<sup>95</sup> The public trust doctrine is another viable candidate for granting public rights of access to private property without compensation, as illustrated in *Matthews v. Bay Head Improvement Ass'n*.<sup>96</sup> The *Mat-*

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water rights without just compensation); *Sotomura v. County of Haw.*, 460 F. Supp. 473, 482–83 (D. Haw. 1978) (same).

<sup>95</sup> Bederman, *supra* note 13, at 1434–46. For the classic and boldest assertion of custom, see *State ex rel. Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969) (holding that the doctrine of custom provides a public right of access to the dry sand area of beaches along the entire Oregon coastline).

<sup>96</sup> 471 A.2d 355 (N.J. 1984). *Matthews*, like *Thornton*, presented a dispute over access to a dry sand beach area between the mean high tide line and the vegetation line. The court stripped the private property owners of the right to exclude by dramatically extending prior precedents, citing the “dynamic nature of the public trust doctrine.” *Id.* at 365. The court extended a prior ruling granting a right of access across municipally owned beach property to privately owned land without even considering whether such an extension should be made, only how far:

In *Avon* and *Deal* our finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality. We now address the extent of the public’s interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches . . . namely, the right to sunbathe and generally enjoy recreational activities.”

*Id.* at 363–64 (citing *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978)). The court went on to confirm both sets of rights. *Id.* at 365. In a telling statement of the court’s confident sense of exemption from the takings protections, the court announced in its best legislative voice: “Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’” *Id.* at 365 (quoting *Avon*, 294 A.2d at

*thews* court did not even attempt to conceal the novelty of its holding, acknowledging that it was not following an “archaic judicial response,” but rather fashioning “an answer to a modern social problem.”<sup>97</sup> It seems likely that many states will be tempted to follow Oregon’s lead in *Thornton* given the Court’s apparent willingness to look the other way in judicial takings cases.<sup>98</sup> As Professor Bederman notes, the possibility of an “end run around *Lucas*” and the takings protections is “real-life,” and “[t]here seems to be no doubt that customary claims to public rights will increase in the coming years, especially as governments discover the benefits of the approach. Custom is a cheap and easy solution to the nagging problem of public rights in private property.”<sup>99</sup> The “nagging problem,” of course, is the constitutional requirement of just compensation.<sup>100</sup>

Whether the doctrine of choice is public trust or custom, it is the conception of the common law as having a “Platonic or ideal existence before the act of declaration”<sup>101</sup> that makes this sleight of hand by state courts possible—a conception deeply intertwined with our understanding of *Erie Railroad Co. v. Tompkins*.

## II. *ERIE*’S CONSTITUTIONAL RATIONALE AND JUDICIAL TAKINGS

Justice Brandeis famously announced in *Erie Railroad Co. v. Tompkins* that the decision of the Court was one of constitutional proportions.<sup>102</sup> After articulating historical and practical reasons for why, he believed, time had proven the *Swift v. Tyson* regime to be incorrect and unworkable, Justice Brandeis admitted that these

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54). Such a doctrine sounds like anything *but* a background principle of state property law.

<sup>97</sup> *Id.* at 365.

<sup>98</sup> See Bederman, *supra* note 13, at 1444 (“The danger that this precept poses to property rights jurisprudence is immense. . . . [M]any states have recognized such a doctrine, and have applied it to property other than dry-sand beaches. Governments at every level are likely to find solace in the doctrine precisely because it affords a way to circumvent due process requirements and just compensation guarantees for entire categories of property.”) (footnotes omitted).

<sup>99</sup> Bederman, *supra* note 13, at 1442, 1446.

<sup>100</sup> It is important to clarify that this Note is not arguing that custom and public trust are wholly illegitimate sources of law. It is simply highlighting that they are susceptible to a particular kind of dangerous creativity, which, as of now, appears unchecked.

<sup>101</sup> *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932).

<sup>102</sup> 304 U.S. 64, 77–78 (1938).

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bases alone would not be enough to convince the Court to overrule *Swift*. A constitutional basis was required:

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.<sup>103</sup>

Justice Brandeis, however, pointed to no specific provision in the Constitution that he found compelled the result in *Erie*.<sup>104</sup> This ambiguity in the *Erie* opinion has created a voluminous debate among legal scholars as to exactly what constitutional principle Justice Brandeis had in mind.<sup>105</sup> Indeed, early critics commonly suggested

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<sup>103</sup> Id. (footnotes omitted).

<sup>104</sup> At least one commentator has argued that Justice Brandeis's failure to point to a specific constitutional provision is "precisely the point." See John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 702–04 (1974) ("The question, here as with respect to any other question of federal power, was whether anything in the Constitution provided a basis for the authority being exerted—and the answer was no . . .").

<sup>105</sup> The literature on *Erie*'s constitutional basis is far too voluminous to acknowledge thoroughly here, but a representative sample should suffice. Much of the early commentary was critical of the *Erie* Court's efforts to constitutionalize the decision. See, e.g., Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267, 278–79 (1946) (noting that commentators have "been wont to consider [Justice Brandeis's constitutional argument] as a dictum, designed to make the overturn of the old doctrine seem more complete and more emphatic. Dictum it surely seems to be.") (footnotes omitted); Walter Wheeler Cook, *The Federal Courts and the Conflict of Laws*, 36 Ill. L. Rev. 493, 515–24 (1942) (same); 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 865–66, 912–15 (1953) (asserting that the constitutional grounds for the *Erie* decision were "totally imaginary"); Arthur John Keeffe et al., *Weary Erie*, 34 Cornell L.Q. 494, 497 (1949) ("Indeed the very assertion of a constitutional argument seems somewhat surprising. . . . The constitutional argument should be recognized for what it is—an attempt to bolster a questionable decision and build the new practice of conformity on a principle so wide and deep that it would be difficult to overturn."). Defenders of *Erie*'s constitutional holding have generally prevailed since this early criticism, but with differing ideas as to exactly what that holding is. See, e.g., Ely, *supra* note 105, at 703 (contending that the prior interpretation of the Rules of Decision Act was "unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*"); Henry J. Friendly, *In Praise of Erie—And of the New Federal*

that no constitutional principle drove *Erie*, and that the mention of the Constitution was merely an attempt to bolster the Court's new statutory construction of the Rules of Decision Act.<sup>106</sup> This Note argues that there *is* an identifiable constitutional principle underlying the *Erie* doctrine. Indeed, that principle lives on today, and it may prove useful in disentangling areas of the law outside of the diversity of citizenship context.

Several primary alternatives for a constitutional rationale are presented in the *Erie* opinion and in the existing literature: equal protection, limited powers of the federal government, separation of powers within the federal government, and federal interference with intrastate separation of powers.<sup>107</sup> This Note addresses these theories in turn and argues that it is the last of them that offers the most coherent and convincing explanation of the constitutional underpinnings of the *Erie* regime, and that once understood, provides an answer to the judicial takings question.<sup>108</sup>

### A. Equal Protection

Justice Brandeis mentioned in his *Erie* opinion that the *Swift* regime “rendered impossible equal protection of the law.”<sup>109</sup> It is be-

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Common Law, 39 N.Y.U. L. Rev. 383, 395 (1964) (finding it “unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not”); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 512 (1954) (describing the “constitutional problem of *Erie*” as “the need of recognizing the state courts as organs of coordinate authority with other branches of state government in the discharge of the constitutional functions of the states”); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 427–28 (1958) [hereinafter Hill, *Erie and the Constitution*] (arguing that “*Erie* does indeed have a constitutional basis—in the sense that our system of federalism is rooted in the Constitution, and that the failure of a federal court to give due regard to state law or to federal law, as the case may be, inevitably thwarts the constitutional scheme of things”); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 Harv. L. Rev. 1682, 1682–83 (1974) (highlighting the principle of separation of powers within the federal government as the constitutional rationale for the *Erie* decision).

<sup>106</sup> See, e.g., Clark, *supra* note 106, at 278.

<sup>107</sup> See discussion and authorities cited in Louise Weinberg, *Federal Courts 10–14* (1994).

<sup>108</sup> The earliest and perhaps ablest articulations of the general argument advanced here, although couched in somewhat different terms, can be found in Hill, *Erie and the Constitution*, *supra* note 106, at 442–47, and Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1025–35 (1953) [hereinafter Hill, *Bankruptcy*].

<sup>109</sup> *Erie*, 304 U.S. at 75.

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yond dispute, however, that *Swift* did not actually constitute a violation of the Equal Protection Clause simply because it allowed for “the application of different legal rules in different forums.”<sup>110</sup> To the contrary, *Erie* itself, as interpreted by *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>111</sup> simply substituted one kind of forum shopping (state-state) for another (federal-state). Additionally, at the time *Erie* was decided, the Equal Protection Clause was only a “last resort of constitutional arguments,”<sup>112</sup> and, by its own terms, did not apply to the federal courts.<sup>113</sup> Given this near universal rejection of equal protection as the underlying constitutional rationale of *Erie*, there is no need to spend more time here thoroughly canvassing the details of these arguments.

*B. Federalism: Limited Powers of the Federal Government*

In the third section of his opinion, Justice Brandeis, drawing on the principles of federalism, stated:

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.

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<sup>110</sup> Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 11 (4th ed. 1998); see also Peter Westen, *After “Life for Erie”—A Reply*, 78 Mich. L. Rev. 971, 980 n.35 (1980) (“Needless to say, in speaking of ‘equal protection,’ Justice Brandeis was not referring to the fourteenth amendment (which, then, applied only to the states) or to any other constitutional limitation.”).

<sup>111</sup> 313 U.S. 487 (1941).

<sup>112</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>113</sup> Principles of equal protection are generally thought to have first been applied against the federal government through the Due Process Clause in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). But see *Buchanan v. Warley*, 245 U.S. 60 (1917) (relying on the Due Process Clause and referencing the Equal Protection Clause in invalidating a city ordinance forbidding blacks from occupying houses in blocks where whites represent the majority of residents); *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) (“[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guaranties of life, liberty, and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race.”).

And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>114</sup>

It cannot be, however, that Justice Brandeis meant to assert that Congress was without power to provide the particular rule of decision in *Erie* itself.<sup>115</sup> Congress had, even at that time, been afforded ample authority to regulate the railroads under the commerce power.<sup>116</sup> Of course, not every area of general law over which the federal courts took cognizance under *Swift* would have come within the ambit of the commerce power at that time. Thus, to the extent that declaring common law rules was viewed by the *Erie* Court as lawmaking,<sup>117</sup> the *Swift* regime was at least susceptible to some unconstitutional applications, as where federal courts declared rules of decision that Congress itself would have been without power to supply. But it would seem peculiar indeed for the Court to pick a case in which Congress *did* have the power to supply the substantive rule of decision to make such a landmark constitutional ruling. Such an understanding of *Erie* would mean that the case's constitutional rationale was merely advisory, and that the holding of the case rested solely on the Court's statutory construction of the Rules of Decision Act.

Granted, if one interpretation of a statute would make the statute unconstitutional in some of its applications and another construction would not, it is sensible, other things being equal, to prefer the one that would not. But Justice Brandeis, as quoted above, expressly disavowed the idea that *Erie* rested solely on statutory construction. It might be argued that Justice Brandeis only indicated that the "course pursued" was unconstitutional,<sup>118</sup> that is, that

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<sup>114</sup> *Erie*, 304 U.S. at 78. This is perhaps the most common theory invoked by *Erie*'s constitutional defenders. See, e.g., Friendly, *supra* note 106, at 384. For a more recent and very thorough analysis of *Erie*'s constitutional rationale, see Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 172 (2000), finding it based primarily on the principle that the federal "legislative and judicial powers were coextensive."

<sup>115</sup> See Ely, *supra* note 105, at 703 n.62; see also Purcell, *supra* note 115, at 173 ("[I]t seemed relatively clear that Congress could enact rules of law that would cover [*Erie*'s] particular facts.").

<sup>116</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) ("Commerce, undoubtedly, is traffic.").

<sup>117</sup> See *infra* Section II.C for further exploration of this assumption.

<sup>118</sup> *Erie*, 304 U.S. at 78.

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the course was susceptible of unconstitutional applications, but that he did not go so far as to say it would be unconstitutional to apply the *Swift* doctrine to the particular facts of *Erie*. While such a reading is plausible, the adjacent language—“compels us to do so”<sup>119</sup>—would seem to connote “compels us to do so” *in this case*. Thus, although the Court was, to some extent, reaching out for the constitutional issue by asking for extra briefing on possible constitutional issues,<sup>120</sup> it was not seeking merely to avoid a potential constitutional issue, but rather to decide one.

Further, notwithstanding the Court’s recent attempts to place some discernable limits on Congress’s power under the Commerce Clause,<sup>121</sup> Congress still retains extremely broad power to legislate in areas of traditional general law. Thus, if the constitutional rationale of *Erie* was restricted to areas in which Congress had no power to supply the substantive rule of decision, one would expect it to have been all but eviscerated with the expansion of the Commerce Clause to its modern breadth.<sup>122</sup> Of course, it has not.<sup>123</sup> Indeed, in the very years that the Court was virtually abandoning all

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

<sup>120</sup> See *id.* at 82 (Butler, J., dissenting) (noting that “[n]o constitutional question was suggested or argued below or here”).

<sup>121</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>122</sup> See Howard P. Fink et al., *Federal Courts in the 21st Century* 506 (2d ed. 2002) (“If we assume the ultimate holding of *Erie* to be that, at least in the absence of express congressional legislation, the federal courts cannot create common law remedies in areas where Congress has no legislative power under Article I, expansive views of Congress’s Article I powers since 1938 have significantly limited the effect of *Erie*.”). Fink and his co-authors examine “the four cases that most strongly influenced Brandeis in his 1938 opinion,” *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U.S. 368 (1893), *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1864), *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910), and *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), and suggest that under the modern expansive view of the commerce power, Congress would now be thought to have the power to supply the rule of decision in all four cases. Fink et al., *supra*, at 506–07. Thus, if the constitutional holding of *Erie* is predicated solely on the notion of co-extensive powers, it must at least be conceded that the doctrine has considerably less scope today than it did when *Erie* was decided.

<sup>123</sup> While depletion of the constitutional rationale would leave the *Erie* regime in place as a matter of statutory construction, one would not expect such widespread influence and universal adherence to follow a decision lacking a viable constitutional basis. Indeed, *Erie* and its progeny still take up at least a week in every law school civil procedure class.

efforts to limit the scope of the commerce power,<sup>124</sup> it was finding new ways to expand the reach of *Erie*.<sup>125</sup> This is not to say that federalism was not a relevant constitutional concern for the Court in *Erie*. Undoubtedly it was. But the limited and enumerated powers idea cannot explain the full *Erie* doctrine. For the Court to have decided *Erie* the way it did, and for the doctrine to have persisted as it has in the face of our modern commerce power, some other constitutional principle must also have been in play.

### C. Separation of Powers Within the Federal Government

Another constitutional principle possibly underlying the *Erie* decision is the idea that, assuming Congress has the power to supply a substantive rule of decision in a certain area, it is *only* Congress that can do so and not the federal courts.<sup>126</sup> All of the legislative

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<sup>124</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding a provision in the Civil Rights Act of 1964 prohibiting restaurants from discriminating on the basis of race, color, religion, or national origin as a valid exercise of Congress's Commerce Clause powers); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress has authority under the Commerce Clause to regulate a farmer's production of wheat, where the farmer did not sell the crop through the channels of interstate commerce, but intended it for personal consumption).

<sup>125</sup> See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (construing a federal statute narrowly to avoid a constitutional question and citing *Erie* for the proposition that "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases"). The facts of *Bernhardt* pose a problem for adherents to the view that *Erie*'s constitutional holding is based on only the principle of coextensive powers: "Insofar as [it] has been due to the assumption that an enactment of Congress is invulnerable to attack on *Erie* grounds, the *Bernhardt* case compels reexamination of the question." Hill, *Erie* and the Constitution, *supra* note 106, at 436; see also Ely, *supra* note 105, at 699 (citing *Bernhardt* and noting that "the *Erie* doctrine" had "gain[ed] control of all choices between federal and state law in diversity actions"). Ely also detailed the lengthy dispute on whether to adopt privilege rules in the Federal Rules of Evidence, which largely centered on whether "the *Erie* doctrine" permitted displacing state privilege law with federal rules in diversity cases. *Id.* at 694.

<sup>126</sup> For a sampling of the proponents of this separation of powers view, see George D. Brown, *Federal Common Law and The Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 *Pace L. Rev.* 229, 237 (1992); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *Pace L. Rev.* 263 (1992); Henry P. Monaghan, *Hart and Wechsler's The Federal Courts and the Federal System*, 87 *Harv. L. Rev.* 889, 892 (1974) (book review). But see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. Chi. L. Rev.* 1 (1985); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 *Const.*



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power of the United States is vested in Congress, not the judiciary, and therefore it is unconstitutional for the federal courts routinely to create their own common law rules. Proponents of this theory would assert that Justice Brandeis, in declaring that “[t]here is no federal general common law,”<sup>127</sup> meant more specifically that federal courts do not have the power to *create* general federal common law.

As an initial matter, such an argument seems impossible to square with the enduring areas of federal common law.<sup>128</sup> While one might contend that there is an important distinction between general federal common law and post-*Erie* specialized federal common law in that the latter is confined to areas where there is a uniquely federal interest and Congress could have supplied a rule of decision, such an argument necessarily grounds *Erie* wholly in the principle of limited powers and is subject to the limitations discussed in Section II.B.

Further, both of these potential rationales for *Erie*—separation of powers within the federal government and the limited powers of the federal government—assume that courts, when declaring a common law rule, are effectively legislating, that is, doing the same thing as legislatures do—making law, rather than finding it. While this assumption may have become generally accepted in the time between *Swift* and *Erie*, it seems most unlikely that such an idea was hard-wired into the Constitution. Indeed, the pre-modern theory of judges finding the law rather than making law was as widely accepted at the time of the framing as our positivist and legal realist conception is now.<sup>129</sup> As Chief Justice Marshall expounded in *Osborn v. Bank of the United States*:

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Comment. 285 (1993) and Weinberg, *supra* note 40, for a series of arguments as to the legitimacy of federal common law.

<sup>127</sup> *Erie*, 304 U.S. at 78.

<sup>128</sup> In post-*Erie* cases, where federal courts have decided that federal law applies over state law, yet no rule has been supplied by Congress, the courts have felt free to provide their own rules, creating pockets of specialized federal common law. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); see also Friendly, *supra* note 106, at 407 (“By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding in all courts because of its source, to develop within a quarter century into a powerful unifying force.”) (citation omitted).

<sup>129</sup> See White, *supra* note 18, at 21–25.

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.<sup>130</sup>

Given Article III's broad grant of "judicial Power,"<sup>131</sup> as applicable even to cases where federal law would not supply the rule of decision (diversity cases, for example), it seems that this grant was not understood to encompass the power to discern and declare common law rules, at least in the absence of a state statute or an authoritative pronouncement from a state's highest court on a given issue. Indeed, in a diversity case, where state law was completely silent on an issue, a federal court was necessarily obliged to find an applicable common law rule on its own.

A key question is, of course, whether the judicial power includes the right to ignore erroneous pronouncements from a state's highest court and to supplant the erroneous rule with the correct one. If one genuinely believes that there is "one august corpus"<sup>132</sup> of common law existing apart from any particular sovereign, and that the judicial power is simply to discern it without any exercise of will but through mere legal discretion, then there is no reason to think that as a constitutional matter, federal courts should only possess such authority when a state has been completely silent—as long as the individual states harbor the same conception. If a state constitution did not delegate any law-making authority to the state courts, but only law-finding power (providing some evidence of what the law is), then why would a state be offended when a federal court declined to follow its courts' precedents? Under this belief, the state courts have no authority to create positive law on behalf of the state. Thus, the law the state courts and the federal

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<sup>130</sup> 22 U.S. (9 Wheat.) 738, 866 (1824).

<sup>131</sup> U.S. Const. art. III, § 1.

<sup>132</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

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courts are applying is not state-specific law at all, but only general law, existing independently of any particular state. The state, as a sovereign, is understood not to have acted or expressed a preference for one rule over another, but only adopted the whole “august corpus” of general law. When only a state court has addressed an issue thought to be of general law, then the state as a sovereign has effectively been silent (save its election to adopt the general law).

Thus, if the original understanding was that the judicial power included the power to declare common law rules, at least whenever a state had been silent on the issue, then the only way for this idea of separation of powers within the federal government to be driving the *Erie* decision, constitutionally speaking, is if that external conception of the common law had become so thoroughly discredited, and common law judging had come to be viewed so much like legislating, that the judicial power could no longer constitutionally be read as encompassing the power to declare such rules exercising independent judgment because it encroached upon the legislative power. That is, it had become unconstitutional for federal courts to think of the common law as a “brooding omnipresence in the sky,” despite the Framers’ understanding.<sup>133</sup> As convenient as this position might be for purposes of this Note, it seems untenable. As Section II.D argues, positivism and legal realism are not constitutionally mandated. While in Part I above, this Note endeavors to show one of the potential abuses of allowing judges to find creative refuge, indeed complete freedom, in such a pre-modern conception of the common law when the judges do not actually feel constrained

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<sup>133</sup> Indeed, if original intent mattered so little as to the Constitution, it is curious to think why, concerning a statute, Justice Brandeis placed so much stock in Charles Warren’s discovery of Senator Oliver Ellsworth’s previous draft of the First Judiciary Act. See *Erie*, 304 U.S. at 72, 73 & n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49 (1923)). Even *Erie*’s proponents have been skeptical of the value of Warren’s research in reading the Rules of Decision Act. See Friendly, *supra* note 106, at 390–91 (“On what quicksand any attempt to interpret so venerable a statute on the basis of an unexplained change from an earlier draft must rest. . . . For the Court to have abrogated a construction so long accepted by Congress, on the basis of an ‘archeological discovery’ or any other basis going only to statutory interpretation, would have been a naked exercise of power—far more fairly subject to the criticism it would deservedly have attracted than the constitutional ground on which decision was placed.” (quoting *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 370 (1959))).

by it, it does not argue here that such a conception is, or was at the time *Erie* was decided, per se unconstitutional.

*D. Federal Interference with State Separation of Powers*

A “brooding omnipresence” conception of the law might lead to unconstitutional results, however, if it served to violate the deference owed by the federal government to the states in deciding how to allocate power within their own individual state governments.<sup>134</sup> This particular argument contemplates that the “august corpus” may still be out there, but that it is trumped by a state judicial decision just as by statute whenever the state says it is. Even if the federal courts still choose to adhere to the “brooding omnipresence” view, states do not have to, and where the states choose not to, the federal government has to respect that choice.<sup>135</sup>

Begin with the premise that each state legislature possesses the authority to supplant as many rules of the general law as it chooses, as long as the state rules of decision are not preempted by a federal law and do not contravene a principle enumerated in the U.S. Constitution.<sup>136</sup> Further, even under *Swift*, at no point have federal courts sitting in diversity been free to ignore such valid state stat-

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<sup>134</sup> See *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) (“It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States.”); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State . . .”).

<sup>135</sup> See Hill, *Erie and the Constitution*, supra note 106, at 443–44 (“[T]he difference between *Swift v. Tyson* and *Erie R.R. v. Tompkins* reflects essentially a changed jurisprudence rather than a changed view of the Constitution. For even under *Swift v. Tyson* the federal courts recognized their duty to follow state law which was recognizable as such. . . . When, with the changing jurisprudential climate, the common law ceased to be regarded as the ‘brooding omnipresence’ of Justice Holmes’ celebrated phrase—when the view became dominant that the law of a state resides in the decisions of its courts as well as in its statutes—it also became evident that . . . the practice [under *Swift*] had to cease by virtue of constitutional assumptions long antedating *Erie*.”) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

<sup>136</sup> Louisiana, for example, did not adopt the common law at all.

utes when their choice-of-law inquiry dictates that state law should apply. Indeed, under such circumstances, it would have been “an unconstitutional assumption of powers”<sup>137</sup> for the federal courts to create a federal rule.<sup>138</sup> If these points are conceded, it is in turn granted that the state has the ultimate authority to supply the substantive rule of decision in such a case, and that when a state has made such a decision, the federal courts are constitutionally bound to abide by it. This principle is embodied in the Tenth Amendment, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>139</sup> While Justice Brandeis has often been faulted for failing to identify a particular constitutional principle in his *Erie* opinion, he practically quoted the Tenth Amendment when he said, “[w]e merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion *are reserved* by the Constitution to the several States.”<sup>140</sup>

Conceding that where no federal law is implicated, the states have a constitutional right to supply the rule of decision, the federal courts must next determine which mechanisms of state government might evidence a choice by the state, as a sovereign, to supply such a rule. While the Constitution guarantees that the states shall have a republican form of government, all of the details

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<sup>137</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>138</sup> As Professor Hill has pointed out, this practice was not based solely on the Rules of Decision Act, for even in federal equity cases, where the Act did not apply, federal courts applied state law “which was cognizable as such.” Hill, *Erie* and the Constitution, *supra* note 106, at 443; see also *Bank of Hamilton v. Dudley’s Lessee*, 27 U.S. (2 Pet.) 492, 525 (1829) (noting that, even before *Swift* was decided, that “the occupant law of Ohio, must, in conformity with the 34th section of the judicial act, be regarded as a rule of decision in the courts of the United States. The laws of the states, and the occupant law, like others, would be so regarded independent of that special enactment”); Hill, *Bankruptcy*, *supra* note 109, at 1026 (“The federal courts realized that they were acting in areas where, under the Constitution, only the states could ‘make’ substantive law. They therefore stood ready to follow distinctively state law which, by their standards, was recognizable as such. Thus it was said that the federal courts would have followed state statutory law even if the Rules of Decision Act had never been adopted.”). Thus considered, § 34 merely codifies the preexisting constitutional arrangement of powers between the federal government and the states.

<sup>139</sup> U.S. Const. amend. X.

<sup>140</sup> *Erie*, 304 U.S. at 80 (emphasis added).

of how to arrange state government—how to divide powers amongst the different branches and carry them into execution—are left to the individual states to decide for themselves. Aside from guaranteeing a republican form, the federal government has no power to police or review such state decisions. Because the Constitution does not grant the federal government such authority, it is accordingly reserved for the states. In his *Erie* opinion, Justice Brandeis quoted Justice Field at length on this issue:

“[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.”<sup>141</sup>

Justice Field’s frequent repetition of the word “independence” suggests that the Constitution prohibits not only federal overreaching into areas of substantive law reserved for the states, but also federal interference with states’ independence to allocate power between the branches of state government. This is the same idea that Justice Holmes emphasized in his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, on which the *Erie* Court later relied in overruling that decision:

If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. I see no reason why it should have less effect when it speaks by its other voice. If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to

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<sup>141</sup> *Erie*, 304 U.S. at 78–79 (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

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follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.<sup>142</sup>

Justice Holmes, thus, found an implicit provision in all state constitutions delegating to the state courts the power to make positive law on behalf of the state simply by virtue of the fact that the state constitution establishes a supreme court. Justice Brandeis, in his opinion for the Court in *Erie*, reiterated this observation by Justice Holmes: “[T]he voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.”<sup>143</sup>

For Justice Holmes’s part at least, this is a decidedly legal realist interpretation of state constitutions. It assumes that by delegating judicial power to state courts, states, as sovereigns, intended for their judges to create laws on behalf of the state that are equally binding as statutes. Of course, a state constitution is not the only means by which a state may delegate legislative power. As far as the federal government is concerned, even if all the lawmaking power of a state is originally vested in the state’s legislature, the legislature remains free to delegate some of that authority to the state courts.<sup>144</sup> If it is true, however, that states have delegated only limited “judicial power” to their courts in the way Chief Justice Marshall understood it, that is, the power to find the law some-

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<sup>142</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534–35 (1928) (Holmes, J., dissenting) (citations omitted).

<sup>143</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 535 (Holmes, J., dissenting)) (alteration in original).

<sup>144</sup> States would also be free, without federal interference, to block such delegations by maintaining a much stricter non-delegation doctrine than the federal government has chosen.

where in the “brooding omnipresence” but never to create it as an act of sovereign will, the *Swift* regime might still be appropriate. That choice is left to the states.

Many state constitutions, however, are simply unclear as to what kind of power they intend the judiciary to possess and they do not express a particular conception of the sources of the common law.<sup>145</sup> Not every state has made an explicit statement of how it wants federal courts sitting in diversity to treat its judicial decisions, either as positive law or merely evidence of what the general law is. Thus, federal courts maintain a constitutional obligation to discern whether a state as a sovereign has chosen to articulate authoritative positive law, binding as statute, through its judiciary, but they possess only scant and ambiguous evidence as to what states have actually decided. This being the case, the *Erie* question ultimately becomes: which way should the constitutional default rule run?<sup>146</sup> Which way are states as sovereigns most likely to conceive of their judicial decisions these days?

Justice Brandeis answered this question in *Erie* by again referring to Justice Holmes’s *Taxicab* dissent:

“[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”<sup>147</sup>

By acknowledging that the relevant decisional inquiry is into the source of “law *in the sense in which courts speak of it today*,” Justice Holmes and later Justice Brandeis for the Court, drove to the heart of the constitutional matter. While Justice Holmes believed

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<sup>145</sup> Many state constitutions simply vest the state “judicial power” in one supreme court and in such lower courts as the legislature may establish. See, e.g., Or. Const. art. VII, § 1; Va. Const. art. VI, § 1. Of course, as discussed in Part II, the concept of judicial power has evolved considerably over time.

<sup>146</sup> Professors Jack Goldsmith and Steven Walt also have noticed that *Erie* must be only a default rule: “For if the state legislature directed that judicial decisions are not to count as a source of state law, presumably *Erie* would not require a federal court to apply state decisional law.” Goldsmith & Walt, *supra* note 41, at 711.

<sup>147</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533–34 (Holmes, J., dissenting)).



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that the “brooding omnipresence” theory of the common law was a “fallacy,” the fact that it may have been fallacious is not what made it unconstitutional. Rather, the point is that, by 1938, federal courts understood perfectly well that states do not merely intend for their judicial decisions to be evidence of what the general law is. The *Erie* Court recognized the more likely reality that states intend for their courts to have the power to create real state law with the authority of the state behind it.<sup>148</sup> Thus, in *Erie*, the time had come for the constitutional default rule to reflect such a reality.<sup>149</sup> If an individual state wanted to reinstitute the *Swift* regime as to its own judicial decisions, it could override this default rule with a clear statement.<sup>150</sup> Of course, it seems ridiculous to imagine a state making such a declaration today, but that is precisely the point. *Erie* is, at least for now, the right default rule.<sup>151</sup>

The constitutional rule of *Erie* is not that judge-made law must be considered equal to statutory law, nor that judges make law instead of finding it, nor even that law only exists with a particular sovereign behind it. It is simply that the national government must respect a state’s right to choose the voice through which it articulates its law. The *Erie* default rule holds that when there is no federal law in play, judge-made law must be considered equal to statutory law *unless the state says it is not*. Judges can make law or find law *unless the state says they cannot*. The default rule controls unless the state opts back into the *Swift* regime with a clear statement in the state constitution or a statute. Thus, when the federal

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<sup>148</sup> See supra note 136.

<sup>149</sup> Note that under this theory, the truth of either doctrine, positivism or “brooding omnipresence,” is irrelevant. See Goldsmith & Walt, supra note 41. What matters, for purposes of setting a default rule that most faithfully honors states’ choices of the voice through which they articulate their law, is what kind of power states generally intend their judiciaries to wield.

<sup>150</sup> Such a statement might read: “The judicial decisions of the state courts are not the law of this state, but merely evidence of what the general law is, and federal courts, when sitting in diversity, should exercise their own independent judgment in discerning the general law.”

<sup>151</sup> The obligation to discern a state’s decision on this issue is thus ongoing. In Professor Berman’s terms, the *Erie* default rule is not itself part of the constitutional meaning, but is a “decision” rule that is subject to change in the long run based on changing conditions. What is not subject to change is the “operative” rule that the federal government must abide by intra-state separation of powers decisions. See Berman, supra note 43.

government either does not have the power to supply a rule of decision or has chosen not to supply one,<sup>152</sup> the Constitution gives the states the right to create laws, as tendered by the legislature or the judiciary, without federal interference.

### III. APPLICATION TO THE JUDICIAL TAKINGS PROBLEM

So conceived, *Erie* provides federal courts with a presumption that states intend for the law announced in their courts to be real and binding state law, just like the law announced through their statutes. But if states truly intend for it to “not [be] a matter of federal concern” “whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision”<sup>153</sup> as the *Erie* default rule holds they do, then states must accept the bitter consequences of this decision with the sweet. The Tenth Amendment acknowledges as much by stating that there are some powers, though not delegated to the United States, that are “prohibited by [the Constitution] to the States.”<sup>154</sup> The power to take private property for public use without just compensation is such a prohibition. While this proscription gives the federal courts the authority to define the scope of what constitutes a taking, in making this determination, they are necessarily limited by *Erie*’s constitutional holding. Specifically, *Erie* imposes the obligation to treat state law created by the judiciary as real state law, which is in turn capable of effecting a taking.

It is at least arguable, however, that *Erie*’s decisional holding, the default rule presuming states’ delegation of general lawmaking authority to the state courts, is irrelevant in the context of state real property law because even under *Swift*, property was considered to be a matter of local law on which the federal courts deferred to the decisions of the local tribunals. While it is true that under the *Swift* regime, federal courts would give due respect to local tribunals’ authority, such deference was granted under the lingering assumption

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<sup>152</sup> To what extent and under what circumstances this federal choice may be exercised by the federal courts as well as by Congress is not a debate this Note intends to enter, although “a considerable pond of ink,” in Judge Friendly’s terms, has already been spilled on the question. Friendly, *supra* note 106, at 383. See sources cited in *supra* note 127 for both sides of the issue.

<sup>153</sup> *Erie*, 304 U.S. at 78.

<sup>154</sup> U.S. Const. amend. X.

that local judges were only exercising the will of the law, not the will of the judge, nor more importantly, the will of the state.<sup>155</sup> *Erie* recognized that state judges should be presumed not only to be authoritative law-finders but also lawmakers, empowered to announce the will of the state—to willfully change the law. It follows, however, that the will of the state is subject to the takings protections.

This Note's introductory example is illustrative of this point. Recall the ruling of the Oregon Supreme Court in *State ex rel. Thornton v. Hay*, which held that the common law doctrine of custom provided a public right of access to the dry sand area of beaches along the entire Oregon coastline.<sup>156</sup> Under *Erie*'s default rule, Oregon as a sovereign is presumed to have made a choice that its courts should have the power not only to uphold the state's existing background principles, but also to announce new and "unprecedented" ones that potentially create new public rights in previously private property. Should Oregon desire to restrict the lawmaking authority of its courts, it need only make a clear statement of its intent to opt out of *Erie*'s default rule (and abide by it).<sup>157</sup> But, if Oregon chooses not to opt out of the *Erie* default rule such that the *Thornton* Court was acting properly within its delegated powers, then Oregon must also face the fact that its lawmaking powers, as a sovereign, are subject to certain specific prohibitions by the Federal Constitution. The Oregon Supreme Court, in exercising the will of the state, becomes subject to federal takings review, just as if the Oregon legislature had passed a statute explicitly granting the people of Oregon a right of access to enjoy the dry sand beaches of the state. Whether such a law constitutes a taking is then a federal question, including, with varying degrees of deference, the question of whether prior

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<sup>155</sup> See *infra* Section II.D.

<sup>156</sup> 462 P.2d 671 (Or. 1969).

<sup>157</sup> An interesting and difficult question would be presented if Oregon purported to make such a clear statement but the Oregon courts did not confine themselves to such a law-finding role, continuing to fashion novel solutions to "modern social problems" as the New Jersey court did in *Matthews*. In such a situation, federal courts would be obligated to discern Oregon's choice with respect to the role of its courts based on conflicting evidence—what the state says and what the courts actually do. While this is admittedly a delicate inquiry, in order to prevent circumvention of the takings protections, federal courts should place the primary objective focus on what state courts do. A "clear statement" becomes entirely opaque if it is paid no attention by the state courts.

Oregon law granted private property rights in the dry sand area in the first place. The Federal Constitution gives Oregon the choice as to judicial lawmaking, but it forces Oregon to abide by its choice.

Admittedly, answering the question on the prior content of Oregon law will frequently be troubling for reviewing courts because state courts are particularly capable of wearing two hats, a traditional law-finding hat and a modern lawmaking hat. Essentially, the question is whether the state court was wearing its lawmaking hat or its law-finding hat in this case. Justice Stewart's test from *Hughes v. Washington* is useful in this respect: Does the Oregon ruling in *Thornton* "arguably conform[] to reasonable expectations"?<sup>158</sup> If so, a federal court must accept it on its own terms, as taking "from no man anything which he has had a legitimate reason to regard as exclusively his."<sup>159</sup> If, however, the Oregon ruling "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents,"<sup>160</sup> then a federal court should treat the Oregon court as wearing its legislative hat, creating a new rule that is subject to takings review.

While answering the background principles question puts federal courts in an awkward position, it is a question the federal courts should be asking in the traditional legislative and executive takings scenarios as well.<sup>161</sup> That is, the judicial takings cases do not add a new problem for federal courts in takings review, they simply force the reviewing court to address squarely a question that they should have been asking all along. The background principles problem is much more easily ignored, however, when a statute or administrative regulation is implicated.<sup>162</sup> Since statutes by their nature re-

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<sup>158</sup> 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

<sup>159</sup> *Thornton*, 462 P.2d at 678.

<sup>160</sup> *Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

<sup>161</sup> *Lucas* itself required the Court to make this kind of judgment. Recall that the South Carolina Supreme Court had held that the state was not required to compensate Lucas because the state had simply acted to prevent a harmful or noxious use of the land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009-10 (1992).

<sup>162</sup> See Thompson, *supra* note 16, at 1535-38 ("The problem is not generally acknowledged—perhaps because of a legal assumption that legislatures and agencies always change property rights when they act."); see also *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (referring to the state court's holding that no property right existed as mere "ipse dixit"); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (finding that a taking had been effected and ignoring a claim that the right in the property allegedly taken did not exist).

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place common law rules with new prospective ones, it is assumed that the rights, duties, and restrictions imposed by statutes are in fact new.

It is much more difficult to distinguish a judicial decision announcing a new common law rule, actually replacing another, from a decision merely articulating a new application of prior principles, distinguishing prior precedents rather than overruling them. Federal courts in takings cases have generally felt free to ignore the previous status of state law when a statute is claimed to have effected a taking.<sup>163</sup> Reviewing courts seem to assume, not without reason, that if the contested right had really never been part of an owner's title, the legislature would not have gone through the trouble of acting. If a state legislature purported to articulate in a statute merely what the common law of the state has always been, adding nothing new, federal courts would likely not hesitate to second-guess that judgment in finding a taking.

It is important to notice, however, that the *Erie* principle cuts both ways: if the state is free to give its courts lawmaking power, it is also free to give its legislature declaratory law-finding power.<sup>164</sup> Federal courts should thus be making the background principles inquiry independently in *all* takings cases, whether the action that precipitated the case was judicial or legislative. It is a difficulty that is simply built into the idea of taking property; a preliminary question will always be whether the property right existed in the first place. The Takings Clause, as incorporated, places the obligation on the federal courts to come up with an answer, however difficult, no matter where the state law originates.

Beyond the background principles question, there are other potential conceptual difficulties associated with a judicial takings doctrine that warrant brief acknowledgement, although what follows here is more tentative and suggestive than what has preceded it. In particular, Professor Thompson has pointed out that answering the

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<sup>163</sup> Recall from Part I that the Court has long held that states may not "insulate a legislative taking from constitutional review by asserting that a property right never existed." Thompson, *supra* note 16, at 1464.

<sup>164</sup> See Blais, *supra* note 13, at 6–7 (arguing that statutes as well as the common law make important contributions to state background principles of property law, and that the *Lucas* Court's apparent assertion that such background principles emanate only from the courts is mistaken).

background principles question puts pressure on how we understand “property” in constitutional terms.<sup>165</sup> If states have autonomy in defining the content of property law, do they also have the final say in delineating which kinds of rights and economic expectations are property rights and which are not for constitutional purposes (a pure positivist approach)? Or does the Constitution itself hold some definition of property, making it an issue of federal law whether a certain set of state-granted rights qualify as property rights under the Takings Clause (a more normative approach)? Under the pure positivist approach, the idea of judicial takings (and takings in general) quickly becomes unintelligible given the existence of indeterminacy in prior law, especially in judicial decisions. As Professor Thompson explains:

Our state systems of property law are beset, at a purely positive level, by a large degree of indeterminacy. . . . What one judge claims to be a change cannot objectively be determined to be a change. By labeling a particular decision a “judicial taking,” the reviewing court is simply imposing its own framework for determining law on the court whose decision is at issue (the “rulemaking court”). Unless the reviewing court is willing to make its own property law, it must accept for constitutional purposes what the rulemaking court has determined to be prior law. . . . At this point, the rulemaking court’s choice of whether to *declare* that it is changing the law becomes merely a trigger with which the rulemaking court can turn the just compensation provisions of the Constitution on and off.<sup>166</sup>

If the reviewing court, however, is willing to review prior law based on reasonable expectations rather than on a purely positivist basis, as Justice Stewart suggested, then the concept of judicial takings becomes more workable. Where a purely positivist inquiry may yield hopeless indeterminacy, reasonable expectations are, in general, more readily discerned. As Professor Thompson notes:

[T]he expectations flowing from statutes and judicial decisions seem far more determinate than the law itself. Read at any single point in time, decisions often point us to a particular conclu-

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<sup>165</sup> Thompson, *supra* note 16, at 1522–40.

<sup>166</sup> *Id.* at 1534–35.

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sion—even while they, and the structure of our law more generally, leave a foundation for change. It is these decisional signals that permit lawyers to offer opinions to clients and allow treatise writers to summarize the law.<sup>167</sup>

Further, if the reviewing court is willing to adopt a more normative meaning of constitutional property then the court also has a basis for distinguishing property expectations, protected by the Takings Clause, from other economic expectations, which receive no constitutional mention. Based on a synthesis of existing Supreme Court case law, Professor Thomas Merrill has recently proposed a “federal patterning definition” for property in the takings context. Professor Merrill’s test asks “whether nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets.”<sup>168</sup> If the answer is yes, then for constitutional purposes, the right is a property right. Thus, states still have ultimate authority over what rights are granted, but the Federal Constitution dictates which of those rights are property within the meaning of the Takings Clause.

Armed with this constitutional definition and Justice Stewart’s “reasonable expectations” test from *Hughes*, federal courts then might fashion a coherent and bounded judicial takings doctrine: Where a state court ruling is “unpredictable in terms of the relevant precedents,” upsetting “reasonable expectations” in the vested “right to exclude others from discrete assets,” federal courts should treat the ruling as a new rule rather than merely an application of background principles. That is, the federal court should understand the state rulemaking court to be wearing its legislative hat. At that point, the Court can embark on its intricate analysis of whether such a new rule constitutes a taking.

## CONCLUSION

In his seminal article on judicial takings, Professor Thompson recognized that perhaps the most important and troubling concern presented by a judicial takings doctrine is the prospect of federal courts second-guessing state courts on questions of state property

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<sup>167</sup> Id. at 1539 (citation omitted).

<sup>168</sup> Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 969 (2000) (emphasis removed).

law.<sup>169</sup> As Professor Thompson noted, federalism arguments do not “explain why we should apply different constitutional constraints to state courts than to state legislatures and administrative agencies.”<sup>170</sup> Professor Thompson reasoned:

By adopting the notion of judicial takings, of course, we would be affecting the current interactions and balance of authority between the legislative, administrative and judicial branches of state government. . . . By not subjecting judicial decisions to the takings protections, however, the Supreme Court is also affecting that division of power. . . . [A]n imbalance in compensation requirements introduces an exogenous factor into a state’s choice of the proper branch to make changes in property law, which pushes issues toward the judiciary. By treating all branches of the government equally under the takings protections, we would actually be relieving federal interference with state decisionmaking.<sup>171</sup>

Accepting this argument, the modest goal of this Note has been to articulate a constitutional principle, rather than simply a policy choice, as to why such federal interference must be eschewed. This Note has contended that the rule of *Erie Railroad Co. v. Tompkins* requires that the federal government not interfere with state separation of powers decisions, and that state courts be presumed to have the authority to make real law, binding as statute, on behalf of the states. Imbued with such power, in making law, state courts are at least capable of offending the takings protections of the Constitution. For the federal government to ignore such a capability would not only allow easy circumvention of the Takings Clause but also introduce an impermissible “exogenous factor into a state’s choice of the proper branch to make changes in property law”<sup>172</sup> in violation of *Erie*’s constitutional holding. Though a daunting charge, answering the background principles question is inherent in the complex enterprise of one sovereign policing changes in another sovereign’s laws. So long as state courts wield law-making power, exercising the will of the state by articulating

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<sup>169</sup> Thompson, *supra* note 16, at 1509.

<sup>170</sup> *Id.* at 1509.

<sup>171</sup> *Id.* at 1510–11.

<sup>172</sup> *Id.* at 1511.



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new legal rules, and so long as states are prohibited from changing legal rules in ways that take private property for public use without just compensation, federal courts must take up the task.