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Judicial Takings in Vandevere v. Lloyd

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I. INTRODUCTION

In *Vandevere v. Lloyd*,[1] the Ninth Circuit created a circuit split by changing its test for determining which property interests are protected under the Fifth Amendment's Takings Clause. With the First Circuit applying federal constitutional law and the Ninth Circuit applying state law, the Ninth Circuit's new test conflicts with Supreme Court precedents that the First Circuit follows.[2] The Ninth Circuit in *Vandevere* considered whether some of Alaska's regulations on commercial salmon fishing, which shortened fishing seasons, reduced fishing areas, and limited fishing for various salmon species, violated the Takings Clause.[3] Commercial fishermen claimed that the regulations severely diminished the value of their entry permits by limiting the number of fish they could catch and sell.[4] Although claiming to follow the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[5] and its own decision in *Schneider v. California Department of Corrections*,[6] the Ninth Circuit applied a new Takings Clause analysis in which "state law governs the demarcation of a property right, while federal law governs the manner in which the state must respect" that right.[7] Deferring entirely to the Alaska Supreme Court's holding in a nearly identical case,[8] the Ninth Circuit then held that the fishermen's entry permits were "not property for purposes of a takings claim."[9]

1. Vandevere v. Lloyd, 644 F.3d 957 (9th Cir.), *cert. denied*, 132 S. Ct. 850 (2011).

2. *See* Schneider v. Cal. Dep't of Corr. (*Schneider II*), 151 F.3d 1194 (9th Cir. 1998); Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990).

3. *Vandevere*, 644 F.3d at 959, 961–62.

4. Two types of permit-holding fishermen challenged the regulations: (1) fishermen who hold entry permits to use drift gillnets, and (2) fishermen who own leaseholds to submerged lands and hold entry permits to place set gillnets on those lands. *Id*. at 961.

5. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

6. *Vandevere*, 644 F.3d at 966 ("In any event, *Schneider* is the law of our circuit and we are bound to follow it." (citing *Schneider II*, 151 F.3d 1194 (9th Cir. 1998)).

7. *Id*. at 964.

8. *See* Vanek v. State, 193 P.3d 283, 285 (Alaska 2008).

9. *Vandevere*, 644 F.3d at 967.

This Note argues that the Ninth Circuit in *Vandevere* incorrectly applied both the Supreme Court's *Lucas* line of cases and its own precedent in *Schneider*. The Ninth Circuit distorted existing Takings Clause analysis to produce a rule that conflicts not only with its own precedent and that of the First Circuit, but also with Supreme Court precedents. Additionally, the court's failure to independently examine the nature and extent of rights that Alaska law created in entry permits effectively permitted a judicial taking of private property without just compensation.[10]

Part II of this Note explains relevant legal principles for determining whether an interest is property for Takings Clause purposes by examining the regulatory-takings jurisprudence of the Supreme Court, the First Circuit, and the Ninth Circuit. Part III describes the facts and procedural history of *Vandevere*. Part IV summarizes the court's reasoning and decision in *Vandevere*. Part V analyzes *Vandevere*: first, it shows how the Ninth Circuit misapplied *Lucas* and *Schneider*; second, it demonstrates why the two elements in a proper Takings Clause inquiry logically and constitutionally cannot be hermetically sealed off from one another as separate inquiries without reaching absurd results; and third, it argues that the *Vandevere* rule facilitates judicial takings. Part VI concludes.

II. SIGNIFICANT LEGAL BACKGROUND[11]

The Fifth Amendment's Takings Clause, applied to the states through the Fourteenth Amendment,[12] provides that private property must not "be taken for public use, without just compensation."[13] A person cannot receive compensation for an

10. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion) (recognizing existence of judicial taking of private property).

11. On December 1, 2011, this Note's author emailed the fishermen's attorney, Arthur S. Robinson, while the petition for certiorari was still pending before the U.S. Supreme Court. Mr. Robinson's paralegal responded: "You make reference to a note to be published. Is there anything in that note that might help us in the reply we intend to send to the printer today?" This author gladly sent this Note in its first draft and was pleased to learn that substantial portions of his work were used in writing the Petitioners' Reply Brief. *Compare* Petitioners' Reply Brief at 4–7, Vandevere v. Lloyd, No. 11-455, 2011 WL 6069614, 2011 U.S. S. Ct. Briefs LEXIS 2466 (U.S. Dec. 5, 2011), *with infra* Parts II.A–C, IV.A.2, V.A–B, VI.

12. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005).

13. U.S. CONST. amend. V.

alleged taking, however, unless he has a "Takings Clause-recognized property interest."[14] This Part addresses how the Supreme Court, the First Circuit, and the Ninth Circuit have determined what qualifies as property for Takings Clause analysis.

A. Supreme Court Precedents

The Supreme Court has established two categories of per se takings that almost always require compensation: (1) regulations that cause a permanent physical invasion of the property and (2) regulations that deprive an owner of all beneficial use of the property.[15] "Outside these two relatively narrow categories," regulatory takings claims, such as when a regulation severely diminishes property values, are decided according to the principles found in *Penn Central Transportation Co. v. New York City*.[16] Additionally, a plurality of the Court has recognized the possibility of a judicial taking of private property.[17]

In *Lucas v. South Carolina Costal Council*, the Supreme Court held that a state regulation depriving a landowner of all beneficial use of his property amounted to a taking without just compensation under the Fifth Amendment.[18] The state could avoid compensation only by pointing to "background principles" of nuisance and property law allowing the regulatory diminution in the land's value.[19] Following *Lucas*, courts and scholars debated the meaning of background principles, and whether these principles included "(1) statutory law, as opposed to just common law; (2) recently enacted law, as opposed to just vintage law rooted in age-old legal tradition; and (3) federal law, as opposed to just state law."[20] One scholar has argued that *Lucas*' text alone makes clear that the "state-law-only

14. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 317 (2007).

15. *Lingle*, 544 U.S. at 538.

16. *Id*. (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).

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

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

19. *Id*. at 1029.

20. Meltz, *supra* note 14, at 353.

view is incorrect because it ignores *Lucas*' explicit mention of the federal navigation servitude."[21]

In its *Penn Central*-type cases, the Court has recognized various factors for determining whether one has a property interest and whether state regulations have effected a taking. Some of these factors include the regulation's "economic effect" on the person, "the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[22] However, the Court has also stated that "property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'"[23] And in a principal case relied on by the Ninth Circuit, Justice Souter stated the following:

> It thus makes good sense to consider what is property only in connection with what is a compensable taking, an approach to Fifth Amendment analysis that . . . would . . . reduce the risk of placing such undue emphasis on the existence of a generalized property right as to distort the taking and compensation analyses that necessarily follow before the Fifth Amendment's significance can be known.[24]

For judicial takings, a plurality of the Court suggested that the inquiry "is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established" under state law.[25] This is because independent

21. *Id.*

22. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978)).

23. Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (citations omitted) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378, 380 (1945)).

24. *Id.* at 175 (Souter, J., dissenting); *cf.* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 482–83 (1973) (Rehnquist, J., dissenting) (stating that although "the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain").

25. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2610 (2010) (plurality opinion); *see* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 367–68 (2012) (proposing as elements for judicial-takings test "(1) the government's intention to appropriate the property for a public purpose, (2) the involvement of repeat players in the state-court proceedings giving rise to the complaint about judicial appropriation, (3) whether the government retains the property in

sources, such as state law, are the basis for the "existing rules or understandings" that create and define property interests by securing certain benefits and supporting "claims of entitlement to those benefits."[26] It should remain clear, however, that "the meaning of 'property' as used in the Fifth Amendment [is] a federal question," despite "obtain[ing] its content by reference to local law."[27] Furthermore, the plurality stated that federal courts can enforce the Takings Clause only if "they have the power to decide what property rights exist under state law," thus allowing them to review judgments of state supreme courts.[28] In sum, Supreme Court precedents suggest that the property inquiry is very fact specific and often requires considering various sources of law.

B. First Circuit Precedent

The First Circuit's Takings Clause analysis follows Supreme Court precedent. In its 1990 opinion in *Hoffman v. City of Warwick*,[29] the First Circuit considered whether veterans who challenged Rhode Island's repeal of a statute that granted "enhanced seniority in employment for returning war veterans"[30] had a constitutionally protected property interest for a takings claim. When the federal district court discovered that the Rhode Island Supreme Court had a similar case pending before it, the district court stayed the veterans' case until the state court had entered its decision.[31] The Rhode Island Supreme Court subsequently held that the repealed statute "merely created gratuities or floating expectancies," and that the veterans had no vested property interest in enhanced seniority unless they had started receiving the increased pay before the statute's repeal.[32]

question for a public use, and (4) the existence of any coordination between the judiciary and another branch").

26. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

27. United States v. Causby, 328 U.S. 256, 266 (1946) (quoting United States v. Powell, 319 U.S. 266, 279 (1943)) (internal quotation marks omitted).

28. *Stop the Beach*, 130 S. Ct. at 2609.

29. Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990).

30. *Id.* at 611.

31. *Id.* at 613.

32. *Id.* at 613–14 (quoting Brennan v. Kirby, 529 A.2d 633, 641 (R.I. 1987)).

Though it dismissed the case on other grounds, the First Circuit rejected the notion that it was bound by the decision of the state supreme court. The court stated that the mere fact that state law creates the property interest does not necessarily mean that "the state has the final say as to whether that interest is a property right for federal constitutional purposes."[33] The court concluded that "federal constitutional law determines whether the interest created by the state rises to the level of 'property,' entitled to the various protections of the Fifth and Fourteenth Amendments."[34] Thus, twenty years before the Supreme Court's plurality opinion in *Stop the Beach*, the First Circuit asserted its authority to decide whether state-created interests are protected by the federal Takings Clause.

C. Ninth Circuit Precedents

Before *Vandevere v. Lloyd*, the Ninth Circuit's Takings Clause analysis was consistent with First Circuit and Supreme Court precedents. While purporting to rely on its 1998 decision in *Schneider v. California Department of Corrections*, the Ninth Circuit in *Vandevere* omitted significant, essential portions of that case.[35] In *Schneider*, prison inmates challenged a policy based on California Penal Code section 5808, which directed the State to deposit in a communal-welfare account all interest earned on individual "Inmate Trust Accounts" ("ITA") while each prisoner-beneficiary was incarcerated.[36] The prisoners argued that by not paying to each inmate the interest earned on his ITA, the State effected "a taking of private property for public purposes."[37] The district court dismissed the challenge—relying both on section 5808 and the lack of a provision "allowing or requiring the Director of Corrections to pay interest earned from funds in an ITA to an inmate"[38]—and concluded that California law did not specifically create a positive property right to the interest earned on a prisoner's ITA.[39]

33. *Id*. at 615.

34. *Id*.

35. *Schneider II*, 151 F.3d 1194 (9th Cir. 1998).

36. *Id*. at 1195–96.

37. *Id*. at 1196.

38. Schneider v. Cal. Dep't of Corr. (*Schneider I*), 957 F. Supp. 1145, 1147–48 (N.D. Cal. 1997), *rev'd,* 151 F.3d 1194 (9th Cir. 1998)

39. *Id*. at 1148–49.

The Ninth Circuit reversed and remanded, disagreeing that the California statute was controlling. The court held that California prisoners *did* "possess a constitutionally [protected] property interest that trigger[ed] Takings Clause scrutiny."[40] In analyzing the takings claim, the court noted that California law, besides creating no property right to the interest earned on an ITA, appeared to reject that any property interest existed at all.[41] But the fact that positive state law either failed to create or expressly denied the existence of a property interest did not end the Takings Clause inquiry.[42] Citing two Supreme Court cases,[43] the Ninth Circuit asserted that "property rights can—and often do—exist *despite* statutes . . . that appear to deny their existence."[44] The court went on to establish several guiding principles for determining what property rights are protected:

> [T]here is . . . a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may . . . confer "new property" status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional "old property" interests found within the core.[45]

40. *Schneider II*, 151 F.3d at 1201. Just three months before *Vandevere* was decided, the First Circuit in *Young v. Wall*, 642 F.3d 49 (1st Cir. 2011), rejected the Ninth Circuit's holding in *Schneider*, concluding that since inmates held fewer property rights than others at common law, and no state case law suggested a right for inmates to receive earned-interest income on their personal accounts, inmates did not have a constitutionally protected property interest. *Id.* at 53–54. Interestingly, retired Associate Justice David Souter sat by designation on the First Circuit panel in *Young*. Justice Souter's dissent in *Phillips*—that the first prong, whether an individual has a protected property interest, should never be separated from the second prong, whether a compensable taking has occurred—addresses many concerns that later occurred as a result of the holdings in *Schneider* and in *Vandevere*. *See supra* note 24 and accompanying text.

41. *Schneider II*, 151 F.3d at 1199.

42. *Id.*

43. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

44. *Schneider II*, 151 F.3d at 1199.

45. *Id.* at 1200–01 (footnote omitted).

The court explained that "the core of constitutionally protected property" is defined "by reference to traditional 'background principles' of property law."[46] Considering a right to earned-interest income as within the "core" of constitutionally protected property, the court rejected the California statute and instead rested its holding on the common-law rule that "interest follows principal."[47]

The Ninth Circuit has also rejected the view that a state's appellate- and supreme-court decisions are binding—solely because they classify an interest as a "privilege"—when determining what is property for federal-law purposes. In *Little v. United States*, the Ninth Circuit considered whether a taxpayer's statutory right to redeem property by paying outstanding property taxes to the state constituted a property interest to which federal-tax liens could attach.[48] In arguing that his statutory right of redemption was not "property or rights to property," the taxpayer cited three California cases holding that the right of redemption was "nothing more than a personal privilege granted by statute."[49] The Ninth Circuit rejected this argument, stating that "[s]imply because an interest is classified as a '*privilege*' under state law" does not end the inquiry.[50] Rather, the proper inquiry is whether under state law the interest is "an economic asset in the sense that it has pecuniary worth and is transferable, so that a claim can be enforced against it."[51] The court then held that the taxpayer's interest—a right of redemption—was "a valuable right to property."[52]

And in 2010, the Ninth Circuit in *Ward v. Ryan* reiterated the view expressed in *Schneider*—that certain property rights are so fundamental that "even if a statute does not explicitly create a property interest, such right may nonetheless still exist."[53]

46. *Id.* at 1201 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992)).

47. *Id.* at 1200 ("The *Webb's* and *Phillips* decisions are therefore similar to one another (and germane to this case) in a critical respect: In both cases, the Court relied, in the face of a contrary state statute, upon the traditional common law rule that 'interest follows principal' in recognizing a protected property interest in earned interest income.").

48. Little v. United States, 704 F.2d 1100, 1103–04 (9th Cir. 1983).

49. *Id.* at 1106.

50. *Id.* (emphasis added).

51. *Id.* at 1105–06 (footnote omitted).

52. *Id.* at 1106.

53. Ward v. Ryan, 623 F.3d 807, 812 (9th Cir. 2010).

III. FACTS AND PROCEDURAL HISTORY

A. Facts of the Case

Since about 1978, Dyer Vandevere, John McCombs, Gary Hollier, and John Jent (collectively "fishermen" or "*Vandevere* plaintiffs") have held permanent-entry permits to commercially fish for salmon in Alaska's Upper Cook Inlet.[54] Two of the fishermen hold permits to fish with drift gillnets, and the other two fishermen hold permits to place set gillnets on submerged lands where they are leaseholders.[55] Entry permits are valuable assets that are transferable, and the Commission has no authority to revoke them.[56] As long as the fishermen renew their entry permits at least every two years,[57] the permits carry many rights and benefits as property under Alaska law: entry permits can be transferred and sold *inter vivos*;[58] devised by will, passed by right of survivorship, inherited through intestacy, and exempted from creditors' claims against the estate;[59] executed against for past-due child-support payments;[60] treated as premarital property in divorce proceedings;[61] used to recover tort damages for another's actions that decrease their value;[62] and pledged as security for certain loans.[63]

The Alaska Commercial Fisheries Entry Commission ("Commission") "regulates entry into [Alaska's] commercial fisheries."[64] In 1996, the Commission began enacting regulations that drastically shortened the drift-gillnet season to run only from June 25 to August 9—shortening the season by seventy-five percent.[65]

54. Vandevere v. Lloyd, 644 F.3d 957 (9th Cir.), *cert. denied*, 132 S. Ct. 850 (2011).

55. *Id.* at 961.

56. *Id.* at 966.

57. ALASKA STAT. § 16.43.150(c)–(d) (2010).

58. *Id.* § 16.43.170.

59. *Id.* § 16.43.150(h).

60. Anderson v. Anderson, 736 P.2d 320, 323–24 (Alaska 1987).

61. *See* Edelman v. Edelman, 3 P.3d 348, 351 (Alaska 2000).

62. *See* Edelman v. Edelman, 61 P.3d 1, 4 (Alaska 2002).

63. *See* ALASKA STAT. §§ 16.10.333–.338, 44.81.215, .225, 44.81.231–.250; *see also* Brief of Appellants at 17, Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011) (No. 09-35957).

64. *Vandevere*, 644 F.3d at 960 (citing ALASKA STAT. § 16.43.100(a)(1)).

65. *Id.* at 961–62. Between 1980 and 1996, the fishing seasons were 190 days each year (June 25 to December 31). *Id.* Since 1996, the fishing seasons have been only forty-six days

B. Procedural History

In May 2007, the fishermen sued the Commission and sought an injunction to prevent further enforcement of the new regulations.[66] The fishermen claimed that the Commission's regulations effected a taking of their property;[67] the shortened fishing seasons severely limited the number of fish that the fishermen could catch and sell, which directly diminished the value of their fishing permits.[68] The district court granted the Commission's motion for summary judgment, providing little to no separate analysis.[69] Instead, relying on the Alaska Supreme Court's holding in *Vanek v. State*[70]—a nearly identical case—the district court held that the fishermen "lack[ed] a property interest in their entry permits" and that "they had not suffered a due process violation."[71]

IV. THE COURT'S DECISION

On appeal, the Ninth Circuit affirmed without dissent the district court's summary-judgment ruling against the fishermen. The Ninth Circuit approached the Takings Clause analysis by breaking down the inquiry into two separate steps. First, the fishermen were required to show that their entry permits gave them a property interest.[72] Whether the entry permits created a property right was a state-law question.[73] Second, the court would determine whether a regulatory taking without compensation had occurred, which was a federal-law question.[74] But the court would not turn to the second

each year (June 25 to August 9). *Id.*

66. *Id.* at 961.

67. The fishermen also claimed a due-process violation because there was inadequate notice and opportunity to be heard when the regulations were passed. *Id.* at 969. Additionally, the two fishermen who held leaseholds to submerged lands made a takings claim. *Id.* at 963. Because these claims were dismissed on different rationales, they are beyond the scope of the circuit split and of this Note.

68. *Id.* at 962.

69. *Id.* at 963.

70. Vanek v. State, 193 P.3d 283 (Alaska 2008).

71. *Vandevere*, 644 F.3d at 963.

72. *Id.*

73. *Id.* at 964.

74. *Id.* at 963–64 ("As to a question of federal law, including this one, we owe no deference to state courts.").

step unless the fishermen could show that they had a constitutionally protected property interest.[75] Having determined that it was required to follow the Alaska Supreme Court's decision in *Vanek v. State*,[76] the Ninth Circuit held that the fishermen's entry permits were "not property for purposes of a takings claim."[77] Accordingly, the court concluded that the "second step of a full takings analysis" was unnecessary.[78]

A. Two-Step Takings Clause Analysis

According to the Ninth Circuit, this two-step, state–federal dichotomous approach to a takings analysis was recognized by the Supreme Court, "albeit obliquely, in *Lucas v. South Carolina Coastal Council*."[79] First, the Ninth Circuit looked to *Lucas*'s disposition and reasoned that because the Supreme Court's disagreement with the state supreme court was unrelated to "*the extent of the property interest* in the . . . land," the posture of the remand order seemed to "firmly *suggest[]*" that property interests are determined by state law.[80] Second, the Supreme Court's decision expressly focused on how far a state regulation could permissibly invade private property without paying just compensation, which was a question of federal law.[81] Thus, the Ninth Circuit concluded that the disposition in *Lucas*[82] appeared to *indirectly* suggest that "state law governs the demarcation of a property right, while federal law governs the manner in which the state must respect" that right.[83]

75. *Id*. at 963.

76. Vanek v. State, 193 P.3d 283 (Alaska 2008).

77. *Vandevere*, 644 F.3d at 967.

78. *Id*.

79. *Id*. at 964 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

80. *Id*. (second emphasis added).

81. *Id*.

82. Notably, the Ninth Circuit also pointed to a procedural-due-process case in which the Supreme Court first had found that several utility customers' property rights were "definitively established by decisions of the state courts," and then had answered the federal question whether the utility company had provided its customers sufficient due process before turning off their utility services. *Id*. (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9, 12 (1978)).

83. *Id*.

1. State—but sometimes federal—law defines property rights

Having established some footing for its takings analysis, "albeit obliquely," the Ninth Circuit garnered more evidence showing that its approach was not novel (at least for state-created licenses) by pointing to *Schneider v. California Department of Corrections*.[84] The court explained that in *Schneider*, it had distinguished between "old property" and "new property" rights.[85] Regarding old property, "which includes the more traditional forms of property based in the common law"—such as the right to keep earned interest on one's principal funds—the *Vandevere* court seemed to imply that "federal courts applying the [C]onstitution make the final call."[86] For new property, which includes nontraditional property rights—such as welfare entitlements, public employment, and state-created contracts and licenses—state law effectively "can curtail or limit it with little constitutional interference"[87] because "state law has the final say on what interests one possesses."[88]

2. Circuit split between Schneider *and* Hoffman

The court felt there was an apparent "tension between [its] analysis in *Schneider* and the First Circuit's Takings Clause analysis in *Hoffman v. City of Warwick*," but the Ninth Circuit concluded that its own precedent was superior for three reasons.[89] First, the court found *Schneider* to be more faithful to the two-step analysis it recognized as implicit in *Lucas*.[90] By contrast, *Hoffman* condensed the analysis into a single inquiry in which "federal courts, guided by their own precedents, decide *both*" steps, rather than the second step alone.[91] Second, the court found that it made more sense to apply

84. *Schneider II*, 151 F.3d 1194 (9th Cir. 1998).

85. *Vandevere*, 644 F.3d at 965.

86. Robert H. Thomas, *Recent Developments in Regulatory Takings Law: What Counts as "Property?"*, 34 ZONING & PLAN. L. REP., no. 9, Oct. 2011, at 5, *available at* http://www.scribd.com/doc/71176492/Thomas-Recent-Developments-in-Regulatory-Takings-Law-What-Counts-as-Property-34-Zoning-Planning-Law-Report-Oct-2011.

87. *Id.*

88. *Vandevere*, 644 F.3d at 965.

89. *Id.* (citing Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990)).

90. *Id.* at 966.

91. *Id.*

state law to decide whether entry permits were property, while *Hoffman* indicated that state law did not have the "final say" in that regard.[92] Third, the court found that principles of stare decisis mandated that it follow *Schneider* and not *Hoffman*.[93]

B. Deference to the Alaska Supreme Court

Alaska state law had spawned the "creature" at issue—entry permits—and the Ninth Circuit found that it was powerless to consider the extent or existence of any property interest independent of "a relevant decision by the state's highest court."[94] Three years before, the Alaska Supreme Court had held in *Vanek v. State* that fishers' entry permits were not property interests for takings-analysis purposes.[95] The Ninth Circuit conducted a brief analysis, limited to determining whether *Vanek* was dispositive on the entry-permit issue. The court summarized the *Vanek* plaintiffs' arguments, noting that the "*Vanek* plaintiffs' arguments . . . echoed the arguments that Plaintiffs advance here."[96]

The *Vanek* plaintiffs argued that their entry permits had all the characteristics of property: an entry permit was economically valuable and transferable; was entitled to due-process protection; could serve as collateral to secure a loan; could be devised by will or inherited by right of survivorship; was property or a right to property for federal-

92. *Id.* ("It would be anomalous to conclude that, in the absence of a statutory or contractual provision for compensation, the state must compensate those regulated when the state regulates an interest that the state itself created in the first place and explicitly made subject to future regulation.").

93. *Id.* ("In any event, *Schneider* is the law of our circuit and we are bound to follow it.").

94. *Id.*

95. *Id.* (citing Vanek v. State, 193 P.3d 283, 285, 288 (Alaska 2008)).

96. *Id.* (citing *Vanek*, 193 P.3d at 285). At first glance, the court's reasoning for summarizing the *Vanek* plaintiffs' arguments and not the *Vandevere* plaintiffs' arguments might seem perfectly logical. But this maneuver is particularly problematic for two reasons. First, in accepting the *Vandevere* plaintiffs' appeal, the court essentially agreed to give the fishermen their day in court—deciding their case on its merits. But the court failed to give the *Vandevere* plaintiffs these courtesies by categorically lumping their arguments with those of the *Vanek* plaintiffs. The court merely recited the Alaska Supreme Court's analysis without conducting any real analysis of its own. Second, and more troubling, the *Vandevere* plaintiffs advanced myriad, distinct arguments that were never considered by the Ninth Circuit (and certainly were not considered by the state supreme court). *See* Brief of Appellants at 10–30, Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011) (No. 09-35957).

tax-lien purposes; and was "subject to execution for past due child support claims."[97] Additionally, the Board of Fisheries had no power to revoke, suspend, or modify entry permits.[98] The State's argument, which the Alaska Supreme Court ultimately accepted, was that permit holders had "nothing more than a use privilege or license to fish, subject to all applicable regulations adopted by the board of Fisheries."[99]

The Ninth Circuit zeroed in on four factors supporting the Alaska Supreme Court's decision. First, an Alaska statute specifically provided that "[a]n entry permit constitutes a use privilege that may be modified or revoked by the legislature without compensation."[100] Thus, the plain language of the statute denied the existence of a compensable property interest.[101] Second, a 1979 Attorney General Opinion stated that legislative enactments affecting the nature of entry permits would not require just compensation because entry permits "ha[d] not acquired the status of a property right."[102] Third, a student-written law-review article stated that the Alaska Senate in 1990 had rejected the notion that entry permits conferred any property right.[103] "Finally, the [state] court examined at length its own precedents and the effect of state constitutional provisions that reserve fish to the people for common use and ban exclusive rights in fisheries."[104]

Relying on the Alaska Supreme Court's opinion, the Ninth Circuit held that entry permits were not property for takings-claim purposes; step two in the Takings Clause analysis was therefore unnecessary.[105]

97. *Vanek*, 193 P.3d at 288–89, 291, 293.

98. *Id*. at 288.

99. *Id*.

100. ALASKA STAT. § 16.43.150(e) (2011).

101. *Vanek*, 193 P.3d at 289 ("The legislature's 'use privilege' language establishes that the permits are merely licenses to fish that are subject to government regulation.").

102. *Id*.

103. *Id*. at 289 & n.21 (citing Jon David Weiss, Note, *A Taxing Issue: Are Limited Entry Fishing Permits Property?*, 9 ALASKA L. REV. 93, 96, 112 (1992)).

104. Vandevere v. Lloyd, 644 F.3d 957, 966–67 (9th Cir.), *cert. denied*, 132 S. Ct. 850 (2011) (citations omitted).

105. *Id*. at 967. As noted before, the Ninth Circuit also disposed of the claims of the two fishermen who held shore-fishery leases. The court first recited a few relevant sections from the fishermen's boilerplate lease agreements—contracts that all fishery leaseholders were required

V. ANALYSIS

Takings Clause analysis should not be divided into two separate bodies of law—state law to determine property interests and federal law to determine whether a compensable taking occurred. Likewise, it is "wrong to separate Takings Clause analysis of the property rights at stake from analysis of the alleged deprivation."[106] The two prongs are bound up together as a mixed question of state and federal law. The Ninth Circuit created this anomalous, two-step rule only after incorrectly applying the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.[107] And by deferring to the Alaska Supreme Court, the Ninth Circuit failed to consider on its own the nature and extent of the benefits and rights that entry-permit holders enjoyed under Alaska law. This is problematic because, as the Ninth Circuit previously recognized in *Schneider v. California Department of Corrections*, property rights can—and often do—exist despite state laws denying their existence.[108] If the Ninth Circuit had properly applied *Schneider*'s analysis, it would have recognized that entry permits confer a large bundle of rights identical to the rights that people get "when they obtain title to property."[109]

A. Lucas *Does Not Firmly Suggest a Two-Step Inquiry*

The Supreme Court in *Lucas* never suggested—not even "obliquely"—that two separate analyses should be conducted to determine whether a state has effected a regulatory taking.[110] Relatedly, and despite the Ninth Circuit's claim otherwise, the Court's remand order in *Lucas* does not "suggest[] that state law

to sign. Then the court concluded that the "lease plainly exempts regulatory takings of the kind challenged here from the requirement that Plaintiffs receive just compensation." *Id.* at 969. While the Alaska Supreme Court had held that fishery leaseholders of submerged land had a "limited property interest," *id.* at 967, the Ninth Circuit did not address the fishermen's takings claim but held that the fishermen had "contractually waived their right to challenge the regulations when they signed their lease agreements." *Id.* at 969.

106. Phillips v. Wash. Legal Found., 524 U.S. 156, 180 (1998) (Breyer, J., dissenting).

107. *Vandevere*, 644 F.3d at 966 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

108. *Schneider II*, 151 F.3d 1194, 1199 (9th Cir. 1998).

109. *Lucas*, 505 U.S. at 1027.

110. *Vandevere*, 644 F.3d at 964 (stating that the Supreme Court recognized a two-step, state–federal law approach to a Takings Clause analysis, "albeit obliquely," in *Lucas*).

governs the demarcation of a property right."[111] Rather, the Court's remand order expressly required that South Carolina (if it wanted to avoid paying compensation) justify its prohibition on Lucas's desired use—building a home—by reference to state *common-law* principles of property and nuisance.[112] This is exactly what the State "would be required to do if it sought to restrain Lucas in a common-law action for public nuisance."[113] In other words, the State's reliance on new legislative findings alone was insufficient to justify its confiscatory regulation, which prevented "all economically beneficial use of land."[114] Additionally, the Court answered the question whether any background principle of property law or nuisance law existed to justify the prohibition: building a home was an "essential" land use that was unlikely to have been prohibited by common-law principles.[115] Thus, contrary to the Ninth Circuit's interpretation, *Lucas* stands for the view that a state's statutory law is limited—not empowered—in its ability to define away property rights.[116]

Additionally, the Ninth Circuit's reasoning—that *Lucas*'s remand order had nothing to do with the extent of the property interest and thus was evidence that state law controlled—is a non-sequitur.[117] Logically speaking, the argument is invalid because it denies the antecedent, taking the following form: If *(A)*, then *(B)*. *(Not-A)*. So, *(not-B)*. To make sense of how the court's reasoning is faulty, one must supply the implicit premises, *(A)* and *(B)*, because the court's argument made explicit only the contrapositives, *(Not-A)* and *(Not-B)*. Thus, the argument with its implicit premises reads as follows:

111. *Id*.

112. *Lucas*, 505 U.S. at 1031.

113. *Id*.

114. *Id*. at 1029.

115. *Id*. at 1031 ("It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on [Lucas's] land; they rarely support prohibition of the 'essential use' of land." (citation omitted)).

116. *Id*. at 1029–30.

117. *Vandevere*, 644 F.3d at 964 ("[T]he Court's quarrel with the state supreme court did not concern the *extent of the property interest* in the beachfront land, which the Court's remand order firmly suggests is a matter of state law but, rather, concerned the *extent to which the state could invade* a property interest without providing just compensation, which is a matter of federal law.").

> If *(A) Lucas*'s remand order concerned the extent of the property interest, then *(B)* the extent of the property interest is not a matter of state law. *(Not-A) Lucas*'s remand order "did not concern the extent of the property interest." So, *(not-B)* "the extent of the property interest" "is a matter of state law."[118]

Practically speaking, however, even if the court's argument were valid, it would still miss the point. The Supreme Court made evident the extent of Lucas's property interest,"a fee simple interest," which was "an estate with a rich tradition of protection at common law" and clearly not unique to the state's statutory law.[119] The Supreme Court did suggest, however, that property interests could be identified in future cases by looking to how a state's property laws have shaped "the owner's reasonable expectations."[120] Put another way, courts should ask "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest."[121] Thus, while correctly looking to principles of state law to identify the fishermen's property interests, the Ninth Circuit incorrectly halted its inquiry after a cursory examination revealed a single statutory provision and a state-supreme-court decision that were seemingly controlling.

B. Takings Analysis: Mixed Question of State Law and Federal Law

The Ninth Circuit's mischaracterization of *Lucas* effectively ended the inquiry. If federal courts refuse to consider on their own "what is property" by looking to the legal recognitions and protections given an interest under state law, states can continue to legislate away property rights and thereby escape the Takings Clause inquiry altogether. If every court were to take that approach, it would *always* end the inquiry.

Fifth Amendment claims of uncompensated takings no doubt present mixed questions of state law and federal law. For the Constitution itself does not create property rights; rather, "independent source[s]"—such as state law, common law, and

118. *Id.* (emphasis omitted).
119. *Lucas*, 505 U.S. at 1016 n.7.
120. *Id.*
121. *Id.*

federal law—confer property rights.[122] Because the Constitution protects property interests that various sources of law confer on individuals, the first prong of the Takings Clause analysis is necessarily bound up with second prong. Thus, while a state's common law or statutory law might be the source of a property right, the total inquiry is whether there has been an unconstitutional taking of that right. It therefore makes little sense to divorce the two prongs when they are naturally bound up as a single constitutional question.

The Alaska Supreme Court's determination that entry permits are not property for Takings Clause purposes is equivalent to a determination that there has not been an uncompensated taking. Because the takings inquiry is a constitutional question, the Ninth Circuit owed no deference to the state supreme court. As one professor has argued:

> [T]he nature of the federal courts' authority to enforce the Takings Clause with respect to state-created property rights dictates that they have the jurisdiction to review final state court judgments that purportedly eliminate established property rights and to decide what property rights existed under state law [before] the challenged decision.[123]

If this were not the case—if federal courts were truly powerless to consider how an interest is treated under state law without deferring to a relevant decision of the state's supreme court—the state judiciary would be granted unlimited discretion to violate the Takings Clause.

Yet the Ninth Circuit in *Vandevere* erroneously deferred entirely to the analysis and holding of the Alaska Supreme Court on this mixed question of constitutional law. Only one Alaska statute actually states that entry permits are "use privileges," while numerous other statutes and decisions by the Alaska Supreme Court give entry permits heightened protections and recognize them as

122. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

123. Craig Anthony (Tony) Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213, 225 (2011) (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2608–10 (2010)).

property interests.[124] And as the Ninth Circuit has recognized in its prior cases, once a state applies its "one-way ratchet" to confer new property status on nontraditional interests, the state cannot then declare that the interest was never property to begin with simply by classifying it as a "privilege."[125] Alaska conferred new property status on entry permits by making them, among other things, transferable, nonrevocable, inheritable by right of survivorship, devisable by will, subject to execution for past-due child-support payments, and usable as collateral to secure a loan.[126] Alaska could not then declare that entry permits were never property to begin with simply by pointing to the statutory language classifying them as a "use privilege."

C. The Vandevere *Test Facilitates Judicial Takings*

The *Vandevere* court's deference to the Alaska Supreme Court's judicial taking is contrary both to Supreme Court precedent and, ironically, to the court's own declaration that it would not so defer. The *Vandevere* court seemingly adopted the plurality view in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[127] The plurality argued that an actor from any branch of government, including the judiciary, could effect a taking:[128] "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[129] The *Vandevere* court echoed this same view in an extended footnote:

> [A]ny branch of state government could . . . effect a taking. We also note that a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a subterfuge for removing a pre-existing, state-recognized property right. That is, we need not take a state court at its word as to the kind of analysis that it is performing.[130]

124. *See supra* Part III.A and sources cited notes 56–63.

125. *See Schneider II*, 151 F.3d 1194, 1200–01 (9th Cir. 1998); Little v. United States, 704 F.2d 1100, 1106 (9th Cir. 1983).

126. *See supra* Part III.A, notes 56–63, Part IV.B, notes 97–98.

127. *Stop the Beach*, 130 S. Ct. at 2592.

128. *Id*. at 2602 (plurality opinion).

129. *Id*. at 2601.

130. Vandevere v. Lloyd, 644 F.3d 957, 964 n.4 (9th Cir.), *cert. denied*, 132 S. Ct. 850 (2011) (citations omitted).

But the court gave only lip service to this idea. The Alaska Supreme Court had recharacterized entry permits—treated under Alaska law as property or rights to property in at least nine different ways—by essentially concluding that entry permits were generally treated as property interests *except for* purposes of the Takings Clause.[131] And the *Vandevere* court did precisely what it vowed not to do: it took a state court at its word and deferred to the state court's analysis.[132] The court blindly followed the Alaska Supreme Court's decision to effect a judicial taking of private property without compensation. Therefore, the Ninth Circuit created a new rule that facilitates judicial takings—giving state supreme courts almost-exclusive discretion to determine which property interests are constitutionally protected.

VI. CONCLUSION

Although the Ninth Circuit purported to follow precedent, its decision in *Vandevere v. Lloyd* breaks from precedent and creates a circuit split. The court's prior approach in *Schneider* did not actually conflict with the First Circuit's analysis in *Hoffman v. City of Warwick*. In fact, *Vandevere* diverges from both *Schneider* and *Lucas* to create a Takings Clause analysis that gives states nearly complete discretion to decide whether property interests are protected by the U.S. Constitution.

The Ninth Circuit should have accurately applied its Takings Clause analysis from *Schneider* and asserted its power to review decisions of a state supreme court. The court should have held that the Alaska Supreme Court's purported definition of entry permits "really amount[ed] to a subterfuge for removing a pre-existing, state-recognized property right."[133] Instead, the court ratified the state court's judicial taking when it declared that entry permits are not property interests.

131. Vanek v. State, 193 P.3d 283, 292–94 (Alaska 2008).

132. *Vandevere*, 644 F.3d at 967 ("On this question of state law, which is the same as the first question that we face here, we must follow Vanek. Therefore, in reliance on this recent opinion of the Alaska Supreme Court, we hold that Plaintiffs' entry permits are not property for purposes of a takings claim.").

133. *Vandevere*, 644 F.3d at 964 n.4.

This Note has shown by *reductio ad absurdum*[134] that the Ninth Circuit's analysis in *Vandevere* is logically inconsistent and stands as proof that its test leads to an absurd result: it "allow[s] a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[135] Thus, *Vandevere* should be overruled.

While the issue presented to the Ninth Circuit was undoubtedly difficult, the court has an ever-present duty to apply federal-constitutional principles to vindicate private-property rights—particularly when state actions improperly define away by legislation, invade by regulation, or destroy by judicial declaration the individual's Fifth Amendment right to just compensation.

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134. Latin for "reduction to the absurd," *reductio ad absurdum* is a "method of proving the falsity of a premise by showing that its logical consequence is absurd or contradictory." *Reductio ad absurdum*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/reductio+ad+absurdum (last visited Mar. 10, 2012).

135. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

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