Article

Judicial Review of Judicial Lawmaking

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INTRODUCTION

Can a court commit a wrong? Could it be viewed at times as violating the legal rights of litigants, and of citizens more broadly, in rendering a decision? More specifically, can a court infringe on constitutionally protected rights the same way that a legislature or an administrative agency might, and if so, what should be the consequences of such a violation?

In some instances, the answers to these questions would be straightforward enough or generally negligible. When a court abruptly ignores the required legal process by, for example, arbitrarily refusing to hear the arguments of one of the parties, when it rules in a matter over which it has no jurisdiction, or when it makes a decision by tossing a coin, the infringement of the litigant's rights would follow from the fact that the court exceeded its authority, violated the due process of law, and so forth. In some other cases, we may say that the court was clearly erroneous in its decision, although we should not necessarily contend that it has *committed a wrong* in the sense of violating a party's legally enshrined rights.[1] This would be so, for example, when a superior court disagrees with the way in which a lower court interpreted a certain statutory provision. Such a flawed ruling would simply be reversed by the higher court,

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1. *See* Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1817–27 (2005) (noting that not every reversal necessarily implies that the lower court committed a judicial wrong). Extreme abuses of discretion would trigger the thought that the judge has grossly exceeded the boundaries of his legitimacy, but "to denounce a judicial act as illegitimate typically expresses a strong condemnation. Virtually no one would characterize every judicial ruling reversed on appeal as legally illegitimate." *Id.* at 1817–18.

regardless of whether we view the judicial act as constituting a "wrong."[2]

There are many other cases, however, in which the question of whether judicial action constitutes a violation of rights is a complex and ambiguous one. These cases nevertheless have major potential consequences. This arises especially when the court can be viewed neither as exceeding its authority or acting arbitrarily, or as being merely incorrect about a certain point of law. It is then that the question of a "judicial wrong" comes to the forefront.

In the recent decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, four of the eight participating U.S. Supreme Court Justices seem to have dramatically broadened the potential scope of judicial wrongs.[3] They did so by formulating a new doctrine of "judicial taking," while at the same time deciding that no such taking had occurred in the present case.[4] According to this opinion, "if a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[5] In a concurring opinion, Justices Breyer and Ginsburg left "for another day" the question as to whether a judicial decision could amount to a taking.[6]

Thus, under this tentative new doctrine, when a state court of last resort dramatically reforms state property law, with such a shift resulting in a systematic reallocation of property rights and duties, this ruling might violate the Fifth Amendment's Takings Clause.[7] This would be so even if the court was

2. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636–43 (1971) (differentiating between primary and secondary judicial discretion). Primary discretion endows the trial judge with a "wide range of choice as to what he decides . . . ." *Id.* at 637. Secondary discretion deals with "hierarchical relations among judges," whenever the system prescribes the degree of finality and authority a lower court enjoys, so that in some cases a trial judge would have a "right to be wrong without incurring reversal." *Id.* But even when reversal is at stake, so that a wrong decision would be overturned, this does not entirely undermine the decision-making legitimacy of the trial judge. *See id.* at 641 ("A trial court determination that is discretionary . . . has a status or authority that makes it either unchallengeable, or challengeable to only a restricted degree.").

3. 130 S. Ct. 2592, 2597–613 (2010).

4. *Id.* at 2612–13.

5. *Id.* at 2602.

6. *Id.* at 2618 (Breyer, J., concurring).

7. *Id.* at 2602 (plurality opinion); *see also* U.S. CONST. amend. V.

authorized to act in view of the allocation of powers among the state's institutions, if such a doctrinal shift is not prohibited by the state's constitution and statutory law, and if the court meticulously followed procedural due process rules in its decision making.[8] Under this approach, the identity of the branch of government committing the constitutional violation does not matter.[9] For this purpose, says Justice Scalia, writing for the plurality, the state court is viewed as just another state actor.[10]

The main argument advanced in this Article is that such a jurisprudential approach may have dramatic, if unintended, consequences regarding the role of courts as lawmakers and state actors. Accordingly, this approach may redefine the role of the U.S. Supreme Court in overseeing law-reforming decisions by state courts in matters dealing primarily with state law, but which also raise a federal constitutional question. In many respects, the approach suggested by Scalia brings up issues that have remained largely unanswered since the seminal Court decisions in *Shelley v. Kraemer*[11] and *New York Times Co. v. Sullivan*.[12]

In *Shelley*, the Court struck down a state judicial decree that upheld a privately drafted racial covenant forbidding the sale of the property to non-whites.[13] The state court based its decision on state common law principles and the private nature of the dispute.[14] The U.S. Supreme Court reasoned that since the state court is a "state actor" in its own right, then by rendering a judgment upholding the covenant, the state court's decision has implicated, and violated, the Fourteenth Amendment's Equal Protection Clause.[15]

In the aftermath of *Shelley*, courts and commentators have dealt mainly with the way in which this decision would blur the distinction between private and public law.[16] This focus has also dominated the legacy of *Sullivan*, in which the Court sub-

8. *See Stop the Beach*, 130 S. Ct. at 2602.

9. *See id.* ("[T]he particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property . . . .").

10. *Id.*

11. 334 U.S. 1 (1948).

12. 376 U.S. 254 (1964).

13. 334 U.S. at 20.

14. *Id.* at 19.

15. *Id.* at 16–22; *see also* U.S. CONST. amend. XIV.

16. For an overview of *Shelley* and its implications, see discussion *infra* Part I.B.

jected state common law libel to constitutional scrutiny and imposed limits on damages for public officials in libel actions, in order to preserve the First Amendment's guarantees of freedom of speech and the press.[17] Beyond the development of this new doctrine, the chief jurisprudential discourse that evolved in the aftermath of *Sullivan* concerned the way in which this decision established a "horizontal application" of constitutional norms to private legal disputes.[18]

But the focus of this Article is quite different, as are the lines that it wishes to draw between *Shelley*, *Sullivan*, and *Stop the Beach*. This Article examines key insights that these cases may provide for evaluating the institutional role of courts within the system of government. This implicates not only the relationships among courts and legislatures or administrative agencies, but also among different types of courts: one acting in the capacity of a judicial lawmaker, and the other serving as a judicial reviewer. In so doing, this Article delineates an innovative theoretical framework for addressing potential frictions within the judiciary that occur whenever the federal reviewing court is asked to examine an alleged constitutional wrong committed by the lawmaking state court.

This Article is structured in four Parts. Part I analyzes the complex evolution of the concept of courts as being both lawmakers and state actors. It starts with a concise survey of the competing views of courts as either "law-finders" or "lawmakers." It then moves to discuss the depiction of courts as a state actor and the nontrivial implications that such an analysis had in the *Shelley* case. It argues that although the *Shelley* ruling has been practically abandoned with respect to the "constitutionalization" of private conduct, its state-actor reasoning nevertheless leaves open some intriguing dilemmas about the institutional role of courts and the constitutional review of their action. This Part concludes by briefly analyzing current constraints on judicial lawmaking by state courts. It discusses both internal limits implicated by intra-state separation of powers doctrines and external limits stemming from potential intervention by lawmaking *federal* courts.

17. 376 U.S. at 265–66, 279–83.

18. *See, e.g.*, Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 434–47 (2003) (arguing that *Sullivan* establishes a strong version of "indirect horizontal application" of constitutional norms to private law disputes, so that while private actors have no direct constitutional duties, all laws, including private law rules, could be subjected to constitutional review).

Part II analyzes the recent *Stop the Beach* case. After discussing the differences of opinion between the groups of Justices about the doctrine of judicial taking, this Part seeks to identify the broader jurisprudential features of the decision. Some of these issues have been explicitly addressed by the Court. This is so, for example, for the debate between Justice Scalia and Justice Kennedy concerning the possibility of constraining the power of a state court to dramatically change property rights by holding that such a change would violate the Due Process doctrine. The two Justices also debate whether recognizing a "judicial taking" could be seen as potentially expanding the power of courts to effect such dramatic changes, in the sense that the law-changing decision would remain valid subject to the payment of "Just Compensation."[19]

Many other issues have been left untouched by the Court, despite their potential dramatic implications. For example, although Justice Scalia sees courts as just another state actor for purposes of the Takings Clause,[20] and all Justices seem to acknowledge the fact that courts engage in the creation of law, none of the opinions discuss the extent to which courts should be viewed more broadly as state actors engaged with setting legal policy.[21] Specifically, none consider whether courts should be granted more, less, or the same level of deference by the Supreme Court, as compared with other branches of government, when their norm making is being challenged as violating federal constitutional rights.[22]

Part III takes up this challenge. Assume that, within a certain state, a court is considered, from a separation-of-powers viewpoint, as legitimately engaging in lawmaking and policy making in a certain field of law. This is so, for example, when a court revises the doctrine of adverse possession by eliminating the requirement that the possession has to be continuous for the statutory period, an element that had been established in its previous case law.[23] In so doing, the state court reasons that such a reform is mandated by the fact that in the contemporary era, landowners have better information about potential en-

19. *See* discussion *infra* Part II.A.

20. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010).

21. *See id.* at 2592–619.

22. *See id.*

23. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 120–22 (7th ed. 2010) (discussing the broader contours of this doctrine).

croachments, and that there is a growing societal need to use lands efficiently.

Or, consider another scenario in which a state court revises the doctrine of the right of redemption, rooted in historic judicially designed equity ideas.[24] The court reasons that with the change of times, this right is now often being abused by homeowners who fail to pay their mortgages when house values go down and resume doing so only when the market goes up again, even if this happens only after they formally default on their mortgage. In light of this, the court decides that the doctrine would now generally apply only to homeowners who live below the federal poverty line or who own no other real property. A defaulting debtor denied the right of redemption based on the new criterion contends that the ruling not only takes her property under the Fifth Amendment, but also violates the Fourteenth Amendment's Equal Protection Clause. Again, assume that such a reform is considered legitimate from the state's viewpoint on separation of powers.

When such state judicial decisions are brought before the U.S. Supreme Court on the argument that they violate the plaintiff's federal constitutional rights, should the Court see the case as a conventional "vertical" intra-judicial matter, and in appropriate cases say that the state court was wrong as a matter of law? Or should it engage in the "classic" type of judicial review, as if it were examining a legislative or administrative provision?

The latter approach would be based on the view of courts as law-makers and not merely as law-finders, but would nevertheless raise an additional set of questions. For example, should the Supreme Court as judicial reviewer defer to the state court's discretion as lawmaker and policy maker to the exact same degree that is does for other branches of government? And should there be a difference in the Court's policy to a judicial reform in a pure common law doctrine vis-à-vis an innovative judicial interpretation of a state statutory provision?

Part IV suggests a potential way out of the tautologies and institutional quagmires that may haunt the adoption of an expansive "judicial review of judicial lawmaking" model. The suggested blueprint starts with the argument that in contemporary legal systems, the judicial development of law is almost

24. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 583–85, 590–604 (1988) (examining the history of this doctrine and related policy considerations).

always being done against a background of legislative or administrative ordering, even in traditional common law doctrines. Adverse possession, for example, is a longstanding mixture of statutes and case law. This Part identifies the choice that legislatures and executive bodies often make between promulgating norms as either hard-edged rules or as open-ended standards, and how such a choice implicates the future development of law by judicial norm making. It argues that the dynamic need for gap filling of vague or lacking provisions legitimizes judicial lawmaking, while at the same time maintaining the original nexus to the statute or administrative provision. Consequently, most potential cases of "judicial wrongs," including "judicial taking" ones, can be reconceptualized as judicial innovations that are nevertheless based on a legislative or executive mandate and reviewed accordingly.

While such an approach would not entirely eliminate the possibility of a "judicial wrong" scenario, it would definitely scale it down. Accordingly, this jurisprudential approach would significantly ease the tension involved with the potential undermining of the nature and structure of the judicial branch. It would strengthen the constant dialogue among the different branches of government within each state system, and make better sense of the federal structure and the interpretation of the U.S. Constitution. In so doing, the legal system would be better able to address the constant need for the progress of law in the modern administrative State, while minimizing unintended implications that may undermine the delicate balance between government's decision making institutions.

I. THE COURT AS LAWMAKER AND STATE ACTOR

This Part examines, first, the intricate history of courts as "law-makers" and not merely as "law-finders." While this legal reality has typified Anglo-American courts for centuries, it was probably only at the turn of the twentieth century that jurisprudential discourse started analyzing this phenomenon explicitly and systematically. This Part then ties the lawmaking trait of courts to their depiction as state actors, a viewpoint that led to a groundbreaking result in *Shelley* and to heightened controversy in its aftermath.

A. THE EVOLUTION OF JUDICIAL LAWMAKING IN THE COMMON LAW

Courts in the English common law tradition, and consequently in the American system, have always engaged in developing the law against the tension of rhetoric and practice.[25] Judges and early English legal thinkers emphasized "historicity as the source of authority of the common law" judicial enterprise.[26] In rendering their decisions, judges looked to the ancient law of the land, dating back to time immemorial.[27] As J.G.A. Pocock argues, early seventeenth-century thinkers such as Sir Edward Coke employed this concept against the background of the political power struggle in England.[28] The concept of an "ancient constitution," allegedly dating back to the days before the Norman Conquest, served the goal of restraining extensive powers claimed by the King.[29]

"At the same time, common lawyers exalted custom as embodying the results of judicial efforts to improve the law over a long period of time, resulting in what Coke dubbed the common law's 'artificial reason.'"[30] This reliance on custom explains the English practical tendency "to read existing law into the remote past."[31] The common law thus constantly looked both *backward* to history and precedents, and *forward* to allow common law rules to develop so as to meet the changing needs of society.[32] The extent to which this backward-forward nature of the common law was authentic or merely a pretext for granting judges more power to design the law remains contested, but it is clear that in practice, English common law courts have been constantly engaged in judicial lawmaking.[33]

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25. *See generally* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (outlining the history of the common law tradition).

26. *Id.* at 581.

27. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 37 (1957) ("But by Coke's time the increasing activity of a nearly sovereign monarchy had made it seem to most common lawyers that if a right was to be rooted in custom and rendered independent of the sovereign's interference it must be shown to be immemorial . . . .").

28. *Id.* at 31–32.

29. *See id.* at 51–53.

30. Meyler, *supra* note 25, at 585.

31. POCOCK, *supra* note 27, at 31.

32. *See* Meyler, *supra* note 25, at 588.

33. *See id.* at 588 (arguing that Edward Coke developed the idea of what she terms "common law originalism," by which "reliance on precedents furnished a certain kind of authority, yet prior case reports themselves might not

This pattern has also typified the development of the common law in the American colonies, and later in the United States. Thomas Jefferson and John Adams aimed at tracing the "true" common law to the ancient English past,[34] but at the same time, the common law has constantly developed in a different fashion among the various colonies and later among the various states.[35] It was probably, however, only with the writings of Oliver Wendell Holmes, Jr., and the twentieth-century legal realists that the concept of common law judges making law, and not merely discovering it, became explicitly entrenched in American jurisprudence.[36]

This lawmaking function has been recognized as taking place in a multitude of settings, such as when judges create new doctrines in traditional common law areas, construct a doctrine against the background of a largely indeterminate statute, or engage in the interpretation of "capacious" constitutional language.[37] Maybe most instructive is Justice Scalia's

provide satisfactory reasons for particular outcomes," so that "reading, rereading, and interpretation were essential").

34. *See id.* at 567–71 (explaining how Jefferson dated the "true" common law to the era before the Magna Carta and how Adams dated the "true" common law to the "ancient constitution").

35. *See id.* at 575 ("The treatment of the common law—and divergences therefrom—in the early states further substantiates the founding generation's recognition that regional common law in America deviated in parts significantly from the English model."). This has also implicated the more general query about the stability or dynamism of the judicial enterprise. Several authors, including Justice Antonin Scalia in his opinions and academic writings, have relied on William Blackstone's *Commentaries on the Laws of England* and other texts to argue that the common law around the time of independence was viewed as fixed, stable, and unified. *See* Rogers v. Tennessee, 532 U.S. 451, 472–78 (2001) (Scalia J., dissenting); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 9–12 (Amy Gutmann ed., 1997) ("It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law, and that each state has its own."). However, a multitude of other sources point to the fact that not only was the common law constantly evolving both in England and in the young United States during that time, but also that a significant level of dynamism and development was recognized as a legitimate component of the judicial role within the emerging American system of law. *See generally* Meyler, *supra* note 25, at 567–80 (discussing the view that judges have taken license to change and update the common law throughout American and English history).

36. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006) (noting that with the rise of legal realism, it "is thus no longer especially controversial to insist that common law judges make law").

37. *See, e.g.*, *id.* at 886–88 (discussing various methods by which judges create common law doctrines).

statement in his *Stop the Beach* opinion, which stated that at the time that the Constitution had been adopted, "courts had no power to 'change' the common law," but as of the nineteenth century, courts "did assume the power to change the common law . . . ."[38]

The general recognition that courts do at times engage in lawmaking does not, however, dictate a single viewpoint about the proper scope of this power. It suffices to say at this point that even if the American system of government is generally sympathetic to the judicial lawmaking capacity, so that alongside its dispute-resolution chore exists a "second paramount function of the courts [which] is the enrichment of the supply of legal rules,"[39] then the different features of the court as lawmaker must be addressed in finer detail.[40] The structure of modern government would be seriously undermined if the scope of legitimacy, process, and methodology of judicial lawmaking remain obscure.

For purposes of the current study, I focus attention on what is perhaps the least-contestable legal setting in which the court makes law: the judicial development of traditional common law doctrines, most notably in the different fields of private law. It is this sphere of activity in which Justice Aharon Barak, former President of the Supreme Court of Israel, views the court as the "senior partner" among the governmental entities in the crafting of the law.[41] Even a conservative such as Justice Scalia has asserted that "[he is] content to leave the common law, and the process of developing the common law, where it is," while opposing the application of the common law "attitude" to statutory and constitutional interpretation.[42]

There is, of course, much debate as to whether the common law dispute-based methodology is the best strategy to devise a set of legal norms to consistently and coherently order future

38. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2606 (2010).

39. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 4 (1988).

40. *See* discussion *infra* Part I.B.

41. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 33–36 (2002).

42. Scalia, *supra* note 35, at 12. This latter caveat stands, of course, as the basis of Scalia's theory of textual interpretation of statutes and of the "original understanding" in constitutional interpretation. *See id.* at 14–15 (arguing for a standard "scientific" method of statutory interpretation, and arguing against allowing judges to modify the effect of statutes through interpretation and the common law).

legal relationships within a certain field of law. Even if courts are well aware of the potential "distorting effect" that a specific dispute may have on the broader legal principles that they develop,[43] it is unlikely that courts would, or should, be able to perfectly mimic the abstract process and substantive products of statutory lawmaking.[44]

In addition, numerous institutional considerations cast doubt on the ability of courts to legislate broad-based norms even within their natural habitat of common law jurisprudence. First, as Barak himself notes, courts may lack reliable information about society and broader-based facts that might justify a change of the law.[45] Second, even if courts are given full confidence as policy makers so that they can incorporate societal values such as redistribution of resources, or otherwise engage in pushing forward broad-based social reform within the contours of common law doctrines, courts lack both the "purse"[46] and the organizational mechanisms—i.e., governmental bureaucracy or agencies—to guarantee the initial feasibility and the future implementation of the legal reform.[47] Third, the ability of the court to update, revise, or entirely overturn a piece of legislation is dependent on having the case before it.[48] Unlike a

43. *See generally* Schauer, *supra* note 36, at 897–98 (discussing such potential distortions, including the fact that judges may be captivated by the way that a certain case is framed).

44. *See, e.g.*, *id.* at 915 (discussing how facial challenges to statutes necessarily require judges to imagine the total array of possibilities as to how the statute could be applied, but these judges' perceptions are inevitably skewed by the facts of the cases before them). As Schauer notes, this does not mean that legislatures are free of the influence of special interests. *Id.* at 912–13. But legislation is generally considered to represent "abstract reasoning" in norm-making, detached from the details of a specific dispute. *See* Catherine Valcke, *Legal Education in a "Mixed Jurisdiction": The Quebec Experience*, 10 TUL. EUR. & CIV. L.F. 61, 99–109 (1995) (discussing "meta-legal" scholarship as a method of legal reasoning that incorporates considerations into lawmaking that come from outside the legal field).

45. Barak, *supra* note 41, at 32–33; *see also* NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 60–70 (2001) (establishing an elaborate analysis of the institutional constraints of courts in addressing complex sets of data that involve large, often indefinite numbers of stakeholders).

46. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

47. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 423 (2d ed. 2008) (arguing that litigation steers activists for change to an institution that is unable to help them and diverts crucial resources away from the only realm that matters: politics).

48. *See* Schauer, *supra* note 36, at 913–16.

legislature or administrative agency that can initiate a rule change or control its timing, courts must depend on an exogenous factor—a relevant dispute brought before them.[49] As a result, courts cannot be time-sensitive in lawmaking—they cannot make "sunset laws," nor can they initiate follow-up hearings at the end of a trial period to review the new law.[50] Consequently, there are limited options that courts can pursue if they are to remain part of the lawmaking process.

Notwithstanding, state courts engage extensively in lawmaking in the traditional fields of common law. In view of the limits on the development of federal common law following the *Erie*[51] doctrine, and the broad mandate awarded to courts from an intra-state separation of powers perspective,[52] the judicial development of common law by state courts of last resort continues to stand firm.[53]

B. THE JUDICIARY AS STATE ACTOR: *SHELLEY*, *SULLIVAN*, AND THEIR AFTERMATH

The general facts and the operative result of the *Shelley* case were briefly presented in the Introduction.[54] The fate of the Court's precedent in *Shelley*, which established the tentative doctrine by which any private dispute could be subjected to constitutional norms once it is brought before a court for resolution, has, perhaps not surprisingly, become practically abandoned.[55] Accordingly, both pro-*Shelley* theories and their criti-

49. *See id.* at 915–16.

50. *See id.*; s*ee also* Bruce Adams & Betsy Sherman, *Sunset Implementation: A Positive Partnership to Make Government Work*, 38 PUB. ADMIN. REV. 78, 78 (1978) (discussing the evolution of sunset laws as a legislative tool).

51. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). For a discussion of limits on federal common law, see *infra* Part I.C.2.

52. *See infra* notes 80–81 and accompanying text.

53. *See, e.g.*, David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 645 (1996) (arguing that state courts have had numerous occasions in recent years to rethink the development of common law doctrine in wrongful discharge cases).

54. *See supra* text accompanying notes 11–15.

55. *Shelley* has not been followed in subsequent Supreme Court and lower court cases. In numerous instances, courts have refused to apply constitutional norms to various categories of private disputes, even though there was judicial enforcement involved. For a study of post-*Shelley* case law, see Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 458–70 (2007). For a survey of the "state action" doctrine, see Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 275–80 (2010). *Shelley* was limited to racial discrimination, and, even within this realm, its holding was practically narrowed to the specif-

ques seem to focus on individual parties and on whether their private dealings should be subjected to constitutional principles, or, more generally, on the modern role of the administrative state in private law.[56] Whether the court is indeed a state actor, and what implications this carries, are issues that seem to have been neglected, probably due to the view that they are a distraction from the *real* query: does the public/private distinction still hold?[57]

ic facts of the case. Only one U.S. Supreme Court case has fully followed *Shelley*'s precedent. Barrows v. Jackson, 346 U.S. 249, 249–60 (1953) (striking down a state court judgment awarding damages for contractual breach against a property owner who signed a racially restrictive covenant but then sold the property to blacks).

56. Thus, to the extent that *Shelley* adopts an "attribution rationale," so that a court cannot enforce substantive provisions that could not have been enacted in general law because they would have violated constitutional rights, later decisions have nevertheless enforced such privately made provisions. *See* Rosen, *supra* note 55, at 458. For example, wills conditioning inheritance on the heir marrying a person of a particular religion were not subjected to the Establishment Clause merely because a judicial decision enforced these provisions. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827–28 (Ohio Ct. Com. Pl. 1974).

57. *See* Rosen, *supra* note 55, at 471–72 (noting history of public/private distinction). Simply put, the post-*Shelley* courts refused to abolish or otherwise heavily undermine the public/private distinction. Viewing private parties and private action as generally immune from direct applicability of constitutional norms, courts seem to have dismissed the *Shelley* expansion of the "state action" doctrine to the judicial enforcement of private law as a subterfuge that may have prevented a morally objectionable result in the *Shelley* case, but that could not justify a broader-based curtailment of the private sphere. *See id.* (reasoning that the public/private distinction is strongly embedded in American culture, so that its survival in constitutional doctrine reflects a strong societal conviction); s*ee also* Richard A. Epstein, *Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet*, 3 CHI. J. INT'L L. 455, 459–60 (2002) ("The line between public and private action need not be gutted simply because the equal protection clause applies to some actions of the judiciary."). There are, of course, those who seek to justify *Shelley* on these grounds exactly. These scholars follow up on the legal realist idea that private law entrusts individuals with government-backed powers. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11–14 (1927) (depicting ownership of private property as the exercise of sovereignty over others with the endorsement of the State). If this is the case, then private parties cannot hide behind the largely artificial private/public distinction. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) ("It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government."). More moderate versions of a pro-*Shelley* approach argue that even if constitutional rights should not always govern private legal relationships, constitutional norms can have an indirect application so that the underlying values of the Constitution would be adapted to private law doctrines. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391,

This Section, however, focuses on another aspect of *Shelley*, namely the institutional reasoning employed by the Court throughout its decision. Even if one finds a jurisprudential disconnect in at least one point along the chain of reasoning advanced in *Shelley*, the case still entails some important observations about the role of courts that are less controversial but nevertheless nontrivial. This view of courts is further entrenched in *Sullivan*, discussed below. Thus, once one puts to the side the conventional-yet-understandable focus on private parties and private action, the *Shelley* decision remains highly instructive as to the way in which a court acts as a state organ and employs coercive governmental powers in the process. Such an institutional conceptualization of courts carries substantial implications, especially when the court is viewed as a lawmaking body, and most notably in the traditional common law field.

Therefore, setting aside the peculiarities of *Shelley*, it is probably uncontroversial to argue that when a court engages in broad-based, future-looking reformulation of common law doctrines, such as in the above-portrayed hypothetical examples of the adverse possession and equitable right of redemption doctrines, the judicial act should be seen as implicating constitutional review, as would be the case with otherwise comparable legislative or administrative reforms.[58] Taking seriously the role of the court as a lawmaker requires us to also recognize the fact that such lawmaking could result in the violation of federal constitutional rights of present and future parties, what is referred to here as a "judicial wrong."

431–46 (2008). Others have argued that the public/private distinction loses much of its power in the era of the "activist state," which is increasingly committed to publicly enshrining social and economic rights that were once governed by private law. *See* Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 438–42 (2002); *see also* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1556–70 (2010) (arguing that "indirect constitutional effect" can be achieved through common law pathways to better protect "positive" social and economic rights).

58. *See, e.g.*, Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 455 (1977) (questioning the constitutionality of congressional attempts to effect certain policies and programs without resort to piecemeal legislative sanction); *see also* Judah A. Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1483 (1988) (discussing judicial review of administrative determinations implicating constitutional rights).

The *Shelley* decision quotes the Court's previous case law, noting that

> It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.[59]

When the judiciary acts, so reasons the *Shelley* decision, a court employs the "full coercive power of government."[60]

The Court then goes on to review a number of cases in which judicial decisions were struck down as a violation of federal constitutional rights, including judicial exclusion of blacks from jury service by reason of their race or color, failure by courts to provide the essential ingredients of a fair hearing, and a finding that a conviction for common law breach of the peace violated, under the circumstances of the case, the First Amendment's provisions on the freedom of religion.[61] While these precedents dealt with more dispute-specific misconducts by the judiciary—those "easy" cases of judicial wrongs in which the court blatantly infringed upon the litigants' constitutional rights—the *Shelley* Court explicitly expands its analysis to include more "legitimate" forms of state action that may nevertheless violate constitutional rights.[62]

This was exactly the case in *Sullivan*, where the Court invalidated Alabama's libel law, which provided for an award of damages for a defamatory falsehood with no requirement of actual malice, as undercutting the First Amendment whenever the defamatory publication was directed at the official conduct of a public official.[63] The Court's special rule for libel of public officials, requiring actual malice in such cases, was followed and is deemed less controversial from the perspective of the constitutionalization of private conduct.[64] This is probably so

59. Shelley v. Kraemer, 334 U.S 1, 14 (1948) (quoting Virginia v. Rivers, 100 U.S. 313, 318 (1880)).

60. *See id.* at 19.

61. *See id.* at 14–18 (citations omitted).

62. *See id.* at 8–23.

63. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

64. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (holding that the State cannot, consistent with the First and Fourteenth Amendments, award damages to a "public figure" for defamatory falsehood relating to his conduct unless verdict is based on actual malice); Rosenblatt v. Baer, 383 U.S. 75, 77 (1966) (holding that for purposes of decisional law, under First and Fourteenth Amendments, a state cannot award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice).

because, while the Court later extended this rule to "public figures,"[65] it refused to apply the rule to private plaintiffs, leaving this general category of libel cases to state regulation.[66]

More broadly, *Sullivan* establishes the principle by which all government-made laws, including common law rules, may be subjected to constitutional review. The Court reasoned that "[i]t matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[67] The Court in *Sullivan* thus seemed agnostic about the question of whether the relevant legal regime is the result of statutory or judicial lawmaking.[68] What is important is that an authorized actor of the state promulgated a body of law, and that this public ordering, like all laws, may result in an infringement of constitutional rights.[69]

Thus, one uncontroversial component of the legacy of *Shelley* and *Sullivan* points to the court as an organ of the state that engages in the development of legal rules, but one that may infringe on constitutional rights. This position is taken again years later in *Stop the Beach*, when Justice Scalia depicts the judiciary as an arm of the state that engages in lawmaking but that is also capable of "taking" property by so doing.[70]

C. CURRENT LIMITS ON STATE JUDICIAL LAWMAKING

Parts II and III will explore the broader implications that the above conceptualization of the judiciary could have for federal judicial review of state judicial lawmaking. However, first, this Section discusses the extent to which state court lawmaking is currently constrained, either by the principle of separation of powers at the state level or by judicial lawmaking at the federal level.

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65. *Butts*, 388 U.S. at 130–62 (applying the rule to defamatory publications directed at a football coach and a former army general).

66. *See* Gretz v. Robert Welch, Inc., 418 U.S. 323, 339–48 (1974).

67. *Sullivan*, 376 U.S. at 265 (citations omitted).

68. *See id.*

69. *See id.* For a slightly different basis for constitutional review of all forms of lawmaking, see Gardbaum, *supra* note 18, at 420 ("[T]he threshold state action issue is irrelevant wherever a law is challenged as unconstitutional because all laws are subject to the Constitution under the Supremacy Clause.").

70. Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2610–13 (2010). For further discussion, see also *infra* Part II.A.

1. Intra-State Separation of Powers

The legitimacy of judicial lawmaking should first be evaluated against the state's own system of government.[71] This is most prominently so regarding the longstanding concept of separation of powers.[72] The way in which this principle is structured in the different states is not simply a miniature version of the federal conception of the separation of powers.[73] There are substantial differences among the texts of the various state constitutions in defining the nature and scope of the separation of powers doctrine.[74]

The differences among the state constitutions reflect not only distinctive historical developments, but also varying normative visions about the system of government.[75] These attitudes have developed over time in each of the different states, so that the current equilibrium within each state system is always implicated not only by the state constitutional text, but also by prevailing public views about the distribution of power.[76] Consequently, the states' constitutional provisions regarding the separation of powers is not necessarily indicative of the practical ways in which the different branches, especially the judiciary, engage in the exercise of powers that belong to other branches.

71. *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329 (2003).

72. *See id.*

73. *See id.* at 330.

74. *See* John Devlin, *Toward a State Constitutional Analysis of the Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236–37 (1993). Ten state constitutions omit any express requirement of the separation of powers, thus following the federal pattern by which this principle is inferred from the provisions establishing the three branches of government. Twelve constitutions include an express provision by which the powers are separated, with some of these further stating that exercising powers belonging to another branch is prohibited, unless otherwise provided elsewhere in the constitution. The remaining state constitutions couple such an express provision with an additional clause prohibiting any person belonging to or exercising power under any branch from holding office or exercising any function belonging to another. *See id.*

75. Many states initially rejected the suspicion of the legislative branch. *See* Tarr, *supra* note 71, at 333–34. During the nineteenth century, however, numerous states altered their constitutions to guard against an untrammeled exercise of legislative power. This was not typically done by transferring power to other branches, but by either transferring some powers directly to the people or by placing procedural restraints on legislative power, such as by requiring extraordinary majorities for certain statutes. *See id.* at 334–40.

76. *See id.* at 340.

One of the most prominent areas in which judicial state action is viewed as involving substantial policy making and lawmaking, and which is often contested as amounting to undue judicial activism, is education finance "adequacy" litigation.[77] Out of the twenty-six state courts that have engaged in such adequacy litigation, eight courts refused to engage in merits review, typically relying on the separation of powers principle in justifying abstention.[78] Eleven state courts approved merits review, but limited their remedial intervention, so that even if the legislature's education finance scheme was found to violate state constitutional standards of education quality the legislature could simply construct an alternative funding scheme.[79] The final group of seven state courts engaged in the highest level of judicial involvement, approving the respective trial courts' issuance of policy-directive remedial orders.[80]

Since most of the normative debate surrounding the legitimacy of the courts' engagement in education finance policymaking has focused on the separation-of-powers principle,[81] it is highly instructive to see the way in which this concept plays out in each of the states. Interestingly, a recent study found no significant correlation between the relevant text of the state constitution, specifically whether it includes an explicit or im-

77. The first wave of education finance litigants in the 1960s and 1970s relied mostly on Equal Protection arguments, and contended that the allocation of funds discriminated against certain groups or classes. *See* Paul A. Minorini & Stephen D. Sugerman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE 34, 34–54 (Helen F. Ladd et al. eds., 1999). The current strategy of education finance litigation focuses on the absolute "inadequacy" of overall public spending on education. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603–04 (1994). Several scholars have argued, however, that equity theories have far from disappeared in school finance litigation. *See, e.g.*, James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1225 (2008) (arguing that courts continue to focus on whether resources among different school districts are comparable).

78. *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 741 (2010).

79. *See id.* at 742.

80. *See id.* at 742–43.

81. For an analysis of this critique against the judicial intervention in policymaking on allocating the state's scarce financial resources, and of potential answers to it, see, for example, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 100, 171–72 (1995).

plicit provision about the separation of powers, and the actual level of judicial involvement in education finance.[82]

These dynamics are also present among state branches of government in other lawmaking power struggles. Consider, for example, methodological rules of statutory interpretation, and whether state courts, in reading a statute, should follow a "textualist" approach, a "purposive" approach, or a different methodology.[83] Although just about every state legislature has codified rules of statutory interpretation, many state courts have practically refused to apply these rules.[84] Instead, state courts have come up with their own methodological rules of statutory interpretation.[85]

These findings do not indicate, however, that the separation of powers principle is simply being ridiculed or ignored by state courts in carving out their lawmaking authority. Rather, this tension points to the fact that the allocation of powers is constantly debated as a major feature of the system of government, and that the equilibrium of lawmaking powers varies from state to state while also changing over time within each state system.[86]

Once again, the field of law that emerges as the least controversial one from a state separation-of-powers perspective, and in which judicial lawmaking is deemed legitimate even when it implicates core policy considerations, is that of traditional common law.

A leading example is the doctrine of implied warranty of habitability, which has been a major pillar in the landlord-

82. *See* Bauries, *supra* note 78, at 743–46. Legislatures have typically responded to "judicial activism" with hostility and foot-dragging, thus practically continuing the power struggle over norm-making. *See* Ryan, *supra* note 77, at 1241 (describing such dynamics in New Jersey).

83. The scholarly debate about rules of statutory interpretation traditionally focuses on federal law—where, in effect, no agreed methodological rules exist. This leads state legal systems to engage in their own jurisprudential rules. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–29 (2010).

84. *See id.* (contending that while some courts simply avoid applying legislative interpretative rules, other courts forthrightly refuse to apply such rules).

85. *Id.* at 1829–46. Gluck argues that this judicial methodological approach is often strikingly similar from state to state. Gluck labels this emerging approach as one of "modified textualism." *Id.*

86. *See id.* at 1826–28 (noting that there is a power struggle between the judicial and legislative branch about which branch will control methodological choice).

tenant law reform introduced by courts in the District of Columbia in the 1960s and 1970s, and consequently followed in the majority of states.[87] In the leading case, *Javins v. First National Realty Corp.*,[88] the Court of Appeals for the D.C. Circuit declared that "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed,"[89] and reasoned that "[t]he continued validity of the common law . . . depends upon its ability to reflect contemporary community values and ethics."[90] Treating a lease as a contract, the court read an implied warranty of quality into the lease.[91] This reading parted ways with the archaic assumption that the tenant can feasibly make all necessary repairs,[92] and focused instead on protecting the "legitimate expectations of the buyer."[93]

The court-made doctrine of implied warranty of habitability was quickly adopted by almost all states.[94] In some states, the courts have reformulated their common law to accommodate the new principle, while in other states the warranty was codified by statute.[95] While the specific scope and terms of the warranty may change from state to state,[96] whenever the warranty is applied to residential properties it cannot be waived by

87. *See generally* Jonathan M. Purver, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R.3D 646 (1971) (discussing the development of the doctrine of implied warranty of habitability).

88. 428 F.2d 1071 (D.C. Cir. 1970).

89. *Id.* at 1074.

90. *Id.* (quoting Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 946 (D.C. Cir. 1960)).

91. *See id.* at 1077–83.

92. *Id.* at 1074. The court reasons that this assumption may have been reasonable in a rural-agrarian society, but that for the modern apartment dweller, the value of the lease is that it gives him a place to live, which includes "not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." *Id.*

93. *Id.* at 1075.

94. *See* 1 MILTON R. FRIEDMAN & PATRICK A. RANDOLPH, JR., FRIEDMAN ON LEASES § 10:1.2, n.21 (5th ed. 2004).

95. *See id.* Such codification has taken place, for example, in Texas, California, Minnesota, and North Carolina. *Id.*

96. For example, a few jurisdictions also apply the warranty to commercial properties, though the majority of states restrict the warranty to residential use. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 448 (2006).

agreement.[97] This makes this judicial reform one endowed with a thick layer of social policy design.

Although the doctrine was initially codified in some states, this does not derogate from the fact that courts have been generally viewed across all states as authorized to extensively engage in lawmaking in this field. A chief argument made in Part IV is that the contemporary landscape of common law doctrines often employs a mixed strategy of lawmaking, so that promotion of reforms takes place through legislation *and* judicial action. Courts thus maintain their legitimacy to engage in lawmaking in traditional common law doctrines even in the "age of statutes."[98] From an intra-state separation of powers view, courts are retaining substantive lawmaking authority in crafting common law doctrines.

2. The Scope of Federal Judicial Preemption

At times, federal lawmaking trumps state judicial lawmaking. Since this issue is not unique to the state judiciary, but applies to any type of state lawmaking, I will touch briefly on one topic that would be of special interest in the judicial lawmaking context. In studying the plethora of issues that may create a tension between federal and state lawmaking, common law once again emerges as striking a distinctive balance between federal and state powers, while primarily implicating the judiciaries on both levels.

The point of departure is the U.S. Supreme Court's seminal decision in *Erie Railroad Co. v. Tompkins*.[99] In *Erie*, the Court held that state common law governs federal diversity cases, famously stating that "[t]here is no general federal common law."[100] The Court based its decision on several constitutional principles, including the Equal Protection Clause (fearing disparate treatment based on the litigants' state citizenship),[101] and ideas of federalism enshrined chiefly in the Tenth Amendment, so that substantive rules of common law relevant to the

97. *See* FRIEDMAN & RANDOLPH, *supra* note 94, § 10:1.4 (reasoning that the this rule is "based on a public policy affecting poor tenants who have no choice but to move into premises in a deplorable condition").

98. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES *passim* (1982); *see also infra* Part IV.B.

99. 304 U.S. 64 (1938).

100. *Id.* at 78.

101. *See id.* at 74–75.

case were a matter "reserved by the Constitution to the several states."[102]

The legacy of *Erie* has been controversial as a matter of both doctrine and theory. This dispute will not be analyzed here,[103] but it is important to note that in the context of *Erie*, the term "federal common law" consists of "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[104] This means that the *Erie* doctrine places federal *courts* at the heart of the constraints imposed on the federal government. Congress can effectively enter into new realms of federal ordering in traditional common law issues by resorting to the Constitution's provisions in Article 1, § 8, most notably those of the Commerce Clause.[105] Federal courts do not have a similar constitutional mandate.[106] Therefore, federal courts cannot regularly intervene in state judicial lawmaking in their own judicial lawmaking capacity.[107] Federal courts, and most prominently the Supreme Court, could thus step in chiefly in their judicial review capacity, when state judicial lawmaking violates the protections of the Federal Constitution.[108]

In summary, judicial lawmaking by state courts, who are acting as state actors, remains an important phenomenon even

102. *Erie*, 304 U.S. at 80; *see also* U.S. CONST. amend. X.

103. Doctrinally, federal common law seems to be constantly expanding, even though the Court rarely admits to doing so outside of the established "enclaves," such as cases affecting the rights and obligations of the United States, disputes between states, international relations, and admiralty. However, despite this "crawling" effect, the development of the core of common law fields generally remains within the states. *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006).

104. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003).

105. U.S. CONST., art. I, § 8, cl. 3. For an analysis of the cunning history of the use of the Commerce Clause to increase Congressional regulatory power, see generally Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

106. In an interesting development, a number of commentators have read *Erie* to represent not only a concept of federalism, but also one of separation of powers, which broadly prevents the federal judiciary from engaging in judicial policy making and lawmaking unless authorized to do so by the Constitution or by Congress. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001). Others have dubbed this new reading of *Erie* as merely a myth. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 619–20 (2008) (arguing it is practically impossible to differentiate common law from statutory or constitutional interpretation, remedial law, and other "non-common-law" judicial decision-making).

107. *See* Clark, *supra* note 106, at 1403–04.

108. *See id.* at 1413.

in the contemporary era of the administrative State. Along with the power to engage in lawmaking, however, is the potential to infringe on legally enshrined individual rights. Thus, the chief challenge for the U.S. Supreme Court, acting in its judicial review capacity, is how to assess such state judicial lawmaking when a potential "judicial wrong" exists. Part II starts this inquiry by discussing how the Court has addressed one such instance, that of a "judicial taking."

II. *STOP THE BEACH* AND THE CONCEPT OF A JUDICIAL WRONG

This Part offers a close reading of the *Stop the Beach* case. After briefly mapping out the different opinions, it explicates on how Justice Scalia's invocation of the "judicial taking" doctrine and Justice Kennedy's application of the Due Process Clause implicate the limits of judicial lawmaking but nevertheless leave many central issues unresolved.

A. INTRODUCING THE JUDICIAL TAKING DOCTRINE

In *Stop the Beach*, the Court reviewed the constitutional validity of a decision rendered by the Florida Supreme Court, in which the latter replied in the negative to the following question, certified to it by the state's Court of Appeal: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"[109] The petitioner argued that the Florida Supreme Court's decision *in itself* amounted to an unconstitutional taking under the Fifth and Fourteenth Amendments.[110]

All eight participating Supreme Court Justices held that no such constitutional violation had occurred in this case.[111] While four Justices, in a decision authored by Justice Scalia, explicitly recognized that under certain circumstances a judicial decision could amount to an unconstitutional taking of property—thus creating a new doctrine of "judicial taking"[112]—Justices Breyer and Ginsburg left "for another day" the general question of if, and when, a judicial taking could take place.[113]

109. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct 2592, 2600 (2010).

110. *Id.*

111. *Id.* at 2596; *id.* at 2618 (Kennedy, J., concurring); *id.* at 2619 (Breyer, J., concurring).

112. *Id.* at 2608 (plurality opinion).

113. *Id.* at 2618–19 (Breyer, J., concurring). Justice Ginsburg joined the

Under the common law in Florida, the state owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore, i.e., the land between the low-tide line and the mean high-water line.[114] Littoral property owners have certain unique rights with regard to the water and the foreshore.[115] These rights include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions (referred to jointly as "accretions" by the Court).[116] Accretion is a slow, gradual process, by which lands once covered by water become dry when the water recedes. Under common law, littoral owners take title to these lands.[117]

The Florida common law provides for a different rule for the process of *avulsion*, a "sudden or perceptible loss to or addition to land by the action of the water . . . ."[118] In the case of avulsion, formerly submerged land that has become dry land continues to belong to the owner of the seabed, which in Florida is the state.[119] Thus, the boundary between littoral property and sovereign land remains the same: the mean high-water land before the event.[120]

In 1961, Florida's legislature passed the Beach and Shore Preservation Act (the Act),[121] which established procedures for "beach restoration and renourishment projects," and was designed to deposit land on eroded beaches and to maintain the deposited land.[122] Under the Act, once a beach restoration project is approved and undertaken, the relevant state agency establishes an "erosion control line," which is set in reference to the existing mean high-water line.[123] The fixed erosion-control line then replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property.[124] This means that once the erosion-control line is

opinion. *Id.* at 2618.

114. *Id.* at 2597–99 (plurality opinion).
115. *Id.* at 2598 (citations omitted).
116. *Id.* at 2594.
117. *Id.* at 2598.
118. *Id.* (citations omitted).
119. *Id.* at 2598–99.
120. *Id.* at 2599.
121. FLA. STAT. ANN. §§161.011–.45 (West 2006).
122. *Id.* § 161.088.
123. *Id.* § 161.161(3)–(5).
124. *Id.* § 161.191(1).

recorded, the common law ceases to increase upland property by accretion.[125] The landowners continue to be entitled, however, "to all common-law riparian rights," except for the right to accretions.[126]

Littoral owners in the City of Destin and Walton County challenged a restoration project, aimed at adding seventy-five feet of dry sand seaward of the mean high-water line, arguing that the project takes their right to receive accretions to their property.[127] The District Court of Appeal accepted their claim, which argued that the project would "unreasonably infringe on riparian rights," and certified to the Florida Supreme Court the broader question of the unconstitutionality of the Act.[128] The Florida Supreme Court answered in the negative, faulting the District Court of Appeal for not considering the doctrine of avulsion, and describing the right to accretion as a future contingent interest rather than a vested property right.[129]

While the U.S. Supreme Court depicted the right to accretion as one to which the Fifth Amendment would apply if the state took the right, it agreed with the Florida Supreme Court that the doctrine of avulsion also applies to state-created avulsions made as part of restoration and renourishment projects under the Act.[130] The Court thus concluded that the judicial decision was consistent with the background principles of state property law.[131] But although all Justices agreed in the judgment, they significantly departed on the general question of judicial takings.

Briefly, Justice Scalia made the argument that the Takings Clause has traditionally applied to state actions beyond the "classic" eminent domain, including state regulations that deprive the property owner of "*all* economically beneficial uses,"[132] and the re-characterization as public property of what

125. *Id.* § 161.191(2).

126. *Id.* § 161.201.

127. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600 (2010). The littoral owners also argued that the project would take away their right "to have the contact of their property with the water remain intact." *Id.* The Court addressed this argument and rejected it. *Id.*

128. *Id.* at 2600–02.

129. *Id.* at 2600–01.

130. *Id.* at 2612.

131. *Id.* at 2610–13.

132. *Id.* at 2601 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

was previously private property.[133] Based on the language of the Fifth Amendment and on "common sense," Scalia reasoned that the Takings Clause "is not addressed to the action of a specific branch or branches."[134] It would be absurd, according to Scalia, "to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[135] Further, "[the Court's] precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest to the contrary,"[136] so that "the particular state *actor* is irrelevant."[137] The test for a "judicial taking," in the context of this case, is thus formulated by Justice Scalia as follows: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[138]

In a brief separate opinion, Justice Breyer deemed it best to leave "for another day" the broader constitutional issues raised by the plurality opinion.[139] The chief concern of Justice Breyer is one of gate-flooding. Since "losing parties in many state-court cases may well believe that the erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims," then "the approach the plurality would take today threatens to open the federal doors to constitutional review of any, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges."[140] Federal judges might therefore find themselves, according to Breyer, playing "a major role in the shaping of a matter of significant state interest—state property law."[141]

Justice Kennedy, in his separate opinion, did not affirmatively hold that a "judicial taking" could or could not ever occur.[142] But he did voice strong concerns about simply extending

133. *See id.* (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–65 (1980)).
134. *Id.*
135. *Id.*
136. *Id.* at 2601–02.
137. *Id.* at 2602.
138. *Id.*
139. *Id.* at 2618 (Breyer, J., concurring).
140. *Id.* at 2619.
141. *Id.* at 2618–19. This issue will be taken up further in Part III.B.3.
142. *Id.* at 2614 (Kennedy, J., concurring).

the Takings Clause to judicial decisions.[143] Kennedy expressed doubt regarding the legitimacy of courts to engage in the taking of property, viewing this power as belonging to the political branches, i.e., the legislative and executive that are accountable in their political capacity for exercising such power.[144] Judicial elimination of an established property right could thus amount to a violation of due process.[145] Although Kennedy remained somewhat obscure about the nature of the due process violation, his general point was that, since the recognition of judicial takings would in effect legitimize the power of courts to engage in takings, the Due Process Clause[146] is the more appropriate channel to address potential encroachments by the judiciary on the power granted to the political branches.[147] At the same time, Kennedy validated the legitimacy of state courts to make incremental changes to property rights without this implicating the Constitution[148]—a point that Scalia rejects as a practical mandate for uncompensated deprivations of established rights.[149]

B. DUE PROCESS, TAKINGS, AND THE SCOPE OF JUDICIAL LAWMAKING

This Section discusses three focal points of the Court's analysis in *Stop the Beach*. First, it frames the controversy between the Justices following Kennedy's suggestion that resort to the Due Process Clause is the appropriate channel for addressing judicial violation of property rights, while locating incremental changes to common law property rights as falling outside constitutional protection. Second, it analyzes the way in which Scalia and Kennedy differ in their depiction of courts as either a more trustworthy or a more suspect state actor in the context of takings. Third, this Section takes up the debate of whether the mere recognition of the "judicial taking" doctrine actually endows state courts with *more* power to take property.

Evaluating these three themes, it seems that Justice Scalia has the better argument in the Due Process debate. The second

143. *Id.* at 2615.

144. *Id.* at 2613–16.

145. *Id.* at 2615.

146. While not explicitly saying so, Justice Kennedy seems to refer to the Fifth Amendment's and the Fourteenth Amendment's Due Process Clauses as one. *See, e.g.*, *id.* at 2614. I will follow the same course in my analysis.

147. *Id.* at 2613–16.

148. *Id.* at 2615.

149. *Id.* at 2606–07 (plurality opinion).

topic, the institutional comparison between courts and legislatures, remains very much underdeveloped by both Justices. Finally, Justice Kennedy's reasoning seems to prevail regarding the debate about the broader implications of the judicial taking doctrine. This leads to an odd result, by which neither of the opinions standing alone develops a coherent analysis of the proper mode of federal judicial review of state judicial lawmaking. This is a gap that I aim at closing in the following Parts.

To begin, one might initially read Justice Scalia's opinion as representing jurisprudential "novelty," with Justice Kennedy offering a more "cautious" approach. But Kennedy's analysis of the Due Process Clause reveals a strict approach toward state courts, which is in fact *reactionary* to contemporary conceptions of judicial lawmaking. In reasoning that courts "are not designed to make policy decisions about 'the need for, and likely effectiveness of, regulatory actions'"[150] and that "[t]he usual due process constraint is that courts cannot abandon settled principles,"[151] Kennedy's position seems far from representing longstanding practices of courts, especially in common law fields.

As Part I has shown, state (and federal) courts have long engaged in core policy decisions in reforming common law doctrines, such as by introducing the implied warranty of habitability with its strong regulatory feature.[152] And as is well known, the stare decisis principle has never been an insurmountable barrier for courts, when changing needs and times have justified, in their view, the overruling of precedents.[153]

In fact, the position that stood as the basis of the Court's formerly suspicious approach toward the doctrine of judicial takings is directly contrary to Justice Kennedy's viewpoint. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, which rejected the notion of a judicial taking, Justice Brandeis famously stated:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administrating the common law. Since it is for the state courts to in-

150. *Id.* at 2615 (Kennedy, J., concurring) (citations omitted).

151. *Id.*

152. *See supra* text accompanying notes 88–97.

153. *See* EISENBERG, *supra* note 39, at 104–45. For an analysis of the plethora of instances in which courts have often overruled or otherwise overturned common-law precedents, see *id.* at 145 (reasoning that "overruling, inconsistent distinguishing, and other forms of overturning do not necessarily involve discontinuity").

> terpret 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.[154]

Controversial as Justice Brandeis's opinion is, as it completely shields judicial lawmaking from federal constitutional constraints, while subjecting similar legislative and administrative "trial and error" lawmaking to constitutional scrutiny,[155] Justice Kennedy goes to the other extreme. Justice Kennedy does so by automatically applying the Due Process Clause to invalidate any judicial decision that would "eliminate or change established property rights"[156] in the process of reforming a common law doctrine, viewing it as an illegitimate exercise of an authority that belongs to the other branches.[157]

Justice Kennedy's opinion is even more puzzling in view of his statement that "[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law."[158] This means that while "incremental modifications" would not at all implicate constitutional concerns, once the court "eliminates or substantially changes established property rights" the Due Process Clause would invalidate such a decision as "arbitrary or irrational," meaning simply unauthorized in Kennedy's view.[159]

But drawing the line between incremental modifications and elimination or substantial change to property rights is far from a simple, straightforward task. Accordingly, delineating the contours of illegitimate or unauthorized judicial action is much trickier than what Justice Kennedy portrays. Needless to say, the regulatory takings doctrine has been such a muddle exactly because it may be extremely difficult to distinguish a constitutional violation from a no-violation scenario when a

154. 281 U.S. 673, 681 n.8 (1930).

155. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1466–67 (1990) (explaining that Brandeis's opinion in *Brinkerhoff-Faris* puts judicial lawmaking in a separate category from legislative and administrative agencies and noting that Brandeis, in dicta, stated that state court changes to the common law were not subject to constitutional restrictions, unlike actions by legislative and administrative agencies).

156. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring).

157. *See id.* ("If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.").

158. *Id.* at 2615.

159. *Id.*

governmental entity takes a certain action that adversely affects property rights.[160] Thus, in view of the infeasibility of the all-or-nothing approach that Justice Kennedy advances, Justice Scalia seems to be on stronger footing in arguing that takings jurisprudence, with its built-in nuances, cannot simply be deemed irrelevant for reviewing the entire spectrum of common law decisions that impact property rights.[161]

A second point of contention between Scalia and Kennedy concerns the nature of the judiciary and its potential propensity to violate constitutional rights. The debate here is extremely brief and lacking, mainly because it is conducted on entirely different levels.

Justice Kennedy's position is that a court basically engages in institutional usurpation when it "eliminates or substantially changes established property rights."[162] In contrast, Justice Scalia follows the more conventional rationales for constitutional scrutiny, saying that Kennedy's "injection of separation-of-powers principles into the Due Process Clause would also have the ironic effect of preventing the assignment of the expropriation function to the branch of government whose procedures are, by far, the *most* protective of individual rights."[163] This least-dangerous-branch argument by Scalia thus legitimizes the power of courts to engage in lawmaking, without exempting them from constitutional review in case of an alleged violation of rights.[164]

It is, however, unclear if courts are indeed categorically less prone to violate constitutional rights, such as the right of private property, in their lawmaking functions. In his 1990 article on judicial takings, Barton Thompson argues that in con-

160. *See* William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 433–38, 481–85 (2005) (explaining the difficulty of distinguishing between government regulatory actions—which are rarely considered takings—and government appropriations, which are always considered a taking). S*ee generally* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (analyzing approaches to takings and stating that one of the most difficult property issues is deciding when certain government actions constitute a taking).

161. *See Stop the Beach*, 130 S. Ct. at 2606 (plurality opinion).

162. *Id.* at 2615 (Kennedy, J., concurring).

163. *Id.* at 2605 (plurality opinion).

164. *See id.* at 2605–08 (explaining that the judicial branch is the "*most* protective of individual rights" and stating that the Court "must not say that we are bound by the Constitution never to sanction judicial elimination of clearly established property rights").

sidering rights-oriented rationales (e.g., the right not to be coerced, or the right not to share an unjustifiably large portion of public costs), and process-oriented rationales (e.g., the risk of demoralization costs of uncompensated takings, fear of political discrimination against property owners, or the problem of "fiscal illusion"),[165] one cannot assume that courts will be entirely protective of individual rights, or that affected parties will consider courts as protective even when they are on the losing side.[166] Thompson thus sees no overarching justification for releasing courts from constitutional property review.[167] Whatever conclusion one may reach in this institutional comparison, Justice Scalia's statement offers little guidance as to the specific characteristics of the Court's review of state court decisions implicating private property, as compared with federal review of legislative and administrative decisions.[168]

Finally, Justices Scalia and Kennedy diverge on whether recognizing a "judicial taking" doctrine would in itself empower courts to engage in such types of actions. According to Kennedy, "[b]ut were this Court to say that judicial decisions become takings when they overreach, this might give more power to courts, not less."[169] If a court "decide[s] that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea," Kennedy predicts that "[k]nowing that the resulting ruling would be a taking, the courts could go ahead with their project, free from constraints that would otherwise confine their power."[170] Consequently, "a State might find itself obligated to pay a substantial judgment

165. For these different rationales, see Thompson, *supra* note 155, at 1472–98.

166. *Id.* at 1495–97 (explaining that there are imperfections to judicial decision making in property law).

167. *See id.* at 1472–1512 (stating the importance of judicial review of property decisions).

168. *See* Mitch L. Walter, Comment, *From Background Principles to Bright Lines: Justice Scalia and the Conservative Bloc of the U.S. Supreme Court Attempt to Change the Law of Property as We Know It* [Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection., *130 S. Ct. 2592 (2010)*], 50 WASHBURN L.J. 799, 822 (2010) (concluding that Justice Scalia did not deny that barring federal courts from reviewing state court decisions would "result in a flood of takings claims coming directly to the U.S. Supreme Court" but did not address this concern nor did he address Justice Kennedy's "remedy-oriented concerns," resulting in little specific guidance on the Court's judicial review of such decisions).

169. *Stop the Beach*, 130 S. Ct. at 2616 (Kennedy, J., concurring).

170. *Id.*

for the judicial ruling."[171] Justice Scalia replies that this would not be the case: "[I]f we were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the . . . judgment."[172] As a result, "[t]he power to effect a *compensated* taking would then reside, where it has always resided . . . in the Florida Legislature—which could either provide compensation or acquiesce in the invalidity of the offending features of the Act."[173]

It is true that the Court could choose among different remedies in addressing a judicial-taking scenario.[174] But in some sense, Justice Scalia's approach, by which the state judicial lawmaking would practically become *non est factum*, is simply unrealistic.

Scalia's suggested remedy of simply reversing the state judicial action would itself have the "ironic effect of preventing the assignment of the expropriation function to the branch of government whose procedures are, by far, the *most* protective of individual rights."[175] By refusing to validate such a judicial act and ordering payment of just compensation, Scalia reaches the exact same result that Kennedy is trying to achieve by using the Due Process doctrine—i.e., ruling that a court is in effect unauthorized to engage in a taking.[176] In so doing, Scalia deviates from the Court's conventional understanding of the Takings Clause, which "does not bar government from interfering with property rights, but rather requires compensation in the event of *otherwise proper interference* amounting to a taking."[177] In this sense Justice Kennedy has the better argument in suggesting that formally introducing a "judicial taking" doctrine has the inevitable effect of enabling courts to engage in the restructuring of property rights.[178]

171. *Id.*

172. *Id.* at 2607 (plurality opinion).

173. *Id.*

174. *See* Thompson, *supra* note 155, at 1514–21 (suggesting an array of remedies).

175. *Stop the Beach,* 130 S. Ct. at 2605.

176. *See id.* at 2613–17 (Kennedy, J., concurring) (explaining why the court should not recognize a judicial takings doctrine).

177. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005) (quoting First Evangelical Lutheran Church of Glendale v. City of L.A., 482 U.S. 304, 315 (1987)).

178. *See Stop the Beach*, 130 S. Ct. at 2615–16 (Kennedy, J., concurring) (explaining that recognizing a judicial takings doctrine would give more power to courts to do what they want with property rights).

We are thus left with a rather odd state of events, by which neither of the opinions standing alone formulates a coherent theory of judicial deprivation of property rights. More broadly, the Justices leave open crucial questions about the proper jurisprudential framework for federal judicial review of state judicial wrongs in general. Part III takes up the challenge of conceptualizing such a model of "judicial review of judicial lawmaking."

III. THE NEXT STEP: JUDICIAL REVIEW OF JUDICIAL LAWMAKING

This Part addresses the core issue that arises from *Stop the Beach* but that has not been adequately conceptualized by the different opinions—namely, how should the legal system construct a model for federal judicial review of state judicial lawmaking?

A. NO "SPECIAL TREATMENT"?

It is now time to frame the main conclusions reached so far in the broader context of "judicial wrongs" and the judicial review thereof. State courts have significant, well-established powers to engage in lawmaking, especially in common law doctrines.[179] In so doing, they act as full-fledged state actors, exercising the "full coercive power of government."[180] Such lawmaking is often considered perfectly legitimate from the state perspective of separation of powers, and when common law is concerned, state courts would hardly be constrained by federal judicial lawmaking. At the same time, state courts should be held accountable for potential violations of federal constitutional rights, even if these occur as a byproduct of otherwise benign judicial reform. These assumptions in place, how should such lawmaking be affected by federal judicial review, compared with legislative or regulatory lawmaking? Should judicial lawmaking that may result in a judicial wrong indeed receive no "special treatment"? For this purpose, consider the two hypothetical judicial actions presented in the Introduction.

179. *See generally* Larry Kramer, *The Lawmaking Power of Federal Courts*, 12 PACE L. REV. 263, 265–73 (1992) (discussing the history of common law lawmaking).

180. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

1. The Adverse Possession Reform

First, consider the judicial reform of the state adverse possession doctrine, eliminating the requirement by which the possession has to be "continuous for the statutory period,"[181] an element that had been set up in previous state case law.[182] What could the potential federal constitutional impact be, and how should judicial review assess this state ruling?

This new rule probably cannot be seen as a full-scale taking of a landowner's "stick" of ownership.[183] The right to bring an action against a trespasser has not been abolished,[184] and there is no objective threshold of a minimal continuous period of possession.[185] This is especially so because the overall periods of the statutes of limitations vary widely from state to state, from five to forty years.[186] So, if the statute of limitations establishes an overall twenty year period, and the court rules that this timeframe could be divided into consecutive possessions of five years each by the same adverse possessor for an overall period of twenty years, it is unclear if the owner's rights have been objectively deprived.[187] At the same time, this reform does derogate to some extent, at least in theory, from the landowner's "bundle."[188]

Such a judicial reform could thus be challenged as a potential "regulatory taking" case that should be seemingly governed by the three-prong test created in *Penn Central Transportation*

181. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 150–51 (2d ed. 2005) (explaining the "continuous" element of adverse possession).

182. For this element, and the doctrine in general, see Part IV.A and *infra* text accompanying notes 305–08.

183. For cases holding that the uncompensated deprivation of one of the "sticks" of a property "bundle" would amount to a taking, see, e.g., Hodel v. Irving, 481 U.S. 704, 715 (1987) (reasoning that "the right to pass on" property is "itself a valuable right"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982) (portraying the power to exclude as "one of the most treasured strands in an owner's bundle of property rights").

184. *See* SINGER, *supra* note 181, at 143 (explaining that the owner can bring an action for ejectment against a non-owner).

185. *See id.* at 150 (explaining that the continuity period depends on the statute of limitation determined by the state).

186. *See id.* at 157 (listing the statutory periods in various states).

187. *See id.* at 151 (explaining that a person can adversely possess property for less than the period required by the statute of limitations if there are succeeding periods of possession called *tacking*); *see also* DUKEMINIER ET AL., *supra* note 23, at 121 (stating that entry must be continuous for the statutory period, but not necessarily constant).

188. *See* DUKEMINIER ET AL., *supra* note 23, at 83 (describing property as a "bundle" of rights); SINGER, *supra* note 181, at 142 (describing the legal rights of owners in the context of adverse possession).

Co. v. City of New York, which requires a weighing of (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action."[189]

In comparing review of a regulatory taking case to that of an otherwise identical legislation or regulation, the first two prongs would seem largely unaffected by the potential peculiarity of the reviewed judicial action. The first prong deals with a quantitative component of the economic loss, while the second deals with the property owner's past investments and consequent expectations against the background of the former legal regime.[190]

The third prong might result in a slightly more awkward test in the context of a potential "judicial regulatory taking." In *Penn Central*, Justice Brennan explains the "character of the governmental action" by saying that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[191] One could understand the latter part of this statement as evaluating the underlying motivation of the governmental branch as either publicly benign or as self-serving, or as Steven Eagle suggested, as looking into the "worthiness" of the government's regulatory purpose.[192]

This is, however, not the conventional reading of this prong. In analyzing the third *Penn Central* prong in *Loretto v. Teleprompter Manhattan CATV Corp.*,[193] the Court seemed to focus on the distinction between a permanent invasion and a regulation as the litmus test for the prong.[194] Moreover, in *Lingle v. Chevron U.S.A., Inc.*, the Court reasoned that takings ju-

189. 438 U.S. 104, 124–25 (1978).

190. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation*, 84 N.Y.U. L. REV. 1222, 1249–56 (2009) (analyzing the first two prongs).

191. *Penn Cent.*, 438 U.S. at 124.

192. Steven J. Eagle, *"Character" as "Worthiness": A New Meaning for* Penn Central*'s Third Test?*, 27 ZONING & PLAN. L. REP. 1, 6–7 (2004) (explaining that the "character test" would consider the motivation and circumstances of the regulator).

193. For the Court's holding, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432–38 (1982) (discussing the distinction between permanent occupation and a temporary invasion).

194. *Id.* at 426–27.

risprudence focuses on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights" or on "how any regulatory burden is distributed among property owners," but it does not question the legitimacy of the goal that the governmental body seeks to promote.[195] Such inquiry is located rather within the realm of substantive due process jurisprudence.[196]

It is indeed under a substantive due process test that the judicial review of the judicial lawmaking encounters genuine conceptual difficulty. In the early twentieth century, the Court looked at whether the governmental regulation was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[197] In the Court's contemporary language in *Lingle*, "[t]he 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose."[198]

Consider therefore a potential substantive due process challenge to the adverse possession judicial reform. One argument could be that even if the "growing need to use lands more efficiently"[199] is a legitimate public purpose,[200] increasing the scope of immunity to trespassers by shortening the period for consecutive possessions is not an effective means to achieve such an end. Adverse possessions are piecemeal, anecdotal, and lack any sort of coordinated action to ensure the more efficient allocation of lands.[201]

So how is the federal reviewing court to inspect the constitutionality of the state judicial reform under a substantive due process argument? The Court in *Lingle*, in warning against the expansion of the "substantially advances" formula to takings jurisprudence, reasoned that a heightened means-ends review of regulation "would require courts to scrutinize the efficacy of

195. 544 U.S. 528, 542 (2005).

196. *See id.*

197. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

198. *Lingle*, 544 U.S. at 542.

199. *See supra* text accompanying note 23.

200. *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2435–36 (2001) (discussing the notion that adverse possession does not always serve the public purpose of putting land to productive use or encouraging certain behaviors from landowners).

201. *See id.* (explaining that adverse possession does not always result in the more efficient use of lands because the risk of adverse possession creates an incentive to monitor one's property, not necessarily an incentive to use the land productively).

a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[202] This explains, per the Court, why "we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."[203]

Should the Court, in its judicial review capacity, exercise such a careful approach to *judicial* reforms? Should it indeed refrain from substituting its "predictive judgments" for those of the state court, which initiated the reform in its role as a common law norm-maker? Alternatively, a case could be made for approaching this problem in a completely different manner: If courts are not well suited to evaluate ends and the means to attain them, the judicial reviewer should not defer at all to the judicial lawmaker. This is because both courts are located in exactly the same (inferior) position to evaluate the prospects and perils of such a reform. While the state court obviously has a more intimate acquaintance with the social and economic background of the specific state—a point I address in detail in Part III.B below—one could argue that this does not necessarily indicate inherent superiority of the state court in analyzing means-ends congruence or in assessing the reform's implications on the Constitution.

2. The Equitable Redemption Reform

Consider now the second hypothetical scenario, in which a state court of last resort revises the equitable right of redemption so as to adjust to contemporary circumstances the original purpose of this right, i.e., protecting homeowners who had formerly defaulted on their mortgage but who had once again become solvent and now wish to avoid the harsh consequences of being evicted under a strict application of the foreclosure procedure.

Viewing this right as designed to protect typically less well-to-do homeowners who encountered financial difficulties, but not to enable lenders to strategically exercise a legal option to make payments based on more general market conditions, the state court decides that the doctrine should be somewhat reframed. Created by English equity courts hundreds of years

202. *Lingle*, 544 U.S. at 544.
203. *Id.* at 545.

ago, the doctrine must now be reevaluated "in order to conform with changing ideas and conditions."[204]

To achieve this need while providing clear legal guidance to future lenders and borrowers, the state court holds that the doctrine would now generally apply only to homeowners who live below the federal poverty line or who own no other real property.

What could be the potential grounds for federal judicial review, and in what way, if any, would such a review be distinguishable from a constitutional assessment of an otherwise identical reform that would have been passed by the state's legislature?

One potential constitutional argument suggests that homeowner-debtors who no longer enjoy the equitable redemption right under the new regime have had one of their property "sticks" taken without just compensation in violation of the Takings Clause. The test would thus simply follow Justice Scalia's formulation of the judicial-taking case, where the court ruled "that what was once an established right of private property no longer exists."[205] Even if the state court acknowledges that it has changed the common law, the dispute would nevertheless entangle the debate between Justices Scalia and Kennedy on whether the judicial reform introduces only "incremental changes," and even if so, whether such a change would avoid implicating the Takings Clause.[206]

A different potential basis for constitutional review, the claim that the new judicial norm implicates the Fourteenth Amendment's Equal Protection Clause, reveals more vividly the peculiarities of federally reviewing the state court's alleged "judicial wrong."[207] Should federal judicial review of such a

204. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930).

205. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010).

206. *See supra* notes 156–60 and accompanying text.

207. Interestingly, in *Shelley*, the Court held the state court to be in violation of the Equal Protection Clause not for changing the law, but quite the opposite, for simply maintaining settled state common law principles enforcing the privately drafted restrictive covenant. Shelley v. Kraemer, 334 U.S. 1, 21–23 (1948). But, most likely, potential challenges to state common law jurisprudence would look more like the equitable redemption example, such that a *shift* in the common law would arguably unconstitutionally differentiate among classes of persons. In the example before us, the new delineation of the doctrine could be contested as an affirmative-action-type discrimination made on the basis of socioeconomic status.

state judicial lawmaking follow the three-tiered Equal Protection framework designed for assessing legislation or regulation?[208] If this is the case, the equitable redemption example would thus fall under "rational basis" review, the most deferential tier of review, since wealth is generally considered to be a non-suspect class under the holding in *San Antonio Independent School District v. Rodriguez*.[209]

Notwithstanding slight varieties in the application of the rational basis test,[210] the test is seen as materially different from the "strict scrutiny"[211] or "intermediate scrutiny"[212] tiers of review, because of the view that under ordinary circumstances, judicial review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[213]

The dilemma about applying the "rational basis" standard of review to *judicial* lawmaking is in many respects reminiscent of the debate about the application of the substantive due process "substantially advances" formula to the adverse possession judicial reform.[214] In both instances, the Court reasons that it is not in a position, in its judicial review capacity, to eva-

208. The three tiers of judicial scrutiny of government actions which are claimed to infringe the Equal Protection Clause are rational basis review (the most lenient type of review), intermediate scrutiny, and strict scrutiny. *See infra* notes 210–13 and accompanying text.

209. 411 U.S. 1, 28 (1973).

210. The conventional analysis of this tier gives the reviewed classification a "strong presumption of validity," emphasizing that rational basis review does not authorize the judiciary to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." Heller v. Doe, 509 U.S. 312, 319 (1993) (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)). A more demanding version, articulated in a few cases, requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). For a discussion of these "weak" and "strong" versions of rational basis review, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512–18 (2004).

211. "Strict scrutiny" relates to classifications based on race or national origin. To pass constitutional muster, the suspect classification "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

212. Courts apply "intermediate scrutiny" review to classifications based on gender. Craig v. Boren, 429 U.S. 190, 197 (1976). Within this middle tier, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*

213. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

214. *See supra* Part III.A.1.

luate the "wisdom" of the lawmaker.[215] These statements seem based on the Court's more general self-perception that a court is a body with inferior institutional capacity and bounded democratic legitimacy to second-guess lawmaking. But if it is another court that it is reviewing, may not one "not-well-suited" court feel unconstrained in passing judgment on a state-level institution suffering from the same shortcomings?

B. JURISDICTIONAL LIMITS ON REVIEWING JUDICIAL LAWMAKING

To further investigate the potential peculiarities of federal judicial review of state judicial lawmaking, this Part briefly identifies more general principles of federal judicial intervention in state court decision making and analyzes the way in which these broader-based considerations implicate the particular dilemmas addressed in the Article.

1. Fact and Law Finding

Consider, first, the general principles under which federal judicial review evaluates questions of fact and law decided by state courts, as compared with the federal assessment of law- and fact-finding by the state legislative and executive branches. As for fact finding, the two chief reasons for judicial deference to the legislative—and, to a lesser extent, executive branches—are, first, that legislators and regulators are institutionally superior in gathering and assessing facts,[216] and second, that courts generally lack the authority or political legitimacy to question fact finding, especially when it is made by the legislature.[217] Accordingly, the Court has ruled that with respect to such fact finding, made on either the federal or state level, those challenging it "must convince the court that the legislative facts . . . could not reasonably be conceived to be true by

215. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544 (2005); *Beach Commc'ns*, 508 U.S. at 313.

216. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994) ("As an institution . . . Congress is far better equipped than the judiciary to 'amass and evaluate vast amounts of data' . . . . And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." (citations omitted)).

217. *See, e.g.*, Bhd. of Locomotive Firemen v. Chi., Rock Island & Pac. R.R. Co., 393 U.S. 129, 136–38 (1968) (deferring to the Arkansas legislature's decision to increase safety by requiring full train crews, reasoning that the "question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives").

the governmental decision maker."[218] While this approach has been criticized[219] and legislatures and administrators have not been immune from review of their fact finding,[220] such bodies enjoy substantial deference due both to institutional capacity and democracy.[221]

In contrast, constraints on federal judicial review of fact finding by state courts are premised on relatively soft conceptions of federalism and, more dominantly, on self-limiting rules of practice. As a result, the Court has allowed itself to engage, in certain situations, in independent judgment of the factual basis of certain constitutional claims. This is clearly the case when state courts explicitly focus on questions of federal constitutional law and make factual findings to arrive at legal conclusions. In *Norris v. Alabama*,[222] in the context of racial exclusion from state juries, the Court reasoned that "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."[223]

After *Norris*, limits on the Court's review of state court fact-finding rest not primarily on federalism, but rather on the general delineation of the Court's appellate jurisdiction.[224] But these limits have not prevented the Court from practically making independent judgment on application of constitutional law, such as the areas of coerced confessions, free speech,[225] or in the collateral review of habeas corpus.[226] As Henry Monag-

218. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463–64 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

219. *See, e.g.*, Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 4 (2009) (arguing that legislatures do "a poor job of gathering and assessing facts" and that these fact-finding shortcomings are "particularly stark when laws restrict core personal rights and liberties").

220. *See Turner*, 512 U.S. at 666 ("That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether.").

221. *See supra* notes 216–17 and accompanying text.

222. 294 U.S. 587 (1935).

223. *Id.* at 589–90.

224. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 261 (1985).

225. *Id.* at 260–62.

226. A federal statute requires federal courts to defer to factual findings made in state court when considering some habeas corpus petitions. 28 U.S.C. § 2254(e)(1) (2006) ("In a proceeding . . . for a writ of habeas corpus by a person

han notes, although the formulas for allowing the Court to review state court fact finding vary—including reviewing "intermingled" questions of law and fact, ensuring that the federal right was not "denied in substance," or the need to determine whether "sufficient evidence existed"—"the entire substance of constitutional fact review ha[s] become the operative measure of the Supreme Court's general appellate jurisdiction."[227]

What would be the result when a federal court reviews a state court's fact and law finding in a more conventional matter of state law—such as a common law doctrine—that is nevertheless contested as implicating a certain federal constitutional right? Three principles regularly inform the understanding of the Court's appellate authority over such judgments of state courts of last resort. First, the Supreme Court's jurisdiction is limited "to the correction of errors relating solely to Federal law."[228] Second, a state court judgment resting upon an "adequate and independent" nonfederal ground precludes the Court from reviewing "even the erroneously determined *federal* issues in the case."[229] Third, and potentially most relevant in the context of reviewing state judicial lawmaking, is the principle by which the federal reviewing court is generally "bound to accept the interpretation of [the State's] law by the highest court of the State."[230]

The latter principle, which limits the federal court to considering if the state court's determination of state law was based on a "fair and substantial basis," has been somewhat modified, and several comments by Justice Scalia in *Stop the Beach* put into question whether this principle would have any significant weight in reviewing potential "judicial wrongs."[231]

in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.") Notwithstanding, the Court has reserved its power to intervene, as "[a] federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

227. Monaghan, *supra* note 224, at 261–62.

228. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874).

229. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1924 (2003) (referring to Herb v. Pitcairn, 324 U.S. 117, 126 (1945)).

230. *Id.* (quoting Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976)).

231. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envtl. Prot., 130 S. Ct. 2592, 2609–10 (2010).

Bush v. Gore,[232] one of the Court's most contested opinions in recent years,[233] also implicated the "fair and substantial basis" test.[234] Stepping in for Florida's Supreme Court in determining the meaning of Florida's election law, the Court practically deviated from this principle. This was done in order to review (and ultimately agree with) the petitioner's argument that the Fourteenth Amendment's Equal Protection Clause imposed a duty of fidelity to Florida's election law as stated by the legislature at the time of the election, and that the state court's later "interpretation" of it impermissibly altered the law and thus violated that constitutional duty.[235] In his concurring opinion, Chief Justice Rehnquist explained that "[t]hough we generally defer to state courts on the interpretation of state law . . . there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."[236]

Federal judicial intervention in the determination of state law by the state's court of last resort, *when a change in state law could in itself have federal constitutional implications*, may sound befitting also for the circumstances of the *Stop the Beach* case, or for that matter, for the two hypothetical examples set out above. And indeed, although Justice Scalia does not refer to *Bush v. Gore*, he does address the potential implications of the plurality's opinion on the "fair and substantial basis" principle.[237]

Scalia reasons that "[t]o assure that there is no 'evasion' of our authority to review federal questions, we insist that the nonfederal ground of decision have 'fair support.'"[238] This means, reasons Scalia, "that there is a 'fair and substantial basis' for believing that petitioner's Members did not have a property right to future accretions which the Act would take away. This is no different, we think, from our requirement that peti-

232. 531 U.S. 98 (2000) (per curiam).

233. *See* Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 612–18 (2002) (surveying the various criticisms).

234. *Bush*, 531 U.S. at 104–11.

235. *Id.* at 112 (Rehnquist, J., concurring).

236. *Id.* at 112–14.

237. Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envtl. Prot., 130 S. Ct. 2592, 2608 (2010). This was done in response to respondents' argument that in a case claiming a judicial taking, the Court should add this principle to its normal takings inquiry. *Id.*

238. *Id.*

tioner's Members must prove the elimination of an established property right."[239]

In a subsequent footnote, Scalia rejects Justice Breyer's view that "we do not set forth 'procedural limitations or canons of deference' to restrict federal-court review of state-court property decisions."[240] "It is true," writes Scalia, "that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. That is unsurprising because it is what this Court does when determining state-court compliance with *all* constitutional imperatives."[241] At the same time, he reasons:

> The test we have adopted, however (deprivation of an *established* property right), contains within itself a considerable degree of deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.[242]

This "restriction" does not mean much, however, and it is probably no surprise that Scalia does not mention *Bush v. Gore*, in which the Court determined previous state law. Accordingly, if it is the state court's change of the common law that creates a potential constitutional violation, a reviewing federal court has no alternative but to determine both what state law *has been*, and what *it is* following the state judicial action.[243] It therefore seems clear enough that in reviewing an alleged constitutional wrong, resulting from a change to a common law doctrine introduced by the state court, the Court would have to preserve the power to independently determine both the former and the current state law. This is, therefore, yet another peculiarity stemming from the judicial review of judicial lawmaking: when the state court itself is suspected of committing a constitutional wrong, the federal reviewer could not defer to the "fair and substantial basis" and to the state court in learning the content of the state's common law.

239. *Id.*

240. *Id.* at 2608 n.9.

241. *Id.* at 2608–09 n.9.

242. *Id.* at 2609–10 n.9.

243. In *Stop the Beach*, Florida's Supreme Court depicted the common law right to accretions as a future contingent interest rather than a vested property interest; Scalia tries to smooth this gap by saying that this distinction does not matter for the takings claim. *Id.* at 2601 n.5.

2. "Full Faith and Credit" in State Judicial Wrongs?

Another jurisdictional issue, which may entail peculiar consequences in the context of judicial lawmaking, is that of claim- and issue-preclusion. While this rule generally makes sense in preventing repetitive litigation in state and *then* federal courts, it creates unique conceptual difficulties when the state court of last resort is the body whose actions are those that had arguably committed a federal constitutional wrong against the plaintiff.

The source of preclusion is located in Article IV, § 1, of the Constitution, under which "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[244] Congress has codified the principle, such that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ."[245] These provisions have long been interpreted by the Court as encompassing both claim preclusion (res judicata) and issue preclusion (collateral estoppel).[246]

What does this principle mean in the context of federal constitutional rights? For most constitutional claims, a litigant arguing for an infringement of a constitutional right could elect whether to go to a state court or to a federal district court to pursue the action.[247] The "Full Faith and Credit" principle would bar her from relitigating in the other forum the causes of action or decided issues.[248] Although such an "either-or" approach may create some difficulties in allocating jurisdiction over some disputes and in ensuring that the adjudicating court provides parties with a full opportunity to raise their various claims,[249] "Full Faith and Credit" claim- and issue-preclusion serves an important goal of preventing a legal scenario in which "an end could never be put to litigation."[250]

244. U.S. CONST. art. IV, § 1.

245. 28 U.S.C. § 1738 (2006).

246. *See, e.g.*, San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 336 (2005).

247. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 286 (5th ed. 2007).

248. *See San Remo Hotel*, 545 U.S. at 336.

249. For a detailed analysis of the allocation of cases between state and federal courts, and a criticism of the prevailing "either-or" approach, see Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1216–26 (2004).

250. *San Remo Hotel*, 545 U.S. at 336–37.

Jurisdictional complexities arise, however, when the resolution of a federal constitutional claim requires an extensive inquiry into the relevant state law. Under the abstention rule set forth in *Railroad Commission v. Pullman Co.*, a federal district court should stay its hands from a dispute if the federal cause of action is embedded in a certain state law question, especially when resolution of the state law matter could make the federal question no longer required.[251] In *England v. Louisiana State Board of Medical Examiners*, the Court held that if the state law adjudication has not resolved the federal law questions, the litigant could then return to the federal court to pursue the matter.[252] But as is often the case, the state court will also address and decide federal constitutional law issues if either of the parties raise them.[253] The plaintiff could then be barred from ever introducing the federal questions to, and having them decided by, a federal district court.[254]

One area in which a combination of abstention, ripeness, and preclusion rules has led to the practical result of a federal constitutional claim never making it to a federal district court, is that of a "regulatory takings" claim. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court held that a regulatory taking claim is generally "unripe" for federal review until the plaintiff seeks both (1) a final decision by the governmental agency, and (2) payment of "Just Compensation" for the taking under available state law and procedure.[255]

In *San Remo Hotel, L.P. v. City of San Francisco*, the plaintiff attacked a city ordinance reclassifying a hotel as for residential use only—as both a facial and "as-applied" taking, as well as a violation of substantive due process.[256] After the federal district court held that the federal causes of action were either unripe under *Williamson County* or barred by the statute of limitations in the case of the facial-taking claim, the state court found for the defendants.[257] The petitioner's attempt to return to the federal court to litigate the federal questions was then blocked.[258] The Court held that only the facial-taking

251. RR. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941).
252. 375 U.S. 411, 418–19 (1964).
253. *See, e.g.*, *San Remo Hotel*, 545 U.S. at 339.
254. *See id.* at 338–40.
255. 473 U.S. 172, 195 (1985).
256. *San Remo Hotel*, 545 U.S. at 330.
257. *Id.* at 330–34.
258. *Id.* at 334–35.

claim was ripe for federal review under *Williamson County*, but that the plaintiff had then voluntarily raised it before the state court so that it became precluded.[259] As for the other federal claims, which were viewed as initially unripe for federal district review and then decided by the California courts, the Court held that "even when the plaintiff would have preferred not to litigate in state court, but was required to do so by a statute or prudential rules," then "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court."[260]

The Court refused to carve out an exception to the claim- and issue-preclusion, even though the plaintiff was initially prevented from electing to litigate its federal law claims in a federal district court because its regulatory-takings claim was unripe under *Williamson County*.[261] According to the plurality opinion,

> It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts . . . . State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulation.[262]

The plurality thus gives, in the context of this case, an enthusiastic positive answer to the question of parity, i.e., "whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal rights."[263] This conclusion, however, is debatable.[264]

259. *Id.* at 340–41.

260. *Id.* at 342.

261. *See id.* at 338, 344–46.

262. *Id.* at 346–47. A concurring opinion by four Justices agrees that no exception should be made to the preclusion principles once the claim has been decided by the state court. *Id.* at 348 (Rehnquist, J., concurring). But it casts doubts on the wisdom of *Williamson County*, which prevents litigants asserting a regulatory taking claim from initially electing to pursue it in a federal court, so that "federal takings claims [are] singled out to be confined to state court, in the absence of any asserted justification or congressional directive." *Id.* at 351.

263. *See* CHEMERINSKY, *supra* note 247, at 36.

264. *See id.* at 38–39 (viewing parity as an empirical question that lacks credible methods of measurements); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06, 1116–28 (1977) (arguing that federal courts enjoy better competence, higher attitudinal inclination to enforce constitutional rights, and insulation from political pressures). Others have looked to political accountability and competitive federalism as partly balancing potential gaps. *See* Eric A. Lindberg, Comment, *Multijurisdictionality and Federalism:*

But whatever the general inclinations about parity, the context of state judicial lawmaking creates a clear paradox. On the one hand, entrusting the state court with deciding federal constitutional claims against its own rulemaking seems simply self-contradictory. Since courts, unlike the legislature or the executive, have no "purse," they would probably never admit to effecting a taking, or to committing some other constitutional wrong that could immediately undermine their own legitimacy.[265] From this perspective, while state courts have lawmaking powers, and otherwise have power to review the constitutionality of government actions, they obviously cannot exercise both powers at the same time.[266] State judicial lawmaking might therefore seem the paradigmatic case for granting federal courts broad jurisdiction to guard against constitutional wrongs.

But on the other hand, opting for the other conventional alternative—federal district court jurisdiction—might also prove awkward. Assume a case in which a judicial reform in a certain common law doctrine is first made by a state's trial court, and the losing party argues that this judicial lawmaking results in a certain constitutional wrong. Should the plaintiff be allowed to now take the case immediately to a federal district court to review her federal constitutional claim? Does it not make much more sense to have superior state courts, up to the state court of last resort, review this piece of state judicial lawmaking on a state common law doctrine, before it is turned over to federal jurisdiction? Would not an approach of state-federal "zigzag" jurisdiction undermine the entire structure of the state court system and the tiered system of appellate review?

What about a third option, by which the case would go all the way up to the state court of last resort, and only then be steered to a federal district court? This runs the risk of violating issue- and claim-preclusion rules not only technically, because the plaintiff would rarely be able or inclined to disregard federal law questions in the state courts, but also normatively, because it undermines the very basic idea of "Full Faith and Credit," that prevents scenarios in which "an end could never be put to litigation."[267]

Assessing San Remo Hotel*'s Effects on Regulatory Takings*, 57 UCLA L. REV. 1819, 1855–59 (2010).

265. *Cf.* Baker v. Carr, 369 U.S. 186, 267 (Frankfurter, J., dissenting) (finding the Supreme Court's authority is based on public confidence).

266. *See* Schauer, *supra* note 36, at 886–88, 889–901.

267. *San Remo Hotel*, 545 U.S. at 336–37.

At the same time, the solution we are left with as a matter of default—that all cases of judicial lawmaking by state courts of last resort are reviewed, if at all, only by the U.S. Supreme Court under its power to issue a writ of certiorari[268]—raises in itself some difficult dilemmas, which I touch on briefly below.

3. The "Error-Correction" Role of Certiorari

Assume that federal constitutional challenges to judicial lawmaking by state courts of last resort would indeed require a writ of certiorari by the Court. How would the Court's policy on the matter be different from its issuance of similar writs, when legislative or administrative lawmaking is challenged on similar grounds and the matter has then been litigated by the state court of last resort? Once again, I focus attention on traditional common law doctrines that arguably implicate a "governmental wrong." Probably unsurprisingly, the Court's review of state judicial lawmaking poses a genuine puzzle that does not sit comfortably with the Court's broader policy on the role of certiorari.

The Court's policy on exercising its "error-correction" function by issuing writs of certiorari is articulated in Rule 10 of the Supreme Court Rules.[269] Under Rule 10(c), a writ can be issued when "a state . . . court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."[270] At the same time, Rule 10's concluding section provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[271]

This latter provision is understood to reflect a policy by which the Court is "less concerned about rectifying isolated errors in the lower courts," believing "that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues."[272] The underlying assumption is that state courts of last resort can be generally trusted with implementing the broad principles laid

268. *See* 28 U.S.C. § 1257 (2006).

269. SUP. CT. R. 10, *available at* http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

270. *Id.* R. 10(c).

271. *Id.* R. 10. This latter addition to Rule 10 was promulgated in 1995. *See infra* note 272.

272. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 430–31.

down by the Court, so that even if the fifty states will not reach ultimate harmony in every single case, a satisfactory level of uniformity will be maintained in applying federal law principles, including when these become entangled with specific state law questions.[273]

How would this working assumption fare in the case of a state judicial wrong? On the one hand, opening every potential state court dispute to a review by the Court, in contrast to the otherwise contractive approach of granting writs of certiorari, runs the risk of gate flooding, as Justice Breyer suggested in his concurring opinion in *Stop the Beach*.[274]

Moreover, as a normative matter, it is debatable what degree of harmonization is really required at the state level, especially when the cases involve traditional common law doctrines. To the extent that *Erie*'s rule that "there is no federal common law"[275] reflects a federalist principle by which common law matters are better left for the states, one might argue that even if these doctrines involve federal law questions, there should be room for greater discretion to state courts of last resort in developing these doctrines.

But, on the other hand, if the state court of last resort is itself the potential wrongdoer under the Federal Constitution, would not the Court, in refusing to accept cases whose potential errors consist of "erroneous factual findings or the misapplication of a properly stated rule of law"[276] simply turn a blind eye to potential constitutional wrongs? Even if we otherwise view state courts of last resort as reliable guardians who would defend federal constitutional rights when these rights are infringed by state legislative and administrative bodies—who will guard the guardians when the state court of last resort engages in judicial lawmaking in a common law doctrine, but in so doing deprives an individual of a federal constitutional right and misapplies the Court's created rules of law?

273. *See* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 273 (2006) (criticizing this approach as not focusing on application and tolerating substantial inconsistency and unpredictability that sometimes "rises to a level that should be intolerable under the rule of law").

274. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2618–19 (2010) (Breyer, J., concurring).

275. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

276. SUP. CT. R. 10.

C. THE CIRCULARITY OF DELINEATING JUDICIAL REVIEW OF JUDICIAL LAWMAKING

The range of issues analyzed in Sections A and B leads to the conclusion that once the full scope of "judicial wrongs" is induced from the emerging concept of the "judicial taking" doctrine, any attempt to neatly define the nature and scope of "judicial review of judicial lawmaking" would basically turn into a vicious cycle.

Throughout the history of the common law, courts have been able to manage the delicate task of being both objective adjudicators who protect individuals from violation of rights by the government and state actors that engage in lawmaking.[277] But once the conflict of interests deriving from this Janus-faced nature of courts is allegedly exposed, then defining the scope of judicial review of judicial lawmaking, without entirely collapsing the fundamental role of courts in the legal system, becomes a highly frustrating endeavor.

My guess is that some of the tautologies and institutional quagmires described in the above Sections, which relate to more functional and technical aspects of the work of state and federal courts, could be generally resolved, even if not perfectly. One could assume that, over time, if the concept of a "judicial constitutional wrong" becomes a prevailing notion as an inevitable extension of the "judicial taking" doctrine, then the Court could come up with some adjustments for claim- and issue preclusion, or for evaluating its own discretionary power of granting certiorari, so as to reach a generally workable framework.

But the most pressing and troubling issue of circularity, from a normative standpoint, is the one implicating the political and institutional legitimacy of courts. The entire structure of government and the constitutional system is built on the underlying concept by which the political branches—the legislature and the executive—are the bodies entrusted with the onus of legal norm making.[278] As such, these bodies enjoy a substantial amount of deference in making policy choices and in transforming social values into legal rights and duties.[279] Recall Justice O'Connor's statement in *Lingle* against expanding the scope of the "substantively advances" test, because this "would require courts to scrutinize the efficacy of a vast array of state

277. *See* CHEMERINSKY, *supra* note 247, at 2; Schauer, *supra* note 36, at 886–88.

278. *See* U.S. CONST. art I, § 1; *id.* art. II, §§ 2–3.

279. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 665–66 (1994).

and federal regulation—a task for which courts are not well suited."[280] But where does this statement leave us when *judicial lawmaking* in a certain common law doctrine is at stake? Does it necessarily come down to a jurisprudential dead end, by which the judicial lawmaker must be deferred to because it is a lawmaker but it cannot be deferred to because it is a court?

The reason that we grant power to courts to assess, and at times invalidate, the lawmaking products of legislatures and administrators is because courts are conceived in this context to be objective guardians, who are willing and able to enforce constitutional rights against the popular will.[281] But what happens when a lawmaking court assumes the role of government? Can it still be trusted not to overlook individual rights in promoting a broad-based social policy? Or has it now turned into a full-fledged arm of government that loses its legitimacy as a guardian?

These problems can probably never be resolved fully and hermetically. But in order to alleviate these difficulties so that they do not entirely undermine the judiciary and the system of government more generally, one needs to develop a general theory of the democratic legitimacy of courts to engage in lawmaking and of the corresponding division of labor among Government's different branches. Although these issues are pertinent to all fields of law, I focus attention again on traditional common law doctrines. It is within this realm that Part IV suggests a tentative framework for a legitimization of judicial lawmaking, while addressing the potential problem of judicial wrongs.

IV. SCALING DOWN THE CONCEPT OF JUDICIAL WRONGS

In this Part, I argue that, at least as far as common law doctrines are concerned, we can articulate a model of political legitimacy for courts to engage in lawmaking. While such a model does not serve as a panacea for all issues pertaining to the allocation of powers among the different branches of government, it does serve the purpose of significantly scaling down the potential peculiarities of "judicial wrongs" jurisprudence. It is important to note that this model does not purport to depict the historical evolution of the division of labor among legislatures and courts in the Anglo-American system, but to suggest

280. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544–45 (2005).

281. *See* Neuborne, *supra* note 264, at 1127–28.

a contemporary model that would entrench the political legitimacy of courts.

The suggested model does so by attributing the power of courts to engage in lawmaking to an implicit mandate by the political branches, such power going beyond the otherwise well-established authority of courts to engage in dispute resolution. This type of mandate is especially entrenched when legislatures and administrative agencies, acting in the "age of statutes,"[282] promulgate norms that govern a certain field of common law, but at the same time, these norms are designed as relatively vague or otherwise open-ended.

As I explain below, such "legal standards" should be seen as delegating authority to courts to fill the norms with thicker content over time, while at the same time maintaining the original attribution of the legal ordering to the relevant political branch. In so doing, the model works to better conceptualize most potential cases of "judicial wrongs" as more conventional "governmental wrongs" that should be reviewed by the Court along its traditional lines of jurisprudence. Even in the instances in which a particular piece of judicial lawmaking does not fit comfortably within such a conceptualization, the basic tenets of the model alleviate much of the institutional quagmires and circular reasoning that could haunt judicial review of judicial lawmaking in the aftermath of *Stop the Beach*.

A. LEGISLATIVE RULES AND STANDARDS AND JUDICIAL LAWMAKING

The rules-versus-standards debate has been one of the focal points of the contemporary discourse on form and substance in jurisprudence.[283] As I have shown elsewhere, much of this new theoretical discussion does not seek to consecrate either hard-edged "rules" or open-ended "standards" as inherently superior.[284] The discussion portrays the comparative advantages of rules and standards as contingent on the empirical or sys-

282. *See* CALABRESI, *supra* note 98.

283. *See, e.g.*, P.S. ATIYAH & ROBERT S. SUMMERS, FORM & SUBSTANCE IN ANGLO-AMERICAN LAW 1–41 (1987). Atiyah and Summers present pro-formalism "second-order" considerations, such as the need for finality, systematic cost-effectiveness, and minimizing the overall risk of error. Their analysis thus levels formalism to a realm that until then had been occupied by legal realism's anti-formalist critique. It incorporates pragmatism and empiricism into the heart of the new formalist argument. *Id*.

284. *See* Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, RUTGERS L.J. (forthcoming 2011) (manuscript at 11), *available at* http://ssrn.com/abstract=1618768.

temic tradeoff of social costs and benefits accruing to both decision makers and the recipients of the legal norms.[285]

In one such prominent work, Louis Kaplow looks at this potential tradeoff for public decision makers, by evaluating factors such as information costs or the frequency and probability that a dispute will arise.[286] According to Kaplow, rules are more costly to enact than standards, because rules involve extensive, up-front, and elaborate determinations of the law's content.[287] However, vague standards create higher costs during the implementation and enforcement stages: parties and their legal advisers take pains to predict potential outcomes, and courts must engage in a more detailed ex post inquiry to decide the law in specific disputes.[288] Studies along similar veins have also been done with respect to private forms of lawmaking, mainly the formulation of contracts.[289]

A central assumption in this literature is that even if we consider clear-cut, up-front legislative rules to be superior, this goal cannot always be attained. Every field of private law (or public law, for that matter) has an inherent feature of incompleteness. Even the most prudent legislature cannot anticipate and regulate in advance all contingencies and scenarios that may arise with respect to a certain norm. Thus, property, contract, tort, and unjust enrichment statutes will always remain incomplete to some extent.[290]

Under this conceptual framework of incompleteness, rules are understood as legal provisions that are more exhaustive than standards not only in the sense that they are initially phrased in more concrete clear-cut terms, but also in the sense that dispute resolution in regard thereto should focus on "a more limited set of authoritative or evidentiary materials,"[291]

285. *See id.*

286. Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150–55 (1995).

287. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–69 (1992).

288. *See id.* at 579–86.

289. Contractual parties decide whether to take the costly action of writing an as-complete-as-possible contract. Their choice hinges on balancing such "front-end" costs against the anticipated "back-end" costs of resolving disputes over vague contract terms. *See* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 189–91 (2005).

290. For the different types of "incompleteness" in property law, see Lehavi, *supra* note 284 (manuscript at 27–44).

291. Avery Wiener Katz, *The Economics of Form and Substance in Con-*

like the specific wording of a given statute or contract. Alternatively, standards are understood as initially vague norms, given content during extensive ex post judicial inquiry.[292]

The debate over the appropriate design of legal norms, especially to the extent that that debate implicates the level of discretion awarded to courts during adjudication, has not focused solely on consequentialist considerations. It also centers upon several arguments that have become especially prominent since the emergence of legal realism. According to the realist view, the legal system should embrace a "substantive" approach to law—one that always looks to connect the application of legal norms to the societal values and goals underlying the norms.[293] Under an aggressive version of this realist approach, vagueness is considered inherently good, because it enables courts to engage in highly detailed, "situation-sense" adjudication.[294] But more contemporary approaches that are sympathetic to substantive jurisprudence nevertheless try to toe the fine line between "norm-sensitivity"—by which the application of rules must have some regard to their normative justification to avoid arbitrary and unjust results—and avoiding the dangers of excessive "context-sensitivity" that would deprive law of its essential planning function.[295] My suggested conceptualization of legal rules and standards seeks to integrate the functional incompleteness of up-front legislative norms with a limited degree of substance-oriented jurisprudence, by focusing on the institutional structure of a legal standard. I thus define a standard as a legal provision that delegates the giving of fuller norm-content to decision-making bodies other than the original standard-setter.

In the context of this Article, this means that in the era of the contemporary administrative State, when legislation or administrative regulation is made in a certain field of common law, a choice to enact certain legal standards, or to leave uncovered a significant number of relevant issues within this field,

tract Interpretation, 104 COLUM. L. REV. 496, 515 (2004).

292. *See* Kaplow, *supra* note 287, at 559–60; Katz, *supra* note 292.

293. For a detailed analysis, see Lehavi, *supra* note 284 (manuscript at 11–16).

294. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 268, 270–71 (1960).

295. *See* Curtis Bridgeman, *Why Contract Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1454–62, 1476–80 (2008).

entails a delegation of authority to courts to engage in a dynamic process of giving or adding content to these standards.

Such a process does not, however, require that the legal standard remain vague all the way down to a judicial case-specific inquiry. In many cases, the opposite would be true. Because no single field of common law could function properly without ensuring a sufficient amount of stability, predictability, and guidance, courts are compelled to refrain from engaging in ad hoc jurisprudence. Nevertheless, legislative delegation of the sort mentioned authorizes, and actually requires, courts to engage in a certain level of judicial lawmaking. The process by which courts give content to legal standards not only clarifies to the instant parties what the law is on a certain point, but also creates a broader understanding of the legal norm and its application within the general field of law. Seen this way, judicial lawmaking is not only a possible result of such a delegation—it is often its inevitable purpose.

A prominent example of the promulgation of legal standards in state common law is found in the different states' versions of the Uniform Commercial Code, which include provisions such as "commercial standards" and "usages of trade."[296] Perhaps the most notable standard in this context is that of "good faith."[297] Under Article 2 of the U.C.C., which applies to merchants, "good faith," is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[298] The latter part of this definition imposes an objective good faith requirement that goes beyond the subjective good faith embedded in "honesty in fact."[299] In 2001, the ALI expanded the U.C.C.'s general Article 1 definition of "good faith" beyond simple "honesty in fact" to include the objective good faith component used under Article 2.[300] This revision of

296. *E.g.*, FLA. STAT. § 671.205 (2004) (defining a "usage of trade"); § 673.1031(d) (incorporating "commercial standards" into a definition of "good faith"); N.Y. U.C.C. LAW § 2–609 (McKinney 2002) (basing the reasonableness of grounds for insecurity between merchants upon "commercial standards"); § 2–202(a) (providing that the terms of a written agreement may be supplemented by "usage of trade").

297. U.C.C. § 2–103(1)(b) (2004).

298. *Id.*

299. *Id.*

300. *Id.* § 1–201(b)(20). For discussion of the development and revision of the Article I "good faith" definition, see Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 609–10 (2006); and Franklin G. Snyder,

the U.C.C. therefore extends the broader definition of good faith to dealings involving non-merchants.[301]

This expansion of the scope of the good faith requirement has led to mixed responses: some states have amended their legislation in accordance with the U.C.C. revisions[302] while others have refused to apply this additional objective standard to non-merchants.[303] I argue that the choice made by each state legislature reflects not only a particular policy decision as to whether non-merchants should be exposed to the same kind of duties as merchants, but also a choice as to the appropriate scope of the lawmaking mandate awarded to the state court for purposes of developing this facet of private law. Entrusting courts with the task of giving content to such a norm goes beyond resolving specific disputes. In fact, it requires courts to engage in lawmaking by delineating the broad contours of human conduct in everyday commercial dealings.

In addition to the promulgation of standards, legislatures also mandate judicial lawmaking when they leave uncovered a significant portion of the relevant issues within an otherwise-legislated field of law. The doctrine of adverse possession, introduced in Part III.A.1, illustrates, and is perhaps the quintessential example of, just such mandate granting. When one looks at the development of this common law doctrine over centuries, it becomes clear not only that the law of adverse possession is in practice a combination of statutory and case law, but also that it reflects a conscious decision by the legislatures to leave some significant portions of the doctrine to judicial lawmaking.[304]

The doctrine originally evolved from judicial decisions resolving disputes over the application of a general statute of limitations, providing for a certain period of years after which claims became barred.[305] The doctrine has since developed way beyond that initially limited scope. For instance, the doctrine

Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code, 68 OHIO ST. L.J. 11, 40–43 (2007).

301. *See* U.C.C. § 1–304 (2004) ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.").

302. *See, e.g.*, ALASKA STAT. § 45.01.211(b)(22) (2010); CONN. GEN. STAT. ANN. § 42a-1-201(b)(20) (2005).

303. *See, e.g.*, CAL. COM. CODE § 1201(19) (West 2007); FLA. STAT. § 671.210(19) (2004); N.Y. U.C.C. LAW § 1–201(19) (McKinney 2001).

304. *See* DUKEMINIER ET AL., *supra* note 23, at 120.

305. S*ee* Stake, *supra* note 200, at 2421–22 (noting that the relevant claim limited by the statute has been an action in ejectment).

now goes beyond claim immunity to grant adverse possessors the positive right to take title to land.[306] Additionally the courts have expanded the nature of the adverse possession doctrine by articulating numerous additional elements that the adverse possessor must satisfy for the doctrine to apply. These elements include entry that creates a cause of action, "open and notorious" possession, that is "continuous for the statutory period," as well as "adverse and under a claim of title."[307] The latter element has been especially endowed with a thick layer of legal policy, often leading to highly diverging opinions among different state courts.[308]

The development of this entire array of law has thus been left to the courts. Even though legislatures have often amended the relevant period of years for introducing real property claims through their general statutes of limitations[309]—meaning that legislatures have kept pace with the doctrine so that the legislation has not simply remained untouched and anachronistic[310]—legislatures have nevertheless left it generally to courts to continue engaging in lawmaking as pertains to the abovementioned components of the common-law doctrine.[311]

This does not mean that the mandate to courts to engage in lawmaking is unlimited. Unlike the court's independent function to resolve specific disputes brought before it, legislatures and administrative agencies can trump or truncate the mandate for judicial lawmaking by deciding to amend or crystallize the underlying legal norms of a certain area of the law. They may even do so as a response to a certain act of judicial lawmaking. This should be uncontroversial even for supporters of broad powers of judicial lawmaking. In the common law, the

306. DUKEMINIER ET AL., *supra* note 23, at 116.

307. *Id.* at 120–22.

308. *See id.* at 131–35.

309.Stake, *supra* note 200, at 2421 n.11.

310. *Id.*

311. I therefore disagree with Duncan Kennedy's argument that under a regime of legal standards, courts would engage in "sub rosa lawmaking." Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976). Judicial lawmaking in these circumstances is not secret or subversive. It is rather a necessary process to fill initially vague norms with content in a comprehensive and transparent fashion. It is a much clearer and more straightforward process of developing the law than is the case when a court uses the standard's vagueness as an excuse for uncontrolled ad hoc jurisprudence.

political branches generally have the final say about law's content.

The suggested model breaks rank from Guido Calabresi's thesis about the role of the courts in an "age of statutes."[312] Calabresi argues that the common law function of courts today "is no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule."[313] According to Calabresi, courts should thus exercise a judgmental function of deciding when a rule "has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it."[314]

In one way, this role strives for too little: it assigns courts only with the negative task of guarding against anachronism or blunt incoherence, rather than also with some positive power to engage in developing the law. In many other ways, however, Calabresi's approach grants courts an almost unbounded discretion, by allowing courts to take remedial action not only through the promulgation of a norm, but also through the use of "techniques designed to influence the legislative and even the administrative agendas."[315] His model locates courts in an adversarial position vis-à-vis the legislature or administrative agency in the development of the common law. It requires courts to engage in perpetual second-guessing of the other branches' overall structuring, or "legal framework," of the common law.

In contrast, the suggested delegation model promoted here is one of collaboration. It allows the legislature to entrust the court with the role of lawmaking, by adopting a strategy of promulgating certain norms as standards or to leave certain issues within a legal field as more appropriate for judicial development. Furthermore it always allows the legislature (subject to the court's otherwise-based power of constitutional review) to update or truncate such mandate by introducing a new piece of legislation or regulation.[316]

312. CALABRESI, *supra* note 98.

313. *Id.* at 164.

314. *Id.*

315. *Id.*

316. Calabresi also purports to avoid "depriving popular or representative bodies of their last say." *Id.* at 164–65. Unlike the suggested delegation model, however, Calabresi's model places the preserved role of the legislature squarely within an adversarial framework that pits judiciary against legislature. *Id.*

B. THE LEGISLATIVE MANDATE MODEL AND "JUDICIAL WRONGS"

The outlined delegation model could play an important role in scaling down the potential superfluous effects of judicial wrongs jurisprudence. The implicit delegation of authority by the legislative and executive branches to courts to engage in judicial lawmaking pursuant to initially vague or lacking common law legislation preserves the original attribution of lawmaking to these political branches. This means that, when the Court assesses the potential infringement of federal constitutional rights by judicial lawmaking, the original motives, core policies, and accountability for policy- and law-making would generally be attributed to the underlying statutory or executive act.

Accordingly, the vast majority of cases that might be depicted in the aftermath of *Stop the Beach* as "judicial lawmaking wrongs" could and should be reconceptualized as more conventional "governmental wrongs." Such potential violations of constitutional rights should thus be evaluated by the Court along its traditional lines of judicial review. Instead of referring to the state court as a self-standing policymaker, and in so doing becoming entangled in the institutional quagmires portrayed in Part III, the Court should look to the underlying statutory or executive act as the source of the contested norm.

The idea here is neither to delineate some simplistic "vicarious liability" model, nor to engage in ancillary issues such as the potential expansion of the nondelegation doctrine as a constitutional or institutional limit on judicial lawmaking.[317] It is rather intended to locate judicial lawmaking in a more genuine and realistic framework of understanding the role of courts in the era of the modern administrative State, rather than being tempted to follow the allegedly natural trajectory of the post-*Stop the Beach* jurisprudence.

What is probably most striking in this respect is the fact that the *Stop the Beach* case in itself is not really a "judicial taking" case. What the Florida Supreme Court did, following the certification of the question "does the Beach and Shore Pre-

317. For the latter idea, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 421–43 (2008) (discussing the nondelegation doctrine which has somewhat limited, even if in a declining fashion, Congress's ability to delegate lawmaking authority to the executive and arguing that the doctrine's underlying ideas could apply at times to the federal judiciary).

servation Act unconstitutionally deprive upland owners of littoral rights without just compensation?," was to examine the Florida legislature's Act, and to answer whether the Act adversely affected previously existing common law property rights so as to result in a taking.[318]

This is exactly what the Florida Supreme Court did. It reasoned that that the legal regime applying to restoration and renourishment projects conformed to the common law principle of avulsion.[319] Moreover, the legislature had demonstrated an awareness of the background of existing common law rules against which it acted by providing that landowners would continue to be entitled "to all common-law riparian rights" except for the right to accretions.[320] So even if the U.S. Supreme Court were to come to the conclusion that the Act violated the Takings Clause, so that the Florida Supreme Court was wrong, the Court should have attributed the motives and underlying policy choices to Florida's political branch, while independently assessing the federal law questions.[321]

Such attribution would make perfect sense, for purposes of federal judicial review, in many other contexts that could have hypothetically been depicted as judicial-wrong cases in the aftermath of *Stop the Beach*. Going back to the adverse possession example, a depiction of the "continuous possession" reform as a judicial act entirely detached from the doctrine's legislative background would in itself be detached from legal reality. The development of the doctrine over centuries as a mixture of statutes and case law reveals a scheme of institutional collaboration.[322] If the legislature were to think that the state court went overboard in its most recent development of the doctrine, it could always revise it and provide guidance for future judicial lawmaking by using the rule-standard strategy.

Thus, for purposes of identifying the underlying motives, goals, and background socioeconomic facts, a federal reviewing

318. *See* Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008).

319. *Id.* at 1114–15.

320. *See* FLA. STAT. ANN. §§161.011–.45 (West 2006).

321. One could speculate as to why the case was initially presented to the Court as a judicial-taking case. It is possible that presenting the case in such an innovative fashion increased the likelihood that the Court would issue a writ of certiorari, that the petitioner hoped that the Court would scrutinize the Florida Supreme Court's decision more stringently than if it were a regular "appeal," or that there were potential hurdles in asserting a facial-takings claim due to the potential application of the statute of limitations.

322. *See* DUKEMINIER ET AL., *supra* note 23, at 120.

court could rely on the way in which the institutional collaborative scheme has unfolded over time, while independently reviewing the federal law questions implicated by the development of the common law doctrine.

More generally, the difficulties that often exist in drawing the lines between "statutory interpretation" and "judicial lawmaking"—a problem that has otherwise troubled decision makers and commentators dealing with the legitimacy and institutional competence of courts to innovate—would not adversely affect the suggest model.[323] Quite the contrary: since under both scenarios, attribution of the original lawmaking would be made, for purposes of federal review, to the political branch, state courts would have few incentives to purposely manipulate the nature of their decisions.

My intention in suggesting the delegation model for understanding judicial lawmaking is not to depict courts as "angels," capable of doing no wrong. As I have stated in the Introduction, there are enough cases in which the state judiciary should be held solely responsible for infringing litigants' constitutional rights. Judicial lawmaking, however, for the reasons set forth above and especially in the context of common law doctrines, represents an entirely different case.

My suggested approach does not purport to eliminate the possibility of a judicial wrong scenario altogether. It would, however, definitely scale it down, not only quantitatively, but also, and perhaps even more so, qualitatively. The suggested model would significantly ease the tension inherent in the potential undermining of the nature and structure of the judicial branch that may follow as an unintended result of *Stop the Beach*. It not only maintains judicial integrity, but also attributes the origin of lawmaking to its natural locus: the political branches.

CONCLUSION

The *Stop the Beach* case is more than just another takings case in U.S. constitutional jurisprudence, and potentially implicates the conception of the balance of governmental power and the proper role of courts in the process of rule-making in the age of the modern administrative State. Whichever opinion is

323. *See, e.g.*, Barak, *supra* note 41, at 46–53; Fallon, *supra* note 1, at 1813–27, 1842–47; Scalia, *supra* note 35, at 9–18; Schauer, *supra* note 36, at 906–17; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 920–32 (2003).

deemed more convincing—Scalia's introduction of the judicial taking doctrine, Kennedy's application of substantive due process for judicial "dramatic" innovation, or Breyer's "better left for another day" approach—the case seems to have exposed an open nerve in the American legal system. It allegedly unveils the trickery of state courts: that objective adjudicators could engage in a violation of federal constitutional rights while encroaching upon the lawmaking domains that are within the province of the political branches. This possibility allegedly necessitates the creation of a new body of jurisprudence that conceptualizes and delineates the federal judicial review of state judicial lawmaking.

Such a viewpoint, however, is twisted. On the one hand, it simply ignores the way in which laws, and especially common law doctrines, have developed over the course of centuries, including during the era of the contemporary administrative State. Courts do not operate in hiding or need to engage in subterfuge to make law in these fields. On the other hand, it depicts courts as acting free of any constraints even though state judicial lawmaking must conform to rights and duties under the Federal Constitution and does not take place within a vacuum. At least as far as common law doctrines are concerned, courts' lawmaking power, which exists alongside their independent dispute-resolution authority, is based on a collaborative scheme with the other branches of government. That power, however, while legitimate under the proper legal framework and an indispensible aspect of the contextualization process of legal standards and norms, eventually yields to legislative supremacy in law- and policy-making.

It would thus be a grave mistake to demonize courts for developing the law, or, on the other hand, to release them from any constraints in exercising their power. Fortunately, the solution to the host of institutional quagmires and conceptual tautologies that the confused *Stop the Beach* decision might have invoked lies within the well-established principles of the American legal system.

In particular, the jurisprudential approach advanced in this Article, by which the problem of "federal judicial review of state judicial wrongs" could generally be resolved by viewing judicial lawmaking as premised on a broad but not unlimited delegation of authority by the political branches, would largely mitigate the danger of undermining the nature and structure of the judicial branch. It would strengthen collaboration among

the different branches of government within each state system, and make better sense of the federal structure and the interpretation of federal constitutional rights. In so doing, the legal system would be better able to address the constant need for progress in law in the modern administrative State, while minimizing unintended implications that may undermine the delicate balance and power-sharing among the three branches of the Government.