Introduction to the Symposium on Judicial Takings

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INTRODUCTION TO THE SYMPOSIUM ON JUDICIAL TAKINGS

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The judicial takings issue is this: Can a judicial action ever be an unconstitutional taking of private property and, if so, when? Until recently, the issue had a very low profile. A few law review articles discussed the possibility of judicial takings, as had a few judicial opinions. Compared to other takings issues, however, the topic of judicial takings was obscure.

The Supreme Court of the United States' recent decision in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection suddenly brought the judicial takings

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4 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl Prot., 130 S. Ct. 2592 (2010).
issue to the fore. *Stop the Beach* was the first case in which the Court had granted certiorari to consider a judicial takings claim. The Court unanimously rejected the judicial takings claim made by the petitioner, but divided on all of the substantive issues presented by the claim. The crucial portions of Justice Scalia's opinion of the Court were joined only by Chief Justice Roberts and Justices Alito and Thomas. Justice Kennedy, joined by Justice Sotomayor, wrote one concurring opinion; Justice Breyer, joined by Justice Ginsburg, wrote another.

The result is a case that is perfect for legal academics, but a potential nightmare for everyone else. The Court simultaneously catapulted the judicial takings issue into prominence and left all of the important issues undecided. It could be that at some point in the future, the Court will answer the fundamental question of whether there can ever be a valid judicial takings claim with a "no," and the entire judicial takings issue will disappear. Even if this occurs, however, the effort of wrestling with the issues raised in *Stop the Beach* will have been worthwhile for the conceptual light it sheds on broader issues of constitutional property.

This symposium issue presents eight papers that explore the *Stop the Beach* case and the problem of judicial takings. Along the way, the papers also explore broader constitutional issues raised by the possibility of a judicial takings doctrine. The result is a collection of papers that illuminates the current controversy on judicial takings while simultaneously providing contributions to the wider literature.

In the first paper, Property Rights, the "Gang of Four" & the Fifth Vote: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (*U.S. Supreme Court*...
Garrett Power provides a careful analysis of the *Stop the Beach* opinions and explores what might happen if Justice Scalia is able to obtain a fifth vote to recognize a judicial takings doctrine. Professor Power argues that Justice Scalia's view of judicial takings reflects an absolutist view of property rights that, if it were able to secure a majority of the Court, would dramatically curtail government action.

Williamson Chang's paper, *Judicial Takings: Robinson v. Ariyoshi Revisited*,\(^1\) provides context for understanding important, if often overlooked, judicial takings cases. Litigated in the 1970s and 1980s, these cases involved judicial takings claims challenging decisions by the Supreme Court of Hawai'i that arguably fundamentally changed Hawai'i property law. Professor Chang examines these Hawai'i cases in the light of the *Stop the Beach* plurality's view of judicial takings, and he discusses the impact that even the threat of judicial takings review might have on state court decision making.

In *Black Robes and Grabby Hands: Judicial Takings and the Due Process Clause*,\(^1\) Trevor Burrus argues that judges can take property, but that the relevant constitutional provision is the Due Process Clause,\(^1\) not the Just Compensation Clause.\(^1\) This argument gains particular importance from the due process-oriented theory of judicial takings articulated in Justice Kennedy's *Stop the Beach* concurrence.\(^1\) Mr. Burrus argues for a view of prepolitical property rights based on customary law, and then he links this view into the Court's due process jurisprudence to argue for a judicial takings doctrine rooted in due process.

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\(^{11}\) Garrett Power, *Property Rights, the "Gang of Four" & the Fifth Vote: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (U.S. Supreme Court 2010)*, 21 WIDENER L.J. 627 (2012).


\(^{14}\) U.S. CONST. amend. V, cl. 4; id. amend. XIV, § 1, cl. 3.

\(^{15}\) Id. amend. V, cl. 5.

\(^{16}\) See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2613-18 (Kennedy, J., concurring in part and concurring in the judgment).
Tensions about beach erosion and property rights led to the dispute underlying *Stop the Beach*, and any legal doctrine that renders beachfront property lines immutable will be problematic as sea levels rise. In *Regulatory Takings and Property Rights Confront Sea Level Rise: How Do They Roll?*, John Nolon discusses the intersection of sea level rise, beachfront property rights, and takings issues. Professor Nolon argues that a flexible approach to coastal management is preferable to a judicial takings doctrine that would place unprecedented limits on state courts.

In *Transition Relief from Judge-Made Law: The Incentives of Judicial Takings*, Christopher Serkin links judicial takings to the larger issue of the impact of legal changes on property owners' investment incentives. This issue plays an important role in the literature on traditional regulatory takings, and the judicial takings context offers a useful lens through which to consider the larger picture. Professor Serkin ultimately argues that the consequences of recognizing a judicial takings doctrine suggest that concerns about investment incentives should play at most a minor role in structuring a takings doctrine.

In *Easements, Necessity, and the Role of Legal Change in Judicial Takings Claims*, I explore judicial takings in the context of easements by necessity and related state private road acts. I argue that any takings claim, judicial or otherwise, requires a change in the law and that judicial awards of easements by necessity consistent with existing state law cannot be judicial takings. I also argue that not all changes in the law can support takings claims and that legal change is therefore necessary, but not sufficient, for a valid takings claim.

In *Judicial Takings and State Takings*, Steven Eagle explores a tension between the Court's broader regulatory takings

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17 *See id.* at 2597-601 (majority opinion).
jurisprudence, which distinguishes between types of government actors, and Justice Scalia's argument in his *Stop the Beach* plurality, which appears to reject such distinctions.²² Professor Eagle argues that focusing on the government actors, judicial or otherwise, helps resolve some of the complexities of regulatory takings doctrine.

Finally, in *Judicial State Action: Shelley v. Kraemer, State Action, and Judicial Takings*,²³ Shelley Ross Saxer considers the impact of judicial takings on the larger issue of whether judicial action is state action for constitutional purposes. For judicial takings to fall within the protections of the Just Compensation Clause, the underlying judicial action would need to be state action. *Shelley v. Kraemer*²⁴ recognized judicial action as state action.²⁵ *Shelley* left lingering concerns, however, about the legitimacy of treating a judicial adjudication of a dispute between two private parties as state action for constitutional purposes. Professor Saxer argues that these concerns counsel against recognizing a judicial takings doctrine.

Together, these papers help us understand the judicial takings problem and the larger constitutional issues that this problem implicates. I extend my thanks to the symposium participants for their thoughtful contributions, and to the editors and staff of the *Widener Law Journal* for their efforts in making this symposium issue a success.

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²² See id. at 813 & nn.11-12.
²⁵ Id. at 20.