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ARTICLES

PROPERTY, FEDERALISM, AND JURISPRUDENCE: A COMMENT ON *LUCAS* AND JUDICIAL CONSERVATISM

FRANK I. MICHELMAN*

I

Professor Robin West has explained in a helpful way what people generally have in mind when speaking in the United States today of judicial conservatism.¹ A given judge's work, West says, can be any or all of three kinds of conservative: market, social, and legal.² Market-conservative judicial work, paraphrasing West, favors institutions and practices designed to reward competitive success and preserve to the successful the fruits of their success.³ Social-conservative judicial work uses law's authority to sustain the social dominance of established mainstream conventional moralities and cultural forms.⁴ Legal-conservative judicial work locates authority in an already-given law, absolving the judicial office of creative and critical responsibility.⁵

Certainly a given judge's work may rank high on any one of these three judicial-conservative dimensions, regardless of how it registers on the others. What of the converse? Can high scores on all three dimensions, en bloc, possibly frame the work of any single judge? If so, then that judge is a judicial-conservative paragon.

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1. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651-62 (1990).

2. *Id.* at 654-58.

3. *Id.* at 657-58.

4. *Id.* at 654-55.

5. *Id.* at 655-57.

The country's leading candidate at the moment for this accolade is Justice Antonin Scalia.⁶

One question I raise here is whether such conservative all-roundedness is possible. The meaning of that question, I grant you, may not be perfectly clear. After all, there sit our judicial conservatives. Can there be any question about their possibility? No, surely not; but there may still be a question about whether they are always, at every moment, quite everything they would seem.

II

Perhaps one pictures current American judicial conservatives pursuing certain programmatic aims, trying to steer in certain directions the present and future course of American constitutional law. Two such putative judicial-conservative projects will be on the table here. One we can call the property project (or, occasionally, the regulatory-taking project). It aims at bolstering national constitutional protections for private property holdings against loss of value to onerous state regulations.⁷

Another ongoing judicial-conservative project is one we can call by the name Justice Black once fastened on it: Our Federalism.⁸ "Our Federalism" names a certain disposition on the part of fed-

6. Chief Justice William Rehnquist has certainly also earned honorable mention, and the early signs are promising for Justice Clarence Thomas. For signs of Justice Scalia's social conservatism, consider his opinions in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). For signs of legal conservatism, consider, in addition to the foregoing opinions, *Employment Div. v. Smith*, 494 U.S. 872 (1990) (Scalia, J.), along with Justice Scalia's extra-judicial encomia to "originalism" and to "the rule of law as a law of rules." See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For signs of market conservatism, consider Justice Scalia's opinions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment); *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

7. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan*, 483 U.S. 825; see also Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1413-15 (1993) (discussing the emergence of a conservative judiciary during the Reagan and Bush Administrations, and "the Taking Clause's new found prominence on the conservative agenda").

8. See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

eral judges regarding their dealings with state law and state courts. It encompasses three related concerns: (i) a concern to keep clear the demarcations between federal law and state law, and between federal and state adjudicative provinces; (ii) a concern to maintain within the federal judiciary a deportment of respect for the competence and responsibility of the state judiciaries; and (iii) a more general concern to maintain within the federal judiciary a posture of judicial restraint.

The judicial-conservative property project obviously sounds in "market" conservatism. Our Federalism's deflection of authority from federal courts can be for federal judges a form of "legal" conservatism.⁹ A part of my thesis is that between these two judicial-conservative projects—the property (or regulatory-taking) project and Our Federalism—there is a bad fit. Indeed, it has yet to be shown that the two can be held together convincingly

You might fairly ask what news there is supposed to be in that. It's an old story, after all, that Reconstruction inscribed into American constitutionalism a rather sharp break (of emphasis, at least) between an older federalistic regard for the jurisprudential severalty and semi-sovereignty of the States and a newer liberal-universalist regard for basic human rights to be guaranteed by national power against state neglect or oppression. A modern paradigm is the Warren Court pruning back federalism in the field of race.¹⁰ When judges mount the bench for whom property figures strongly as a basic human interest and constitutional concern, we can expect to find them similarly clearing out spaces in Our Federalism for national enforcement of property rights. The story in its broad outline is not new. My hope in these pages is to enrich it in detail and nuance.

Warren Court judicial liberals not only made federalism yield to civil rights. Under the constitutional banner of "liberty," they na-

9. See, e.g., Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1002-03 (1985) (referring to the "decision-ducking" aspect of various sub-practices of judicial federalism, such as certification and abstention).

10. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); cf. *Boynton v. Virginia*, 364 U.S. 454, 457-60 (1960) (holding that the Interstate Commerce Act's prohibition on racial discrimination in transportation services extends to independent businesses located in transit terminals).

tionalized portions of the law regarding those dimensions of liberty picked out by terms such as "privacy" and "autonomy,"¹¹ thus producing new legal protections for certain aspects of personal liberty. Might we not, then, expect present-day judicial conservatives to make similar use of the Constitution's "property" clauses to nationalize some aspects of the law of property?¹² From these reflections sprang the bright idea that first prompted this Essay: the idea that such a conservative "property" project would be harder to bring off than the liberal "liberty" project, by reason of a certain deep discrepancy in the ways in which lawyers conceive of property and liberty, respectively.

Liberty, I thought, lends itself readily to judicial nationalization because "liberty" is, for lawyers, intuitively a category whose scope and content are known independently of current legal facts. When it comes to knowing what liberty is, it doesn't matter at all what the extant laws of one State or another say about it. Liberty is what it is, regardless of what the laws say. If the laws are not in accord with liberty, then liberty can stand while the laws fall.¹³ Liberty thus understood is what we may loosely call a *naturalistic*—as opposed to a *positivistic*—normative category. I say "loosely" because to assert that a category's content is determined without reference to *current* legal facts is not necessarily to make that content a matter of transcendent reason beyond all contingencies of human action; it does not, for example, necessarily deny that the content of constitutional "liberty" is in some part controlled by *past* social and political facts. A judge who tested current laws against a "traditional" conception of constitutional liberty, firmly set in a social past, would still be treating "liberty"

11. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

12. See *supra* note 7 and accompanying text.

13. An opposite approach is not unthinkable. Justices now sitting have opined that "liberty" interests subject to procedural due process protection are those that either are specifically named in the Bill of Rights or, alternatively, "attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul v. Davis*, 424 U.S. 693, 710 (1976) (Rehnquist, J.). See David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324-28 (1976) (analyzing and criticizing Justice Rehnquist's reasoning in the *Paul* decision).

naturalistically in our special sense of severing the category's content from the dictates of current law.¹⁴

Property, I thought, figures differently—non-naturalistically—in contemporary American legal thought. By an argument that reaches back at least to Bentham,¹⁵ property's scope and content—property's existence, even—are completely dependent upon standing law. Thus, in contrast with liberty, property *cannot* stand while the laws fall. My property is that to which the laws currently in force give me a secured entitlement. In a vacuum of such laws, there can be no property.¹⁶

This is what is widely called a legal-positivist view of property. From it (when we take it fully seriously) flow some interesting consequences. *First*, the term "property" in the Fourteenth Amendment denotes nothing except what some corpus of extant positive law happens to make into property. *Second*, the Federal Constitution does not itself contain the requisite corpus of positive law. *Third*, the constitutional term "property," therefore, can denote nothing except what some extra-constitutional cadre or cadres of positive lawmakers from time to time may happen to make into property. *Fourth*, these cadres can be none other than the duly authorized lawmakers of the several States—their respective legislatures and common law judiciaries. If one grants the foregoing argument (as the legal-positivist view of constitutional "property" apparently requires), then it follows logically that effective national judicial protection for property must mean giving federal judges the last word on questions of the meanings of laws emanating from state authorities. But this seems to be a gross contravention of Our Federalism.

The general problem here is easy to identify. It arises out of the fact that certain clauses in the Federal Constitution, while plainly

14. May not such an approach also claim to be "positivist" in the sense of judicial self-abnegation emphasized by Robert Cover, according to which the judge's role is to apply "the will of others" and "in no event" to exercise a "personal will of the judge?" See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 132 (1975). Such a claim must rest on an unspoken, problematic premise: that "tradition" supplies, in a way or degree that "natural reason" does not, a normative source that is clearly distinct from any personal "will" of the judge. See *infra* notes 61-69 and accompanying text.

15. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 68-69 (R. Hildreth trans., 1975).

16. For further explanation, see *infra* pp. 308-11, 313-14.

designed to guarantee certain classes of individual interests against oppressive state lawmaking, speak in terms of general-law categories, such as contract and property, whose delineation generally has been thought to fall within the reserved province of state lawmaking, beyond the national government's delegated lawmaking powers.¹⁷ Again, the problem is anything but new. The concern that state courts might defeat federal constitutional claims by evasive manipulation of the state general-law categories was present at the creation of federal judicial review of state court decisions¹⁸ and has been recurrent ever since.¹⁹

Within the sweep of this history, there might be nothing untoward about the property project of contemporary judicial conservatives. It might be a normal case—a resurgence of federal judicial resolve to vindicate against state legal machination a national constitutional norm of regard for a specified class of individual rights. That is doubtless how it would seem, if the participant federal judges had produced a convincing naturalistic account of constitutional “property” upon which to take their stand. So far, however, they have not. Until they do, the question will remain of how a joint commitment to both Our Federalism and nationally guaranteed property rights can possibly be held together coherently with the prevailing legal-positivist account of constitutional “property.”

The lesson here is not exactly what I had thought starting out; it is not that judicial nationalization of property rights is harder to square with Our Federalism than judicial nationalization of personal-liberty rights, because property but not liberty is deeply understood by lawyers to be a totally law-dependent concept. The

17. This view of general-law provinciality gained its most emphatic form in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), but it has prevailed throughout our constitutional history. Even under the doctrine of *Swift v. Tyson*, the common law spontaneously applied by federal courts in diversity-of-citizenship cases was held subordinate to state legislation. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

18. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (determining the correct application of Virginia law to a land-title dispute affected by federal treaties); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (reversing Virginia Court of Appeals' refusal to follow the Supreme Court's mandate in *Fairfax's Devisee*).

19. See, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98-99 (1938).

truth, I think, is more interesting. Undoubtedly, we in our lifetimes have witnessed and experienced the conjunction of a positivistic inflection of "property" with a naturalistic inflection of "liberty" This development, however, is no manifestation of anything stably fixed in the concepts of property and liberty It is a manifestation, rather, of constitutional politics.

"Property," after all, had a strong naturalistic force in American constitutional argument in the *Lochner* era,²⁰ and in the Gilded Age before that.²¹ Positivization of "property" (the constitutional category) is a more recent occurrence, the work of the counter-*Lochner* New Deal and Warren Courts. The Warren Court, of course, also infused a liberal natural-law content into "liberty" (the constitutional category).²²

As a rough generalization, then: Nationalizers naturalize; federalizers positivize. Nationalizers pour naturalistic content into constitutional categories of legally protected interests and rights; federalizers drain them of it.²³ That much seems constant. What is plainly not constant is which constitutional categories are at any given time undergoing naturation or denaturation. In a nice example of what J.M. Balkin calls "ideological drift,"²⁴ today's judicial conservatives work at reversing, in this respect, certain efforts of their predecessors. Determined to nationalize a general law of property, today's judicial conservatives show signs of renaturalizing constitutional "property"²⁵

20. See, e.g., *Truax v. Corrigan*, 257 U.S. 312 (1921); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1904).

21. See William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 Wis. L. Rev. 767; Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Rita J. Simon & Steven Spitzer eds., 1980).

22. See Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1315-20 & n.261 (1991).

23. See LeBel, *supra* note 9, at 1023 ("[T]he suggestion that [geographical] subdivisions reflect different concepts of morality seems startlingly inappropriate to the political ethos accepted in this country. [T]he American Civil War seemingly laid to rest the ideal that [different notions of right and wrong] would be officially implemented according to geographic location.")

24. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375.

25. More fully described, the situation is somewhat complex. Roughly speaking, conservatives favor protection for the "old" property of private-sector tangible wealth (along with its

III

Clauses in the Fifth and Fourteenth Amendments command, in effect, that governments in this country shall pay for any property they may take from private owners.²⁶ By settled usage, we call this constitutional command the Taking Clause. By settled understanding, we place beyond the reach of this command certain classes of government actions that do in fact deprive someone of a valued mode of enjoying or exploiting property. One such exception especially concerns us here: According to the prevalent legal-positivist view of property, no taking of property, in the constitutional sense, can occur unless a government does something to upset a property-based advantage that is just then legally secured to the private owner, by law then in force.

Not every existent and substantial property-based advantage meets this test. Consider this case:²⁷ My home, let's say, sits on a parcel of land that I own in fee simple absolute, as fully as anyone legally can own a parcel of land. Adjacent to my land is a vacant lot owned by the city. Over a span of many years, the city has allowed me to keep a vegetable garden on the vacant lot that it owns. The city has graciously granted me, for free, what property lawyers would call a revocable license for a garden. As a result, the land parcel containing my home—the parcel that I unquestionably own as my property—has yielded more value to me over the years than it otherwise would have done.

intangible paper signifiers), while liberals want protection for the "new" property of government "benefits." In its fully unfolded form, then, the contemporary conservative movement would be toward renaturalizing (and concomitantly protecting) old property, see *infra* text accompanying notes 56-59, while ultra-positivizing (and concomitantly unprotecting) new property. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559 (1985) (Rehnquist, J., dissenting); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (Rehnquist, J., plurality); Shapiro, *supra* note 13, at 322-24. Partial positivization (leaving to "nature" the question of basic procedural fairness in administration) was the only way to make government benefits into protected property at all, and judicial liberals were responsible for that development. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Brennan, J.).

26. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *id.* amend. XIV, § 1 ("No State shall deprive any person of property, without due process of law. . ."); *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897) (holding uncompensated takings to be deprivations of property without due process of law).

27. For a graphic example in the annals of jurisprudence, see *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

This year, however, the city calls off the deal and revokes the license. They do so, they say, because they want to provide a habitat for owls and owls don't like gardeners. Having the owls around is supposed to be a public benefit. If so, then I as a member of the public share in that benefit. It's not, however, any more of a benefit to me than to anyone else. The Supreme Court has often said that a purpose of the Taking Clause is "to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."²⁸ It may look, then, as though the Taking Clause must require the city to compensate me for my special loss of the gardening privilege. After all, I have been stripped of a property-based advantage that was real and substantial while it lasted.

Settled doctrine, however, says the city doesn't owe me anything. Settled doctrine says that because no secure prospect of keeping the gardening privilege indefinitely was ever contained within my legally recognized property entitlement, the revocation of the privilege by the city doesn't count in the Constitution's sight as a real loss of property. Real losses of property occur only when someone is stripped of some property-based advantage that they've been led *by the law* to count upon as really theirs to keep.²⁹

Right or wrong, good or bad, ultimately tenable or not,³⁰ this legal-positivist way of thinking about property is, by and large, a given, an unquestioned starting point, in everyday legal argumentation under the Taking Clause. It means that no constitutionally significant taking of property can occur unless some government in some way *perpetrates a departure from some then-existent body of law*, upon which the complaining party might appropriately have relied as securing to him or her some property-based advantage. Obviously, the city by revoking its temporary license to me has not perpetrated any new legal departure; it merely has exercised its own rights under existing law.

Now, precisely what body or bodies of law are we talking about here? In everyday legal argumentation, we are talking about bodies

28. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

29. *See, e.g., Willow River*, 324 U.S. at 502-03.

30. For probing critique, see Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991).

of property law maintained by the several States. The Supreme Court generally has said that the Federal Constitution does not itself advance any particular views, or mandate any particular rules or standards, concerning who gets title to which property under what circumstances, or concerning what precise set of legally secured advantages goes along with being granted the status of legal owner of one or another kind or piece of property. Rather, it is a commonplace of Our Federalism that these matters are left for definition by bodies of state law that the States are free to shape as they severally choose.³¹

If that is so, you may wonder how state officers or lawmakers ever could be seen to take property for which the Taking Clause commands a compensation payment? One answer is that it is always possible for state officers, and even state lawmakers, to act at a given point in time so as to strip a person of some property-like or property-based advantage that the State's body of property law, *in force at that same point in time*, does in fact secure to that person. If the state action is not of that kind—stripping owners of advantages secured to them by state law just then in force—then, from a legal-positivist view, it cannot count as a taking of property.

This state of the doctrine is fraught with possible consequences for judicial federalism. This state of the doctrine means that questions about the content and meaning of historical state property law are potentially in issue every time someone complains in court that a state government has violated the Federal Constitution by taking property without paying for it. If a taking of property can occur only when a government in some way perpetrates a departure from the then-existing body of property law, then in order to tell whether a given state action takes property you have to know what the State's property law as a matter of fact is—what that law as a matter of fact says—at the moment when the action complained of takes place.

Questions about the historical content and meaning of state property law thus may figure in taking cases—and this means, potentially, all such cases—as a special kind of question of fact. In the framework of Our Federalism, questions about the content and

31. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

meaning of state law normally are perceived as falling within the special domains of state courts.³² Of course, not all state judiciaries are dominated or controlled by judicial conservatives. To the extent that they are not, Our Federalism's apparent leaning toward strong deference to state judiciaries in taking cases opens a wide door to possible hindrance of efforts by conservative federal judges to revitalize constitutional safeguards for property through what I've called the regulatory-taking project.

IV

Nothing could better illustrate the situation I have described than the case of *Lucas v. South Carolina Coastal Council*.³³ In June of 1992, the United States Supreme Court handed down a ruling in the *Lucas* case. The Court, however, did not decide the case conclusively at that time. The reasons why it did not are wrapped up with everything I've said so far.

At a time when no enacted statute of South Carolina prohibited the building of houses there, Mr. Lucas bought fee simple titles to two parcels of land near the South Carolina seacoast.³⁴ Thereafter, the South Carolina legislature enacted a statute banning any significant building construction on land in that area.³⁵ As house lots, the parcels Lucas bought would have had a market value of about \$1 million, but the statutory prohibition made them close to worthless on the market.³⁶ The declared purpose of the statute was to protect South Carolina's ocean beaches and their dunes—valuable public resources of the state—against erosion and destruction as a consequence of nearby building construction.³⁷ Lucas himself agreed (as did all the Justices of the U.S. Supreme Court) that South Carolina's goal of preventing beach erosion fell easily within the range of the state's proper governmental concerns

32. This perception prompts quite a number of rules and practices regarding jurisdiction, abstention, and so forth.

33. 112 S. Ct. 2886 (1992).

34. *Id.* at 2889.

35. *Id.*

36. *See id.* at 2890, 2892.

37. *Id.* at 2896 & n.10.

and that prohibiting construction on land in the coastal zone was a reasonable way of pursuing that goal.³⁸

What Mr. Lucas didn't see was why he rather than the taxpayers of South Carolina should foot the bill for a \$1 million share of the cost of securing this public benefit. He contended that the Taking Clause required the State to spread the burden to its taxpayers by writing him a check to cover his \$1 million market loss. Lucas was thus pressing against the State what is called an inverse condemnation claim, for what is called a regulatory taking. A claim for a regulatory taking is a claim that a State has taken property from you, in effect, by imposing an onerous legal restriction on the way you are allowed to use some piece of property to which you still hold title. An inverse condemnation claim is a claim for money that the State allegedly owes you, by force of constitutional mandate, for property that it allegedly took from you without compensating you for it as the Taking Clause commands.

Although Lucas meant his claim to be based on the Federal Constitution, he filed his case in a South Carolina state trial court. Our Federalism left him no choice. Where state courts are authorized by state law (as they are in South Carolina) to adjudicate inverse condemnation claims, the U.S. Supreme Court requires federal district courts to ignore such claims unless and until they have been rejected by the courts of the State concerned.³⁹

The South Carolina Supreme Court rejected Lucas' taking-of-property claim as a matter of law. It believed that a regulatory restriction of property use cannot amount to a taking of property, as long as the restriction is aptly designed to protect a significant public value against harm or destruction.⁴⁰ The U.S. Supreme Court disagreed. In an opinion by Justice Scalia, the Court held—subject to an important proviso—that a State's regulatory

38. See *id.* at 2896-97.

39. The rough idea is that until that has happened, it cannot yet be clear that "the State" has committed the constitutional impropriety consisting of an *uncompensated* taking of property. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (holding that a constitutional claim for uncompensated deprivation of property does not ripen until the property owner has pursued without success all avenues provided by the State to obtain compensation).

40. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).

restriction of land use can be a taking of property in the constitutional sense, and it is (generally speaking) a taking when it deprives an owner of a land parcel of all economically beneficial use of the parcel.⁴¹

Under Justice Scalia's reasoning, a State cannot avoid this result just by showing that it has a very strong reason of public policy for imposing the restriction. Why, after all, should that matter? The direct effect of saying that property has been taken from Lucas is not to bar South Carolina from carrying out its program of land use restriction in aid of its policy of dune preservation. The direct effect is only to require the State to spread to all of its taxpayers the million dollar loss to the value of Lucas' land, occasioned by the State's choice of this particular means of securing a public benefit. What could be fairer?

Well, nothing as long as you are fully satisfied that Lucas is truly suffering a property loss in this case. But is he not clearly suffering such a loss, given the stipulated facts that his land securely free of the building restriction is worth a million dollars on the market and with the restriction in force is worth hardly anything? The answer to that is: It's not so clear. You have to keep in mind the legal-positivist view of property. According to that view, a new South Carolina statute that forecloses Lucas' opportunity to build houses on his land might very well not affect his property. In order to make that determination, we need to know a fact about South Carolina property law as it stood just prior to the enactment of the statute.

Justice Scalia and his Court fully understood this point. I have already mentioned that the Court's holding was made subject to a proviso. Now let us examine the proviso. In its broadest formulation, it is this: A State's regulatory restriction of land use, even one that obliterates the economic value of a parcel of land to its current owner, cannot count as a taking of property if exposure to restriction of that kind already "inhere[s] in the restrictions that background principles of the State's law of property and nuisance place upon land ownership."⁴² In such a case, liability to

41. *Lucas*, 112 S. Ct. at 2893-95.

42. *Id.* at 2900.

restriction always already encumbers every land title claiming legal recognition under that same body of law.

Having gone that far, Justice Scalia and his Court then shunted Lucas' case back to the South Carolina Supreme Court for a determination of what we can now see is a crucial factual question about the content and meaning of historical South Carolina property law: Did that law, or did it not, contain a norm—a rule or principle—whose effect is to deny to owners of land (situated as Lucas' was) a secure freedom to build (as Lucas proposed to build)?

Justice Scalia's opinion made plain, however, that his Court did not intend for the state court's determination of that question to be final. Rather, it would be subject to the U.S. Supreme Court's own subsequent examination of the determination's "objective reasonableness" as an application of "relevant" state-law "precedents."⁴³

V

Imagine that the South Carolina court on remand of the *Lucas* case decides against Lucas and hands down the following opinion:⁴⁴

As we understand the United States Supreme Court, we are now asked to decide whether the annals of South Carolina property law contain material fairly prefiguring the potential liability of land like Lucas' to be subjected to the kind of statutory restriction on use that Lucas says took property from him. If the answer is yes, then potential liability to such a restriction was already inherent in Lucas' legal property title at the moment when he acquired it, so that actual statutory enactment of the restriction did not take from Lucas any property entitlement that he ever truly had.

43. *Id.* at 2902 n.18.

44. In fact, the South Carolina court on remand responded in a quite different manner from what my text imagines. Construing the U.S. Supreme Court's *Lucas* opinion as putting to it a question of whether the state's Coastal Council "possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land," the court said that its "research [has not] uncovered any such common law principle" and accordingly decided this phase of the case in Lucas' favor. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). We shall see below what may have led the South Carolina court to take such a narrow view of the opening left it by Justice Scalia's opinion for a possible decision in favor of the State.

The issue before us is deeply layered. The deepest layer seems to us to be this: In order to say precisely what consequences are fairly prefigured by an "objectively reasonable" reading of a body of legal material, a *corpus juris*, you have to posit something about the jurisprudential spirit or interpretative attitude with which the material is conventionally approached and consulted. We can imagine a legal culture—a "law-of-rules" culture, let us call it—in which refusing compensation to Lucas now would be unreasonable, outrageous, a repudiation of what Justice Scalia calls the "historical compact" promising a decent regard for the institution of private property.⁴⁵ The clearest case of such a legal culture would be one that is both strongly libertarian and strongly formalist. The twin premises of such a culture would be these: First, the default position, in the absence of express positive law to the contrary, would be absolute freedom on the part of property owners to use their property as they choose. Second, nothing would count as express positive law to the contrary unless it took the form of a specific, virtually self-applying rule-statement, something like "building houses in dunelands is forbidden." More spacious principles of right and wrong, whose applications to specific cases require exercises of judgments having more contestable outcomes, would not in such a law-of-rules jurisprudence count as law at all.

What we have just described is a possible legal culture. It is not, however, the legal culture of South Carolina. South Carolina is a common-law jurisdiction. To common lawyers, asking whether a given consequence "inheres in" the main body of a State's law is the same as asking whether that consequence is fairly prefigured by a prudent extrapolation of the precedential trajectories that are fairly legible in the material. To put it another way: Law, for us, is an adaptive body of general principles, not a frozen list of sharply specific rules and rulings. Citizenship here encompasses responsibility for constantly adjusting one's actions and expectations to that evolving body of principles, among which—we need hardly point out—are principles of deference by all to common needs and interests of the people of South Carolina that from time to time gain wide recognition as important.

Salient among our law's long-entrenched principles of property law is that owners of property shall refrain from using what

45. *Lucas*, 112 S. Ct. at 2899-2900.

they own in ways that unreasonably impair other people's—including the public's—use and enjoyment of what they own. Another long established principle here is that the ocean beaches and dunelands are a public trust for all the people of this State. It is true that in the past, and indeed until quite recently, owners of duneland property have in practice been allowed the freedom of putting houses there. It is true that prior to the statute of which Lucas complains no South Carolina law or decision had ever declared that building houses on or near dunelands went beyond the normal liberties of a landowner. It is, however, equally true that no law or decision had ever declared irrevocable the freedom of house-building in the dunes.

Our law makes allowance for the fact that what appears to one age to be innocent use of one's own property may sometimes justifiably come to appear to a successor age to be an unreasonable encroachment on the property-based interests of others or of the public at large. As Justice Scalia wrote in his opinion in this very case, the law of nuisance contains the principle that "changed circumstances or new knowledge may make what was previously permissible no longer so."⁴⁶ This capacity of the common law—the "background" law—to extend itself to new conditions is today, and has long been understood to be, an integral part of this State's background principles of property law. As such it enters into and inheres in all property titles claiming recognition under our law, including the titles acquired by Mr. Lucas. Case dismissed.

For convenience, I'm going to call the sort of response to Lucas' claim that I've just sketched a "jurisprudence of principles response."⁴⁷ There are clear signs in Justice Scalia's *Lucas* opin-

46. *Id.* at 2901.

47. There is also a more radically revisionist way of understanding the mock opinion—one that, with a cue from Margaret Jane Radin, we may call a "jurisprudence of culture" response:

[T]he existence of property regimes, their phenomenological detail, is connected with culture and not just with government action narrowly conceived. [O]ur very recognition of the existence of property rights is intertwined with our perceptions of their justice. There is no sharp demarcation between empirical and normative questions, and cultural commitments are reflected in the way we view either kind of question.

[G]overnment and culture are not separate. Legal regimes both express and help to shape culture, and in that function they have symbolic force

ion—signs that I will describe specifically later on—that he and his Court do not intend to let States use this sort of response as a way of defeating claims that highly onerous restrictions of land use amount to compensable takings of property. It is not difficult to think of possible reasons why they would not. Judicial conservatives, to repeat, do not control the judiciaries in all of the States, perhaps not in most of them. It could well be that a significant number of state judiciaries, dealing with regulatory taking claims in the aftermath of the *Lucas* decision, honestly will see their States' background laws of property and nuisance in the light of a jurisprudence of adaptive and evolving principles including expansive principles of public trust and social responsibility, much as does my imagined South Carolina court. Some state judiciaries may be spurred to such a view by political outlooks that are hostile to beefed-up constitutional protection for property, or they may be spurred just by desires to help minimize their States' exposures to regulatory-takings liabilities.

If the jurisprudence-of-principles response is, in principle, allowed to defeat a regulatory-taking claim, then the regulatory-taking project—the *Lucas* Court's apparent drive to put some muscle back into constitutional protection for property against costly regulation—is at the mercy of state judiciaries. The reason is that the jurisprudence-of-principles response, if allowed at all, seems deployable by any moderately capable state judge to justify uncompensated imposition of *any* state regulatory restriction of land

.The culture of private property in some states [seems] to be evolving toward an understanding that beaches are a special resource not treated the same as ordinary objects of property. The legal system influence[s] this cultural evolution, but the cultural evolution also influence[s] the legal system. The understanding seem[s] to be that both free public access to enjoyment of the resource, and conservation of the resource for future public enjoyment, [are] important enough to attenuate, as a matter of natural right, the possibilities for full private ownership of beach property. The cultural understanding seem[s] to be that the stereotyped private property regime, with its broad discretion of owners to control use and exclusion [is], with respect to this particular resource, wrong.

Margaret Jane Radin, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, in *COMPPELLING GOVERNMENT INTERESTS: THE MYSTERY OF CONSTITUTIONAL ANALYSIS* (Stephen E. Gottlieb ed., forthcoming) (manuscript at 241-44, on file with the *William and Mary Law Review*).

use that passes the basic due process test of rational relation to a legitimate state goal—no matter how confiscatory the regulation's impact and no matter how sharply deviant from past practice some may find it.⁴⁸

One can see, then, how embrace of the regulatory-taking project might dispose the *Lucas* Court to want to resist the jurisprudence-of-principles response. More difficult to see is how the Court possibly can resist it, without making hash of another stance toward state law and state adjudication that judicial conservatives profess to cherish. Of course I mean the stance affectionately known as Our Federalism.

VI

Picture the U.S. Supreme Court rejecting the jurisprudence-of-principles response to the *Lucas* remand that I imaginatively put together for the South Carolina court. The insult to Our Federalism would seem massive. The matter at issue is the content and meaning of "background principles" of *South Carolina law*. The question is what restrictions on land use are and are not fairly prefigured in, or conscientiously inferable from, that State's corpus juris. How can the Federal Supreme Court credibly purport to know better in this matter than the state supreme court? What I have called a jurisprudence-of-principles response by a state supreme court would almost certainly not be facially implausible. If any sort of question seems to demand deference to a state judiciary, this question of the prevailing "jurisprudential spirit" in a State looks like it.⁴⁹

We now have before us what seems like an impasse between two apparent projects of contemporary judicial conservatives, the regulatory-taking project and Our Federalism. Next, let us consider some possible escapes.

48. See John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENV. L. 1, 7 (1993) ("In essence, the law of nuisance provides a common law immunity from takings challenges.").

49. See, e.g., LeBel, *supra* note 9, at 1038 (noting the state court's presumptive superior knowledge of the particular state's "decisional milieu," meaning "the total environment within which law is crafted—a complex set of specific factors that affect the content of legal rules").

There may be fifty States, but does it necessarily follow that there are in America fifty different bodies of general background principles of property and nuisance law? Why couldn't it be that there is only one such body, in which all the States participate? Why couldn't it be that the one body of background law is a uniform national possession? If it were, then federal judges could answer for its content and meaning directly, with no need at all to take instruction from state judges.⁵⁰

Passages in Justice Scalia's *Lucas* opinion suggest that he might have just such a notion somewhere in mind. He writes in places as if there is just one American background law of property and nuisance—supportive, as it happens, of Lucas' claim—that is common to the national jurisdiction and all the state jurisdictions. "It seems unlikely," opines the Justice, "that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land."⁵¹ Could Justice Scalia here be intimating a unified or standard American "background" law that he regards as *eo ipso* the law of South Carolina?

It seems that Justice Scalia could not have meant exactly *that*, unless perchance he is the ghost incarnate of *Swift v. Tyson*.⁵² *Swift*, you will recall, is the case that stood for the notion of a "federal general common law," repudiated in *Erie Railroad v. Tompkins*.⁵³ As *the* founding document of modern American judicial federalism, *Erie* famously explained, on legal-positivist grounds, why in the American federal system there can be no such general background law of the country.

50. On that understanding, we could explain Justice Scalia's remand of the *Lucas* case to the South Carolina court not as a quest for facts about South Carolina law that are best known to that court, but as an act of comity meant to give the South Carolina judges a fair crack at deciding the case under newly-minted federal constitutional doctrine. See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991).

51. *Lucas*, 112 S. Ct. at 2901. It is probably accidental that Justice Scalia chose to support that proposition by a citation to *Curtin v. Benson*, 222 U.S. 78 (1911), an obscure case involving a challenge to a restriction imposed by the federal government on the use of private land under federal jurisdiction because the land was located within the boundaries of a national park.

52. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

53. 304 U.S. 64, 78 (1938).

“ [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.

[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.”⁵⁴

It would be extremely surprising if the *Lucas* decision turned out to carry in its innards a disguised attack on the premises of *Erie*, which doesn't seem to be the sort of decision to be overruled sub silentio. If perchance one did feel compelled to read *Lucas* as doing that, then one certainly would have confirmed the sense of deep dissonance between the regulatory-taking project and Our Federalism.

But hang on a minute, you say There could be a uniformly binding body of American background property law about which federal judges are positioned to know as much or more than state judges, without its being any kind of *general* federal law It could be federal *constitutional* law⁵⁵ Specifically, it could be a body of norms extruded by the Fifth and Fourteenth Amendments' protections for private property—a sort of minimum content of property law impressed upon all the States by force of the Federal Constitution.⁵⁶ Such a constitutionally mandated minimum content of property law logically could contain the sub-rule that ownership of a parcel of land always includes at least the liberty of putting that parcel to whatever counts for it as an “essential use,” along with a corollary presumption that “essential use” includes a family-size house.

54. *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533-34, 535 (1928) (Holmes, J., dissenting)).

55. I bypass the question of whether this would be constitutional “common law” subject to congressional revision. See Henry P. Monaghan, *The Supreme Court, 1974 Term; Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9-10 (1975) (positing federal judicial power to “create a sub-order of ‘quasi-constitutional’ law of a remedial, substantive, and procedural character to vindicate constitutional liberties”).

56. See, e.g., Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

In such a view, there would be no offense to *Erie*. There may be, however, other obstacles to ascribing this line of thought to Justice Scalia. We could start by pointing to its deviation from the Court's standard legal-positivist property mantra: Property interests "are not created by the Constitution," the mantra goes. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."⁵⁷ To be honest, though, I don't yet see much of a problem. It could be perfectly reasonable to say that the Federal Constitution mandates upon the States a minimum content of property law, a common substrate, while all the rest of property law, elaborations and superstructures that give the law its concrete shape and content, are given by the diverse positive laws of the several States.

A more serious doubt is whether the stance described is available to Justice Scalia, considering what Our Federalism specifically means to him. To speak of a "minimum content" of property is to flirt dangerously with a constitutional jurisprudence of natural law in the strong sense. To speak of a minimum content defined in part by intelligible essences—defined in part by "essential uses" of property that are objectively cognizable by judges—is seemingly to close the deal, to move from flirtation to espousal.

It is tempting to ask whether Justice Scalia can do this without taking leave of himself. If "property" in the Fourteenth Amendment mandates a minimum natural-law content, then what about "liberty?" If a United States Supreme Court Justice can know that property's minimum content encompasses the privilege of building a house on land you own, why couldn't he by the same token know that liberty's minimum content encompasses a right to see your natural child occasionally,⁵⁸ or a right of decision over how long your own life,⁵⁹ or your own pregnancy,⁶⁰ is to endure?

57. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See Radin, *supra* note 47 (manuscript at 246) ("Scalia's view [in *Lucas*] tends to impose a general regime (i.e., a federal interpretation) of property and foreclose state deviance from it. This view appears in tension with the Court's view in an analogous earlier decision, *PruneYard v. Robins*, that refused to recognize any federal regime of property rights") (citation omitted).

58. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J.).

59. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring)

We can see, I think, how Justice Scalia would respond. It seems he would say that the constitutionally mandated minimum content of property is drawn not from transcendent sources ("nature") but from an historically specific, American "constitutional culture"—"the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to [land]"⁶¹—the contents of which are accessible by judges not through speculative reason but through objective knowledge of historical social practice. It is, in fact, to this kind of social history that Justice Scalia's opinions expressly turn for answers to questions about the minimum federal content of "liberty"⁶² Why not likewise for "property?"

This response passes the test of logical consistency. The question is how it could ever be made substantively convincing. Justice Scalia's *Lucas* opinion discerns in the American past (as of some unspecified moment) a tradition of firm—nay, unconditional—expectation to be compensated if ever the government should act so as foreclose you of opportunity to build a house on a beach lot you bought and paid for, by requiring you for the public good to leave the land in its "natural," undeveloped state.⁶³ Despite awareness that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all,"⁶⁴ the *Lucas* opinion's subscribers are of the view—they "think"—that any suggestion that land titles always come encumbered with a liability to potential state action that would totally strip the property of "economically valuable use" is precluded by a "historical compact recorded in the Taking Clause that has become a part of our constitutional culture."⁶⁵

We need to ask, in the first place, how or why any judge would consider himself licensed for assertion of anything like objective

60. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., dissenting).

61. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899-2900 (1992).

62. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., dissenting); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring); *Michael H. v. Gerald D.*, 491 U.S. 110 (1990).

63. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1441 (1993).

64. *Lucas*, 112 S. Ct. at 2900 n.15.

65. *Id.* at 2900.

knowledge—safely proof against the judge's own "will"⁶⁶—of such a free-floating sort of historical fact. (I mean *naked* assertion, too, because the *Lucas* opinion refers to no source external to its subscribers for its crucial claim of judicial knowledge.) We need further to keep in mind some other pertinent and, it seems, equally plausible traditions. One thinks of the tradition of free public access to the sea and its environs, today increasingly read by courts all around this country as encompassing public rights of enjoyment of the beach.⁶⁷ One thinks of the tradition of legally required regard for other people's interests when you make use of your property. One thinks of the tradition of a dynamically functional law of property, oriented no less to contemporary community goals than to protection of private advantage.⁶⁸ One thinks of the "historical tradition in which the common law core of nuisance has been the frequent subject of statutory additions and refinements, providing most of our modern law of land use."⁶⁹

I say that these traditions I've just mentioned are (at the very least) components of the same social history that contains Justice Scalia's (alleged) tradition of respect for people's (unconditional) freedom to put houses on land they own. I won't say that my traditions trump his, but neither will I grant that his trump mine. There they all are, and the question is how do they sum or combine when it comes to house-building in 1990 in the South Carolina dunelands. This looks like a hard question. Justice Scalia needs to explain why he should consider himself and his judicial colleagues any better qualified to answer it—any better qualified to resolve for South Carolinians this congeries of traditions—than nine people picked at random from the Charleston telephone book.

Were we to hold that question utterly unanswerable, we could not read the *Lucas* decision as resting on a penumbra (shall we say?) of constitutional property law, without setting Justice Scalia

66. See *supra* notes 14, 61-62 and accompanying text.

67. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984); Radin, *supra* note 47.

68. See Sax, *supra* note 63, at 1446-47.

69. Humbach, *supra* note 48, at 4; see *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting) (speaking of the legislative branch's "traditional power to revise the law governing the rights and uses of property").

on some sort of collision course with himself. But is the question utterly unanswerable?

VII

Perhaps it is not. An answer most likely would start in the unmistakable constitutional command to protect (some) property, in some way, against the lawmaking engines of the States. Just as judicial liberals have held, in effect, that the Fifth and Fourteenth Amendments require the federal judiciary somehow to define a "liberty" norm *over against* the extant content of state law, so might judicial conservatives make a like claim for property.⁷⁰ Such a claim would be most comfortably available to conservatives prepared to cut back on the legal-positivist account of property and replace it, in whole or in part, with something naturalistic. Those who will not or cannot do this convincingly must still face the prospect of countermanding state judicial renditions of state law, raising the hackles of Our Federalism.

But perhaps the hackles rise too fast. *Lucas* might just be a case of federal judicial oversight in the historically approved mode of ensuring against circumvention of federally guaranteed rights by opportunistic manipulation of state law by state judges.⁷¹ Notice, however, that operations in this mode are delicate. Unless firmly documentable, charges of circumvention are maximally insulting and degrading to state judiciaries, hence maximally taxing on Our Federalism. This delicacy plainly informs the established standard test for counter-evasive federal judicial reversal of state court judgments: whether the state judgment lacked a "fair" and a "substantial" basis in state law.⁷² And now comes the question: In the face, say, of the sort of jurisprudence-of-principles stance I conjured for an imaginary South Carolina court, how could such a charge ever be convincingly sustained?⁷³

70. If property and its use are subject to limitless, uncompensated "redefinition" by state lawmaking, Justice Scalia remarks, there is danger that redefinition will extend so far that "at last private property disappears." See *Lucas*, 112 S. Ct. at 2892-93 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)).

71. See *supra* notes 18-19 and accompanying text.

72. See *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

73. See *supra* part V

To this exigency, judicial conservatives might conceivably try to respond by thrusting upon the States, pro tanto and in the Constitution's name, a law-of-rules jurisprudence. Look again at the conjoined opinion,⁷⁴ and you'll see the court there first describing a "law-of-rules" jurisprudence that would support Lucas' claim and then denying that this is the jurisprudence of South Carolina. Recall the two key elements of the rejected jurisprudence:

First, the default position, in the absence of express positive law to the contrary, is the absolute freedom of property owners to use their property as they choose. Second, nothing counts as express positive law to the contrary unless it takes the form of a specific, virtually self-applying rule-statement, something like "building houses on dunelands is forbidden." More spacious principles of right and wrong, whose applications to specific cases require exercises of judgment, would not in such a jurisprudence count as law.

That conforms precisely to the jurisprudential stance that Justice Scalia advocates in general for constitutional judges. In his Holmes Lecture on *The Rule of Law as a Law of Rules*,⁷⁵ Scalia urged that a true Rule of Law is, indeed, a law of rules, meaning rules cast in terms so specific that their applications to cases are highly determinate and predictable, as opposed to broad principles whose concrete applications are necessarily often a good deal more debatable.⁷⁶ Perhaps it is by insisting that state judiciaries read their bodies of property law as "laws of rules," as composed of narrow rules only and not spacious principles, that Justice Scalia means to protect the regulatory-taking project from frustration by unsympathetic state judiciaries.

Justice Scalia's *Lucas* opinion contains language pointing clearly in this direction. The opinion declares very specifically that a general background principle of an owner's duty to avoid property uses that are excessively harmful to interests of others (packaged with the state legislature's recent, reasonable determination that house-building on dunelands is thus harmful) is not enough to get

74. See *supra* text accompanying notes 44-47.

75. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

76. *Id.* at 1176-77.

South Carolina off the compensation hook in Lucas' case: "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."⁷⁷

In order to get off the hook, the opinion says, South Carolina will be required—just as if "it sought to restrain Lucas in a common-law action for public nuisance"—to "identify background principles of nuisance and property law that *prohibit* the uses he now intends in the circumstances in which the property is presently found."⁷⁸ The State must show that use of the land in the way ruled out by the new enactment had "always" been "unlawful," so that the new law merely makes this lurking illegality "explicit."⁷⁹ In other words, South Carolina must pay if its newly enacted prohibition of house-building on Lucas' land "goes beyond what the relevant background principles would *dictate*."⁸⁰

These are curious formulations. "Principles" in the law don't typically prohibit, dictate, or brand as unlawful specific classes of actions. "That is, after all, what makes them principles rather than rules."⁸¹ These formulations are tendentious, too: Without explanation, they nullify any principles of state law that might possibly warrant a more complex conclusion than simple "prohibition" or "dictation;" for example, a conclusion that a freedom hitherto enjoyed by landowners to build houses on dunelands has always been subject to revocation by duly authorized lawmakers⁸² (not limited to judges adjudicating nuisance claims, perhaps not even including them⁸³).

77. *Lucas*, 112 S. Ct. at 2901.

78. *Id.* at 2901-02 (emphasis added).

79. *Id.* at 2901.

80. *Id.* (emphasis added).

81. Michael E. Wall, (Im)possible Justifications of *Lucas* 6 (Apr. 28, 1993) (unpublished student paper, on file with the *William and Mary Law Review*).

82. See Humbach, *supra* note 48, at 11, 16 (noting a distinction between current legal "toleration" for certain uses of land and legal recognition of "inviolable" rights to continue such uses, and pointing out that "the fact that activities were lawful in the past [is not itself a] justification for their continuation").

83. See *id.* at 3 & *passim* (contending that legislative authority to revise, supplement, and extend the common law of nuisance is a "centuries-old" understanding, which *Lucas* "re-

We can always fairly ask—what stops us?—whether the relevant principles in a state's corpus juris ever did secure to landowners, however situated, an *unconditional* freedom of house-building, regardless of any consequential danger to a widely regarded public interest that might ever come to light. If the answer is no, then the State's revocation of Lucas' freedom to build (when such a danger did come to light) is no more a loss of property to him than the city's revocation of my temporary freedom to garden was a loss of property to me. Justice Scalia's formulations, couched in terms of "prohibition" and "dictation," seem carefully devised to head off any such inquiry

We cannot tell yet just how insistent the Supreme Court will be in this demand for simple, yes-no, specificity and resolution—red light or green light but no yellow (or yellow means green)—in the preexisting state law "background" materials upon which States may rely when appraising claims of regulatory taking of property. But if the demand goes very far at all, then once again it seems deeply at odds with Our Federalism. For its consequence is to federalize the law of land use in a peculiarly profound way. The effect is to make the Federal Constitution, specifically the Taking Clause, dictate to the States the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions. Such a mandate must in turn exert pressure on States regarding the form in which those materials had better be written. It must push the States toward preferring the form of monadic, specific rules to that of complexly interactive open principles.⁸⁴

Perhaps, then, one might see *Lucas* as a move in still another conservative judicial gambit, that of using the Federal Constitution to dictate a legal-formalist jurisprudential style to States not disposed on their own to agree with Justice Scalia that the only true Rule of Law is a law of rules. Of course, Justice Scalia's view of this matter is very controversial.⁸⁵ It remains unclear how Our

vises" by a "reassignment" of authority from state and local legislatures to state and federal judiciaries).

84. Professor Humbach speaks of an impending "petrification" of nuisance law. *See id.* at 13.

85. *See, e.g.,* RONALD DWORKIN, *LAW'S EMPIRE* (1986); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

Federalism could accept a use of the Constitution's property clauses to foist it upon the States.