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No More Free Easements: Judicial Takings for Private Necessity

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NO MORE FREE EASEMENTS:

JUDICIAL TAKINGS FOR PRIVATE NECESSITY

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By Professor John Martinez

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INTRODUCTION

This article bridges the fields of constitutional judicial takings and the common law with respect to easements that arise based on private necessity. The article suggests that the law of takings requires payment when a court declares that an easement should be established because of private necessity.

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2. The federal Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Similar Just Compensation provisions in state constitutions, prohibit the "taking" of "property" without payment of "just compensation." See, e.g., CAL. CONSTIT. art. I, Sec. 14 ("Private property shall not be taken or damaged for public use without just compensation . . . ."); UTAH CONSTIT. art. I, Sec. 22 ("Private property shall not be taken or damaged for public use without just compensation.").

Part I describes the law of takings and explains that permanent physical intrusions onto private land, whether by a highway department or by a court's application of common law rules, triggers the requirement that the burdened landowner must be paid. Part II sets out the distinctions between public and private necessity in takings jurisprudence and in common law. The core of the problem considered by this article is set out there: under existing common law rules, courts can declare that an easement exists--without payment of compensation to the burdened landowner--simply because the benefitted party has a *private* necessity for the easement.

Part III discusses the remedies required for judicial takings for private necessity and Part IV describes the settings excluded from the theory of judicial takings for private necessity easements suggested in this article.
I. Permanent Physical Occupations as Per Se Takings

A. Direct Condemnation--the evolution of the meaning of "public use" from "utilization by the public" to "public purpose"

If my house is located in the path of a freeway, there is no question that the highway department has the power of eminent domain to appropriate my house, as long as it provides me notice and opportunity to be heard, and pays me "fair market value". In that paradigm setting, there is no question that a "public use" is involved: the "public use" in the highway setting is the straightforward "utilization by the public" of the asset acquired: the public literally will utilize what was my private land as a small portion of the freeway.

That literal meaning of "public use," however, is not clearly present when private land is taken for economic development by private developers. In Kelo v. City of New London, the United States Supreme Court held that a city may condemn private, non-blighted land to implement a comprehensive plan for the purpose of economic development of the area in order to generate jobs and increase tax revenue. The issue was whether such acquisition of non-blighted land for the objective of economic redevelopment satisfied the "public use" clause of the Just Compensation provision of the federal constitution's Fifth Amendment.

The Court emphasized that the fundamental norm underlying the "public use" clause—the key evil to be avoided—was the taking of private property from Owner A for the sole purpose of transferring it to private Owner B.\(^5\) Acknowledging that the taking involved in the case did not entail literal "utilization by the public"-type of "public use," the court instead formulated a three-part standard for distinguishing between takings that violated the fundamental norm. Thus, the court required that such takings incorporate a development plan which: (1) was comprehensive in character; (2) was adopted after thorough deliberation; and (3) was not adopted to benefit a particular class of identifiable individuals.

**B. Permanent Physical Occupations**

In Loretto v. Teleprompter Manhattan CATV Corp.,\(^6\) a state law required landlords to permit cable companies to install cable facilities on private apartment buildings. The United States Supreme Court held that such "permanent physical occupations" were takings per se, particularly because they destroyed the apartment owners' right to exclude. The nature of the public interest, or even whether one existed, were irrelevant to the analysis. The impact on the owner was decisive.

**C. Judicial Takings**

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\(^5\) See generally John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFFALO LAW REVIEW 619 (2010)(arguing that governmental conduct transferring property from private Owner A to private Owner B in order to benefit private owner B is one instance of situations that violate the fundamental anti-favoritism norm in American property law).

In Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,⁷ in an opinion by Justice Scalia announcing the judgment of the Court, joined in part by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito and Sotomayor, the Court held that Florida beachfront landowners had no established property right under Florida law—to additions to their lands resulting from accretions (the slow, gradual and imperceptible deposit of additional sand, sediment or other deposits) and relictions (the exposure of land resulting from receding of water), nor to have their lands touch the water—superior to the State's right to fill in its submerged land.⁸

In Parts II and III of Justice Scalia's opinion, joined only by Chief Justice Roberts and Justices Thomas and Alito, he declared that unconstitutional takings of private property in violation of the Just Compensation Clause may arise in the "judicial takings" setting, in which a court declares that what was once an established right of private property no longer exists.

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⁷. Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S.Ct. 2592 (2010).

⁸. The Court held that since Florida law prior to the events involved in the case allowed the State to fill in its own seabed, with the resulting sudden exposure of previously submerged land treated like an avulsion whereby the newly-exposed land belonged to the State, therefore the littoral landowners here had no protectable property right to accretions or relictions under Florida law in the circumstances. Similarly, with respect to the littoral landowners' claim that they had a property right to maintain contact with the water, the Court held the owners only had a right of access to the water, which remained unaffected.
Judicial takings are thus one vote away in the United States Supreme Court from becoming viable federal constitutional claims. In an early article, I suggested that property owners subjected to takings by courts' interpretation of common law doctrines should be provided compensation—or at least a reasonable period of time to amortize their investments. If federal judicial takings claims become viable, then the availability of the full panoply of remedies—forced condemnation, injunction, and interim damages—must be reconsidered. That discussion must also grapple with identifying with precision those circumstances in which judicial takings claims should apply. This article begins the discussion with what perhaps are the easy cases, in which governmental judicial conduct imposes a permanent physical occupation on private land based solely on the private necessity of the benefitted party.

D. Synthesis of Elements of Judicial Takings for Private Necessity

Judicial takings involve a court as the governmental actor, whereas in the direct condemnation setting, the governmental actor typically is an administrative agency such as a highway department. But if the impact is a permanent physical occupation, then Loretto compels the conclusion that a governmental "taking" has occurred. Therefore, if a court's conduct imposes a permanent physical occupation, then compensation is constitutionally compelled.

9. John Martinez, Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings, 11 HARY. J.L. & PUB. POL’Y 297 (1988)(suggesting that either compensation—or a reasonable period of time to amortize their investments—should be provided to those who reasonably rely on common law property rules that are subsequently overturned by courts).
The "public use" limitation on governmental conduct ultimately prohibits the taking of private property from Owner A for the sole purpose of transferring it to private Owner B. Kelo specifically includes a factor prohibiting takings for the benefit of a particular class of identifiable individuals. *A fortiori*, where a *single* individual is benefitted by governmental takings, it would seem self-evident that an unconstitutional taking has occurred. And yet that is exactly what the common law of private necessity easements purports to allow.

**II. Public and Private Necessity**

**A. The Concept of Necessity in Takings Jurisprudence**

The concept of "public use" in takings jurisprudence distinguishes between benefitting one particular person and benefitting the public as a whole.\(^{10}\) Indeed, a *public* necessity of sufficient magnitude--a fire threatening to destroy a whole city--may justify the complete destruction of private property by the government--blowing up a private house to stop the fire--*without* payment of compensation.\(^{11}\) For example, in Bowditch v. Boston,\(^{12}\) the Court upheld a Boston ordinance

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11. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 n.16, 112 S.Ct. 2886, 2900 n.16, 120 L.Ed.2d 798 (1992)("The principal 'otherwise' that we have in mind is litigation absolving the State (or private entities) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others.").

which authorized the city fire department to blow up a house in the path of a fire in order to stop the spread of a fire, based on the common law principle of "natural law" "imperative necessity."

Similarly, in United States v. Pacific R.R.,\textsuperscript{13} the Court discussed at length the principle that private harm resulting from the Civil War was not compensable. Another example is YMCA v. United States,\textsuperscript{14} in which damage caused to a building when federal officers who were seeking to protect the building were attacked by rioters was held not to be a taking. And in Mouse's Case,\textsuperscript{15} it was held that in a tempest, and to save the lives of the passengers, a passenger could throw valuable goods of another overboard, without making himself liable to an action by the owner of the goods.

The "actual necessity/emergency" principle thus precludes compensation when there is a broad-based, general public need, even if the impact on the property owner is absolute property destruction. Precise definition of when such a dire public necessity exists has proved elusive.\textsuperscript{16} However, it is clear that the foundation of the principle is a broad-based, general public need.

\textbf{B. Common Law Private Necessity Easements}

\textsuperscript{13} United States v. Pacific R.R., 120 U.S. 227 (1887).


\textsuperscript{15} Mouse's Case, 77 E.R. 1341, 12 Coke Reports 63 (1608).

\textsuperscript{16} Compare Customer Company v. City of Sacramento, 10 Cal. 4th 368, 895 P.2d 900, 41 Cal. Rptr. 2d 658 (1995) cert. denied 116 S.Ct. 920, 133 L.Ed.2d 849 (1995)(denying recovery to owner whose store was damaged by police looking for a criminal suspect, on grounds that benefit was conferred and that emergency existed) with Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991)(owner in similar circumstances entitled to compensation).
The concept of necessity at common law also distinguishes between private necessity--the need to protect an actor's individual property, life or limb--and public necessity--the need to protect the public at large.\(^{17}\) The problem, however, is that implied easements may arise under several common law doctrines even though only a private necessity is involved.

### 1. Shelter Easements

In *Ploof v. Putnam*,\(^ {18}\) the court held that the owner of a private dock could not prevent a boat owner from tying up at the dock in the middle of a storm which threatened to damage the boat, as well as the safety of the boat owner and his family. Similarly, in *Vincent v. Lake Erie Transportation Co.*,\(^ {19}\) a dock owner could not prevent a ship from mooring at a private dock in order to prevent the ship from being carried away by a storm.

The net result of each case was that the boat owners had to pay for any damages to the docks that resulted, but the dock owners were not entitled to the rental value of such dockings nor to injunctions to prevent them.\(^ {20}\) Thus, the dock owners were subjected to permanent physical occupations: they were deprived of their right to exclude as well as of their rights to use and possess the docks--both without payment of just compensation. The dock owners thus were

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\(^{19}\) *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).

\(^{20}\) See generally Restatement (Second) of Torts, \(^{197}\) (Private Necessity)(Illustration 1 is taken from the *Ploof* case; Illustration 2 is taken from the *Vincent* case).
deprived of easements for private necessity without compensation.

2. Strict Necessity and Reasonable Necessity Access Easements

In Hellberg v. Coffin Sheep Co., the Coffin sheep company leased a portion of its land to Hellberg, but provided no means of access from Hellberg's land out to a public roadway except by traversing the portion of the land that Coffin had retained. Several years after the 10-year lease was executed, Coffin padlocked the gate, preventing Hellberg from getting to the public road. Hellberg sued enjoin Coffin to establish that Hellberg had an easement to cross over Coffin's retained land to get to the public road.

The court held that Hellberg had an easement implied in fact by "strict" necessity because there was no other reasonable way Hellberg could get to the public road, and also that Hellberg had an easement implied in fact by "reasonable" necessity because Coffin engaged in a "quasi-easement" use prior to the lease in getting from the Hellberg land to the public road, and continuation of such use was "reasonably necessary" for beneficial use and enjoyment by Hellberg of its land.

The net result was that the servient owner (Coffin) was not entitled to an injunction to prevent the intrusion, nor to the value of the easement that arose by implication. Coffin was subjected to a permanent physical occupation without payment of just compensation.

3. Licenses Ripening into Easements

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In Holbrook v. Taylor,\textsuperscript{22} the Taylors had built a house costing $25,000 on their tract, using an adjacent roadway, with the permission of the road's owner, Holbrook. The roadway became their only reasonable outlet. In 1970, Holbrook demanded that they purchase the roadway for $500. The Taylors refused to pay, so Holbrook blocked the roadway with a steel cable and the Taylors responded by suing Holbrook to establish their right to use the roadway.

The court held that the Taylors had a right to continue to use the road based on a license rendered irrevocable by estoppel. The court noted that estoppel bars revocation of a license when the licensee has invested substantial sums and/or labor in reasonable reliance on the expectation that the license would not be revoked. The concept of "licenses ripening into easements" is well established in the law.\textsuperscript{23} Such easements last for as long as it takes for the licensee to amortize its investments made in reliance on the initially revocable permission.\textsuperscript{24} The servient owner is thus subjected to an implied easement--albeit one with a limited duration--based on private necessity.

\textbf{III. Remedies for Judicial Takings for Private Necessity}

\begin{itemize}
\item \textsuperscript{22} Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976).
\item \textsuperscript{23} See, e.g., Forsyth County v. Waterscape Services, LLC, 303 Ga. App. 623, 634, 694 S.E.2d 102, 112-13 (2010)("An express oral license may ripen into an easement based on equitable estoppel if the license holder expends funds in reliance on the grant.").
\item \textsuperscript{24} Restatement (Third) of Property (Servitudes) \textsuperscript{'} 4.3 (2000), comment e (duration indeterminate).
\end{itemize}
Since each of the common law private necessity easement settings involves a taking of private property by the government in order to confer the property on another private owner based on private necessity, a taking *per se* has occurred for which a remedy is required.

In the paradigmatic direct condemnation setting, the owner is entitled to enjoin the governmental conduct, thereby prohibiting the government from taking the property altogether, and also is entitled to interim damages for the duration of the improperly imposed taking.\(^\text{25}\) Alternatively, the owner is entitled to a "forced condemnation" remedy, requiring the government to purchase the property outright, valued as of the time the taking began.\(^\text{26}\) Since either remedy would entail legislative action involving policy and fiscal consequences, the choice of which remedy will be provided is left up to the government.\(^\text{27}\)


\(^{26}\) Id. See generally John Martinez, GOVERNMENT TAKINGS ' ' 3:29--3:41 ("forced condemnation" remedy); ' 3:42 (interim damages remedy)(Thomson-West 2006).

\(^{27}\) See First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 321, 107 S. Ct. 2378, 2389 (1987)("Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function \(\_\). Once a court determines that a taking has occurred, the government retains the whole range of options already available-Amendment of the regulation, withdrawal of the invalidated regulation or exercise of eminent domain.").

The same principles apply outside of the paradigmatic direct condemnation setting. Thus, regulatory governmental conduct amounting to a taking--but for a *private* purpose--similarly gives rise to the full panoply of Just Compensation Clause remedies. See, e.g., Daniels v. The Area Plan Commission of Allen County, 306 F.3d 445 (7th Cir. 2002)(county's amendment of recorded plat map, eliminating private covenant which restricted burdened lot in subdivision to residential uses, at request of burdened lot owner who wanted to use burdened lot for commercial use, enjoined as violating Just Compensation Clause by vacating restrictive covenant for a private, not "public" purpose).
Analogously, in the judicial takings setting, if a court holds that a judicial taking has occurred, that court (or a subsequent court in which the takings claim was asserted)\textsuperscript{28} should give \textbf{the benefitted party} a choice: (a) consent to reversal of the judicial taking (amounting to granting an injunction to the burdened landowner against the taking) and pay interim damages to the burdened landowner for the time that the judicial taking was in place or (b) pay the burdened landowner "just compensation" (amounting to granting the burdened landowner a "forced private condemnation" remedy).\textsuperscript{29} With respect to the measure of the "forced condemnation" remedy, \textsuperscript{28} A second suit would be available unless preclusion rules applied. The topic of preclusion rules in takings litigation is beyond the scope of this article. See San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491 (2005)(litigation of a state takings claim which provides identical protection as a federal takings claim has issue preclusion effect on subsequent suit on the federal claim); see generally 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, '16:53.10 (ripeness doctrine in federal takings litigation); John Martinez, GOVERNMENT TAKINGS (Thomson-West 2006), ' ' 4:14, 4:16, 5:4 (ripeness doctrine in federal takings litigation).

\textsuperscript{29} Justice Kennedy got confused by the twists and turns in regard to remedies in the Stop the Beach Renourishment case. He focused on the court, rather than the benefitted party, as the one to be confronted with the choice:

\begin{quote}
It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation. In the posture discussed above where Case A changes the law and Case B addresses whether that change is a taking, it is not clear how the Court, in Case B, could invalidate the holding of Case A. If a single case were to properly address both a state court's change in the law and whether the change was a taking, the Court might be able to give the state court a choice on how to proceed if there were a judicial taking. The Court might be able to remand and let the state court determine whether it wants to insist on changing its property law and paying just compensation or to rescind its holding that changed the law. Cf. First English, 482 U.S., at 321, 107 S.Ct. 2378 (AOnce a court determines that a taking has occurred, the government retains the whole range of options already available-amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain@). But that decision would rest with the state court, not this Court; so the state court could still force the State to pay just compensation. And even if the state
Parchomovsky and Stein suggest "propertized compensation," which "seeks to reinstate, to the extent feasible, the owner's right to exclude others and to set any price for occupation and use of her property" and as a back-up measure, disgorgement, representing the value of the trespass to the intruder.\(^{30}\)

A "pliability rule," amounting to nothing more than a temporary injunction against the trespasser, would be insufficient because it would satisfy neither of the constitutional remedies required. Such a rule would merely incorporate an entropy provision, or stated otherwise, a "condition subsequent" for temporary injunctions, which would be constitutionally inadequate.\(^{31}\)

**IV. Settings Excluded from the Theory of Judicial Takings for Private Necessity**

\[^{30}\text{Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection 130 S.Ct. 2592, 2617 (2010)(Justice Kennedy, concurring in part and concurring in the judgment).}\]

\[^{31}\text{Gideon Parchomovsky & Alex Stein, Reconceptualizing Trespass, 103 Northwestern L. Rev. 1823, 1826-28 (2009)(discussing shifting burdens of proof and measures of compensation).}\]

\[^{31}\text{Abraham Bell & Gideon Parchomovsky, Pliability Rules, 101 Mich. L. Rev. 1, 5-7 (2002)(recommending limited-time liability rules--followed by permanent injunction rules--or vice-versa).}\]
The circumstances giving rise to the judicial takings remedy suggested in this article are limited to those in which a permanent physical occupation has occurred. In the absence of a permanent physical occupation, the standards for takings are far more complex. Thus, in Lingle v. Chevron U.S.A. Inc., the court set out the following as proper tests for such other non-direct condemnation "takings": (1) "total" regulatory takings whereby an owner is deprived of all economically beneficial use; (2) "partial" regulatory takings; and (3) regulatory land use exactions.

The validity or invalidity of the governmental conduct--such as a court which has no subject matter or personal jurisdiction over the dispute or the parties--is a separate concern. Thus, under those circumstances, the burdened party would have to object to the court's power to adjudicate the dispute as a threshold matter. Failure to do so would waive that defect, but of course

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33. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)(where the beneficial use of two beachfront lots was completely destroyed; except that no taking would have been found if "background principles of nuisance, property, and exigent circumstances independently restricted the owner's intended use of property").

34. Palazzolo v. Rhode Island, 533 U.S. 606, 631, 121 S. Ct. 2448, 2464-65 (2001)(determined under Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), by consideration of (a) the economic impact of the regulation on the claimant, (b) the extent to which the regulation interferes with distinct investment-backed expectations, and (c) the character of the governmental action, such as whether it amounts to a physical invasion or instead merely affects property interests through a public program adjusting the benefits and burdens of economic life to promote the common good; except that no taking would have been found if "background principles of nuisance, property, and exigent circumstances independently restricted the owner's intended use of property").

35. See Dolan v. City of Tigard, 512 U.S. 374 (1994)(permit to expand a store and parking lot conditioned on the dedication of a portion of the land for a "greenway," including a bike/pedestrian path); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)(permit to build a larger residence on a beachfront lot conditioned on dedication of an easement allowing the public to traverse a strip of the lot between the owner's seawall and the mean high-tide line).
would not waive an objection based on Just Compensation to the court's ultimate judgment. As the United States Supreme Court emphasized in Lingle, the Just Compensation Clause does not question the validity of governmental conduct, but focuses on the impact of governmental conduct on the owner. \(^{36}\)

\[^{36}\text{Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 541-42, 125 S. Ct. 2074, 2083-84 (2005)(the validity or invalidity of governmental conduct is the task of the Due Process Clause). The Fourteenth Amendment's due process clause provides in pertinent part: "[N]or shall any State deprive any person of . . . property, without due process of law . . .." U.S. CONST. amend. XIV, Sec. 1.}\]
Adverse possession and prescriptive easements are not private necessity takings. Adverse possession title and prescriptive easements do not arise because the trespasser needs the title or easement, but because of the trespasser's adversity of use and the failure of the servient owners to effectively stop such use.

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37. See, e.g., Marengo Cave Co. v. Ross, 212 Ind. 624, 10 N.E.2d 917 (Ind. 1937)(cave, with opening on purported dominant land, but with no visible evidence on servient land, did not give rise to adverse possession of purported servient land).

38. See, e.g., MacDonald Properties, Inc. v. Bel-Air Country Club, 72 Cal. App. 3d 693, 140 Cal. Rptr. 367 (1977)(adverse use--consisting of errant golf balls which landed on servient land for over 40 years--gave rise to prescriptive easement).

39. With respect to the adverse possession setting, Professor Merrill has noted that "requiring every [adverse possessor] to indemnify the [true owner] would seriously undermine the institution of adverse possession." Thomas W. Merrill, Property Rules, Liability Rules, and Adverse Possession, 79 Nw. U. L. Rev. 1122, 1154 (1984)(albeit suggesting that a good faith trespasser should be required to compensate the servient owner).
Easements that arise out of consensual transactions also are not private necessity takings. For example, in State v. Shack,\textsuperscript{40} the New Jersey Supreme Court held that a farmer could not exclude a social worker or a legal services attorney from entering onto the farm to provide services to migrant farmworkers living on the farm. The easement that thus arose, in the form of a right to enter onto the premises, originated with the farmworker-farmer agreement which provided the farmer with workers and the workers with housing.\textsuperscript{41} The consensual arrangement in State v. Shack differs from the license-ripening-into-easement setting discussed above because the farmer in State v. Shack consented to giving the farmworkers possession of the premises for housing and activities related to that possession--such as receipt of social worker and legal services. In contrast, in the license-ripening-into-easement setting, the servient owner merely granted the non-owner a right to enter the premises for a limited purpose.

**CONCLUSION**

Judicial takings which impose easements based on private necessity are unconstitutional

\textsuperscript{40} State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971).

\textsuperscript{41} [I]t has long been true that necessity, private or public, may justify entry upon the lands of another. .... The process involves not only the accommodation between the right of the owner and the interests of the general public in his use of this property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. .... ... The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility. State v. Shack, 58 N.J. 297, 305-07, 277 A.2d 369, 373-74 (1971)(Emphasis added).
under the federal Just Compensation Clause unless just compensation is provided. This article traces the evolution of federal Just Compensation law and the common law doctrines which have purported to authorize such unconstitutional judicial takings.