

# Can Procedure Take?: The Judicial Takings Doctrine and Court Procedure

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*In considering the value of the judicial takings doctrine, this Comment argues that we should look to a new area of law: procedure. Courts often have the authority to set procedure, and they use this authority for substantive ends. This Comment argues that applying the Takings Clause to procedure demonstrates the value of the judicial takings doctrine. It argues that the Takings Clause, rather than the Due Process Clause, is the appropriate framework for certain forms of procedure. Under the Takings Clause, we can recognize the judiciary’s authority to use procedure for substantive ends while also offering “just compensation” to those unduly affected.*

*In contending with the practical effects of “judicial-procedure takings,” this Comment argues that we can supplement the existing takings framework in two ways. First, we can look to intent: where the government intends to single out a particular set of property owners to bear a public burden, that should weigh in favor of finding a taking. Second, we can refine our analysis by focusing on whether the act has an element of aggregation. Where the court has combined discrete elements to create a result that is greater than the sum of its parts, that too should weigh in favor of a taking. By supplementing the existing test, we can better identify procedures that are functionally equivalent to traditional takings—without swallowing up the courts in the process.*

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### INTRODUCTION

“[I]f regulation goes too far it will be recognized as a taking.”

– Justice Oliver Wendell Holmes, Jr., *Pennsylvania Coal v. Mahon*<sup>1</sup>

In response to the COVID-19 pandemic, several state legislatures and executives limited the circumstances in which landlords could evict their tenants.<sup>2</sup> Predictably, many of these moratoria were met with challenges under the Fifth Amendment’s Takings Clause, which prohibits the government from taking private property for public use without just compensation.<sup>3</sup> These challenges have been largely unsuccessful.<sup>4</sup>

In practice, however, many of the most stringent limits on landlords’ ability to evict tenants came not from the executive or legislative branches but from the judicial branch. Many state courts suspended eviction proceedings entirely, meaning that landlords were unable, on a practical level, to evict anyone.<sup>5</sup> These suspensions often limited evictions more broadly and for a longer period of time than executive or legislative eviction moratoria. In New York, for instance, former governor Andrew Cuomo suspended evictions for nonpayment of rent only for tenants “eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the

<sup>1</sup> 260 U.S. 393, 415 (1922).

<sup>2</sup> See Ann O’Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (July 22, 2020), <https://perma.cc/7CDS-ZE9U>.

<sup>3</sup> See U.S. CONST. amend. V; see also, e.g., *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162–68 (S.D.N.Y. 2020).

<sup>4</sup> See, e.g., *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 162–68 (holding that the New York governor’s eviction moratorium was not a taking).

<sup>5</sup> See O’Connell, *supra* note 2.

COVID-19 pandemic.”<sup>6</sup> That order was set to expire on August 19, 2020.<sup>7</sup> In an administrative order, New York’s Chief Administrative Judge<sup>8</sup> clarified that, while landlords were allowed to file new eviction petitions, *all* eviction matters were suspended and could not proceed to trial.<sup>9</sup> In short, the administrative order limited the ability of landlords to evict *any* of their tenants and, unlike the governor’s order, had no definite end date. As in most other states, this suspension was part of a larger effort to postpone nonessential court proceedings to protect the public and the court staff.<sup>10</sup>

In at least one state, however, the judiciary adopted these limits based on their broader concerns about public policy. In California, the Judicial Council—the rulemaking body within California’s judicial branch—issued Emergency Rule 1, addressing the eviction process.<sup>11</sup> The rule, among other limits, forbade state courts from issuing summonses in eviction cases, unless the action was necessary to protect public health and safety.<sup>12</sup> The prohibition originally was to remain in effect until ninety days after the state of emergency was lifted, or until the rule was amended or repealed.<sup>13</sup> In proposing this rule, the Judicial

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<sup>6</sup> N.Y. Exec. Order No. 202.28, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202 (2020).

<sup>7</sup> *See id.*

<sup>8</sup> The terminology might be confusing here, given the use of the term “administrative judge” at the federal level. In New York, the Chief Administrative Judge is a member of the judicial branch tasked with the administration of the New York court system. *See* N.Y. CONST. art. VI, § 28. This is distinct from federal administrative judges, who are members of the executive branch.

<sup>9</sup> *See* Procedure for Addressing Residential and Commercial Eviction Proceedings, AO/127/20 (June 18, 2020), <https://perma.cc/RKH2-H56Z>.

<sup>10</sup> *See, e.g.*, Memorandum from Chief Admin. Judge Lawrence K. Marks (Mar. 15, 2020), <https://perma.cc/W8AL-RJRE>; *State Courts Take Steps to Protect the Public from the Coronavirus*, NAT’L CTR. FOR STATE CTS. (Mar. 18, 2020), <https://perma.cc/VG86-C3RR>.

<sup>11</sup> CAL. RULES OF CT., app. I, emergency r. 1. Under California’s Constitution, the Judicial Council has the authority to “adopt rules for court administration, practice and procedure,” so long as they are not inconsistent with any statute. CAL. CONST. art. VI, § 6(d). In response to the pandemic, the governor of California issued an executive order giving the Judicial Council unprecedented authority to promulgate rules of civil and criminal procedure. The Executive Order provided that, if any rule adopted by the Judicial Council could be inconsistent with existing statutes, those statutes were suspended to the extent they conflicted with the proposed rule. *See* Cal. Exec. Order No. N-38-20, 3 (Mar. 27, 2020), <https://perma.cc/Q9VM-XZEL>.

<sup>12</sup> CAL. RULES OF CT., app. I, emergency r. 1(b).

<sup>13</sup> *See* JUD. COUNCIL OF CAL., REPORT TO THE JUDICIAL COUNCIL, ITEM NO. 20-141 at 8 (Apr. 4, 2020) [hereinafter REPORT TO THE JUDICIAL COUNCIL], <https://perma.cc/8X2Q-NWCJ>. Again, this was a broader limit than California’s existing Executive Order, which forbade evictions for only those experiencing documented,

Council observed that pursuing evictions during the pandemic was “particularly problematic” for two reasons.<sup>14</sup> First, eviction cases “require very fast legal responses (within five days) from defendants who are often self-represented and at a time when court self-help centers and legal aid services are not readily available.”<sup>15</sup> Second, “when involving residential property, they threaten to remove people from the very homes they have been instructed to remain in.”<sup>16</sup>

While the Judicial Council noted that an existing executive order limited some evictions, it said that the executive order could not “by itself provide sufficient assistance to tenants and courts to avert this crisis.”<sup>17</sup> Emergency Rule 1 was therefore necessary to protect litigants and court staff as well as to “implement the goals of the executive order.”<sup>18</sup> Following the enactment of Emergency Rule 1, California state legislators asked the Judicial Council to extend the rule because of delays in passing their own tenant protections.<sup>19</sup>

Landlords affected by the order later sued, alleging that the Judicial Council “usurped the [state] Legislature’s core functions in violation of the separation-of-powers guarantee” in California’s state Constitution.<sup>20</sup> The complaint argued that Emergency Rule 1 was a “classic policy decision” within the domain of the state legislature, not the Judicial Council.<sup>21</sup> Neither the complaint nor any other lawsuit alleged that Emergency Rule 1 was a taking.

While legislative and executive actions are typical fodder for takings challenges, the Takings Clause was long seen as inapplicable to certain judicial actions. Contrary to this long-standing belief, a plurality of the Supreme Court opined in *Stop the Beach*

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COVID-related financial hardships. Cal. Exec. Order No. N-37-20, 1–2 (Mar. 27, 2020), <https://perma.cc/5TJP-M4QP>. The rule was subsequently amended by the Judicial Council to sunset on September 1, 2020. JUD. COUNCIL OF CAL., CIRCULATING ORDER MEMORANDUM TO THE JUDICIAL COUNCIL, CIRCULATING ORDER NO. CO-20-13 at 7 (Aug. 11, 2020), <https://perma.cc/9BDM-82JG>.

<sup>14</sup> REPORT TO THE JUDICIAL COUNCIL, *supra* note 13, at 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Melody Gutierrez, *California Legislative Leaders Ask Courts to Keep Coronavirus Eviction Ban in Place*, L.A. TIMES (Aug. 5, 2020), <https://perma.cc/D7DV-SCN2>.

<sup>20</sup> Verified Petition for Peremptory Writ of Mandate at 9, *Christensen v. Cal. Jud. Council*, No. BCV-20-101361 (Cal. Super. Ct. June 15, 2020), <https://perma.cc/6TTB-9SG7>.

<sup>21</sup> *Id.* at 10.

*Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>22</sup> that the judiciary was also subject to the Takings Clause. However, the Court considered only whether changes to a state's common law of property could constitute a taking. It did not consider whether changes to court procedure—such as Emergency Rule 1—could as well.<sup>23</sup>

Emergency Rule 1 is just one example of the ways in which judicial changes to court procedure could conceivably result in a taking. Procedure is “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”<sup>24</sup> Put another way, procedure is focused primarily on courts' own internal processes, rather than substantive law.<sup>25</sup> But the Supreme Court has repeatedly acknowledged that “most procedural rules” affect a “litigant's substantive rights,”<sup>26</sup> often intentionally. The Court has explained, “Pleading standards, for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence.”<sup>27</sup>

This Comment explores two related questions: Should the Takings Clause apply to procedure promulgated by the judicial branch? And, if it does, when should that procedure constitute a taking?

Part I of this Comment first offers some background into the doctrine of regulatory takings. It then offers a normative justification for takings. It suggests that the Takings Clause is the appropriate framework for legitimate—perhaps even normatively desirable—government actions that unduly burden a specific subset of property owners. In those limited cases, application of the Takings Clause spreads the cost of desirable regulations across society by compensating burdened property owners. Part I then offers insight into *Stop the Beach* and the extension of the Takings Clause to the judiciary.

Parts II and III focus on the question of whether the Takings Clause should apply to court procedure. Part II argues that

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<sup>22</sup> 560 U.S. 702 (2010).

<sup>23</sup> *Id.* at 714.

<sup>24</sup> *Shady Grove Orthopedic Assocs., P. A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (quoting *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941)).

<sup>25</sup> See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814–15 (2008).

<sup>26</sup> *Shady Grove*, 559 U.S. at 407 (citing *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

<sup>27</sup> *Id.* at 404.

court rules at the state and federal levels should be—and, under existing doctrine, likely already are—subject to the Takings Clause. The judicial branch’s authority to make procedural rules outside of the adjudicatory process suggests that we should forgo total reliance on the separation of powers in limiting the reach of the Takings Clause. Part III then argues that, if court rules are subject to the Takings Clause, procedure set through other means—including court orders, judicial decisions, and case management—should be as well.

Part IV analyzes when changes to court procedure should constitute a taking. This Part begins by addressing a threshold issue, arguing that some form of property right attaches when a plaintiff brings a legal claim to court, so long as the claim is based on an underlying property right. It then considers ways to supplement the existing regulatory takings test to fit the extension of the judicial takings doctrine. In supplementing the test, it looks to three themes in the Court’s takings jurisprudence: an emphasis on the fairness of government action, the form of the action, and a concern that takings liability not unduly impair government functioning.

Given these themes, Part IV argues that we should supplement the test in two ways. First, we should consider the intent of the judicial actor<sup>28</sup> in analyzing potential judicial-procedure takings. Where the judicial actor intends to single out a particular subset of property owners, the concern over fairness is implicated, and that should weigh in favor of a taking.

Second, we should look to whether the judicial actor is engaged in an aggregative act, combining distinct elements into something that is greater than its parts. This is in line with both the Court’s focus on the form of the government’s action as well as its focus on fairness: where the judicial act generates a surplus, we should, in fairness, use that surplus to compensate the burdened property owner. Part IV then briefly allays concerns about forcing other branches to pay for actions taken by the judiciary.

## I. TAKINGS

This Part begins with an overview of takings jurisprudence. It then explores some normative justifications for takings. Finally, it

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<sup>28</sup> This Comment uses the term “judicial actor” to refer to a court or other subset of the judicial branch that creates or changes the court’s procedure.

explains the *Stop the Beach* plurality's opinion that the Takings Clause should extend to the judicial branch.

#### A. Foundational Takings Jurisprudence

The Fifth Amendment commands that no “private property be taken for public use, without just compensation.”<sup>29</sup> “As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’”<sup>30</sup> Thus, the Takings Clause is only intended to secure compensation for otherwise legitimate interferences with property rights.<sup>31</sup> If a government action is illegitimate, “that is the end of the inquiry,” and “[n]o amount of compensation can authorize such action.”<sup>32</sup> An action could be illegitimate, for instance, if the property is not taken “for public use”<sup>33</sup> or if it violates another provision of the Constitution.<sup>34</sup>

The government's action can be a taking in two ways. First, the government may directly appropriate property through its power of eminent domain.<sup>35</sup> Second, the government may implicitly take property when a regulation or other government action is functionally equivalent to eminent domain.<sup>36</sup> When an action falls into the second category, it is conventionally referred to as a “regulatory taking.”<sup>37</sup> In developing the doctrine of regulatory takings, Justice Oliver Wendell Holmes, Jr., observed, “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>38</sup> In a later opinion, Justice Sandra Day O'Connor added, “The rub, of course, has been—and remains—how to discern how far is ‘too far.’”<sup>39</sup>

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<sup>29</sup> U.S. CONST. amend V.

<sup>30</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)).

<sup>31</sup> *See id.* at 536–37.

<sup>32</sup> *Id.* at 543.

<sup>33</sup> The Supreme Court has broadly interpreted the “public use” requirement to be met whenever property is taken for a “public purpose.” *Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005).

<sup>34</sup> *See, e.g., Lingle*, 544 U.S. at 543.

<sup>35</sup> *See id.* at 537.

<sup>36</sup> *See id.* at 537–39.

<sup>37</sup> *See, e.g., James E. Krier, Judicial Takings: Musings on Stop the Beach*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 217, 218 (2014).

<sup>38</sup> *Mahon*, 260 U.S. at 415.

<sup>39</sup> *Lingle*, 544 U.S. at 538.

Within the category of regulatory takings, a per se regulatory taking occurs when the government forces a property owner to submit to a permanent physical occupation<sup>40</sup> or deprives the property owner of all economically beneficial use of the property.<sup>41</sup> In analyzing other potential regulatory takings, courts apply a multifactor test developed in *Penn Central Transportation Co. v. New York City*.<sup>42</sup> Under *Penn Central*, courts consider (1) the economic impact of the regulation, (2) the “extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) the “character of the governmental action” to determine if a regulatory taking has occurred.<sup>43</sup>

For instance, in *Noghrey v. Town of Brookhaven*,<sup>44</sup> a jury found that a regulatory taking occurred based on the town’s decision to rezone parcels of land owned by the plaintiff.<sup>45</sup> The plaintiff purchased two parcels zoned for business use, including the construction of a shopping plaza. Two years later, the town enacted a moratorium on new commercial development and rezoned the parcels to allow for only residential use.<sup>46</sup> The jury applied *Penn Central* and found that the rezoning constituted a regulatory taking.<sup>47</sup>

In practice, lower courts are highly deferential when analyzing regulatory takings, and it is rare for a court to find that a regulatory taking has occurred.<sup>48</sup> Indeed, some scholars have described *Penn Central* as the “death knell” for takings claims given the abysmal rate of success under the doctrine.<sup>49</sup> Nonetheless, the doctrine may have some success in constraining government officials at the decision-making stage. Furthermore, there is a renewed effort by some lower court judges to impose stricter requirements under the Takings Clause, suggesting the doctrine

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<sup>40</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–26 (1982).

<sup>41</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>42</sup> 438 U.S. 104 (1978).

<sup>43</sup> *Id.* at 124.

<sup>44</sup> 938 N.Y.S.2d 613 (App. Div. 2012).

<sup>45</sup> *Noghrey v. Town of Brookhaven*, 852 N.Y.S.2d 220, 221 (App. Div. 2008) (describing the facts of the dispute); *Noghrey*, 938 N.Y.S.2d at 615 (upholding the jury’s determination that a partial regulatory taking occurred and incorporating the facts by reference).

<sup>46</sup> *Noghrey*, 938 N.Y.S.2d at 615.

<sup>47</sup> *Id.*

<sup>48</sup> See James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 55–66 (2016).

<sup>49</sup> *Id.* at 88.

could be applied more stringently in the future.<sup>50</sup> As such, even though liability under *Penn Central* is rare in practice, this Comment takes the Court's takings jurisprudence at face value. That is to say, it assumes that, at a minimum, *Penn Central* takings exist and that the doctrine can be used to serve its intended purpose. The next Section explores this purpose, arguing that the Takings Clause serves an important normative role in our constitutional structure.

## B. Normative Considerations in the Takings Doctrine

This Comment argues that, with some limits, the Takings Clause should apply to court procedure. At the outset, then, it is important to examine the function of the Takings Clause. If we can better understand what the Takings Clause should be doing, we can understand why it would be doctrinally and normatively desirable to apply it to procedure.

The Court has emphasized that the Takings Clause serves to “bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>51</sup> Professors David Dana and Thomas Merrill argue that this “equal treatment justification remains today the most widespread explanation for the compensation requirement” in takings scholarship.<sup>52</sup>

If equal treatment is the ultimate justification for takings, why have the Takings Clause at all? The Equal Protection Clause or Due Process Clause may seem better suited to the task. The Takings Clause, however, plays a unique role because of its remedial structure. If a government action violates the Equal Protection Clause or Due Process Clause, the action is simply invalid. If a government action violates the Takings Clause, the government may continue the offending action, so long as it compensates the aggrieved property owner. The Equal Protection and Due Process Clauses are property rules; the Takings Clause is a liability rule.

The Takings Clause thus gives the government a flexibility not found under the other provisions of the Constitution. It allows

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<sup>50</sup> See, e.g., *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 375–76 (4th Cir. 2020) (Richardson, J., concurring in the judgment in part and dissenting in part) (arguing that Maryland's ban on rapid-fire trigger activators for guns constitutes a “classic taking”).

<sup>51</sup> *Lingle*, 544 U.S. at 537 (quotation marks omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>52</sup> DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 33–34 (2002).

for some middle ground by identifying actions that the government can legitimately undertake—actions that might be completely desirable—while also recognizing that in a limited number of cases, the government should be required to compensate those affected. In doing so, the Takings Clause mandates that the government spread the burden of regulation across society.

Of course, we cannot require the government to compensate every aggrieved property owner for every regulation. As Justice Holmes noted in developing the doctrine of regulatory takings, “[g]overnment hardly could go on” if it were forced to “pay[] for every [] change in the general law.”<sup>53</sup>

Thus, the Court’s early takings jurisprudence focused on takings liability as a remedy for *disproportionate* burdens. In developing the *Penn Central* test, the Court drew on the work of Professor Joseph Sax, who argued that takings compensation was a “bulwark against unfairness, rather than against mere value diminution” resulting from regulation.<sup>54</sup> When the regulatory burden is spread across society, we expect that the government will internalize that burden in its decision-making. But when the regulatory burden “single[s] out”<sup>55</sup> a subset of property owners, we cannot have the same expectation. Thus, burdens that single out particular property owners are analyzed as potential takings. The Takings Clause forces the government to internalize the costs of these decisions; it keeps the majority in check, while enabling the government to continue to regulate in the public’s interest.

Given these fairness and justice concerns, the Court has limited its focus almost exclusively to the nature and extent of the burden imposed on property owners.<sup>56</sup> In *Lingle v. Chevron U.S.A., Inc.*,<sup>57</sup> the Court rejected the notion that a reviewing court should consider the effectiveness of the government’s regulation in assessing the fairness and justice issues. The Court observed, “A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.”<sup>58</sup> It

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<sup>53</sup> *Mahon*, 260 U.S. at 413.

<sup>54</sup> Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 57 (1964).

<sup>55</sup> The Supreme Court often describes targeted property owners as being “singled out.” *E.g.*, *Lingle*, 544 U.S. at 543.

<sup>56</sup> *See id.* at 537.

<sup>57</sup> 544 U.S. 528 (2005).

<sup>58</sup> *Id.* at 543.

continued: “The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.”<sup>59</sup>

Although the Court has not clarified exactly what *Penn Central*’s “character” factor entails, it might incorporate some of these fairness and justice concerns. Some scholars argue that the character factor is meant to measure something like fairness, average reciprocity of advantage (the expected benefits a property owner may receive versus the burden of the regulation), or the extent to which a property owner has been singled out.<sup>60</sup> Under these approaches, all economic losses are not created equal.

In sum, we can understand the Takings Clause as a more flexible alternative to the Due Process and Equal Protection Clauses. To say that a government action is a taking is not to condemn that action. Properly understood, takings law “does not inhibit democracy by constraining those collective adjustments to property laws that produce diminutions in economic value.”<sup>61</sup> Rather, “takings law helps to guide adjustments to property laws in ways that maintain property’s character as a healthy, fair, and just democratic institution.”<sup>62</sup>

### C. Judicial Takings and *Stop the Beach*

The Takings Clause has traditionally been applied to executive and legislative acts.<sup>63</sup> Occasional Supreme Court jurisprudence touched on the question of whether the judicial branch was also subject to the Takings Clause, but the cases offered no clear answer.<sup>64</sup> In *Stop the Beach*, a plurality of the Supreme Court contended that the Takings Clause applied to all judicial acts.<sup>65</sup>

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<sup>59</sup> *Id.* (emphasis in original).

<sup>60</sup> See, e.g., Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 447–50 (2007); Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 633–36 (2010).

<sup>61</sup> Timothy M. Mulvaney, *Non-enforcement Takings*, 59 B.C. L. REV. 145, 158 (2018).

<sup>62</sup> *Id.*

<sup>63</sup> See *Stop the Beach*, 560 U.S. at 743 (Breyer, J., concurring in part and concurring in the judgment).

<sup>64</sup> For a brief summary of the cases leading up to *Stop the Beach*, see Michael B. Kent, Jr., *More Questions Than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 VA. ENV’T L.J. 143, 151–52 (2011).

<sup>65</sup> *Stop the Beach*, 560 U.S. at 713–15 (plurality opinion).

*Stop the Beach* concerned a Florida statute that allowed local governments to seek permits and funds to restore eroded beaches through deposits of sand.<sup>66</sup> A city and county sought permits to restore nearly seven miles of beachfront, adding seventy-five feet of dry sand.<sup>67</sup> Under the statute, the state claimed title to the newly created beachfront property.<sup>68</sup> Property owners who previously owned the beachfront objected.<sup>69</sup> They argued that the statute eliminated two of their common law rights: (1) the right to receive accretions—gradual additions of sand or other deposits to waterfront land—and (2) the right to continue to have direct contact with the water.<sup>70</sup> The property owners alleged that this constituted a taking in violation of the Takings Clause.<sup>71</sup> The Florida Supreme Court rejected the challenge.<sup>72</sup> The property owners then argued that the Florida Supreme Court itself “effected a [judicial] taking” by abrogating the owners’ common law property rights.<sup>73</sup>

A plurality of the Supreme Court determined that the Takings Clause applied to the judiciary: “The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor.”<sup>74</sup> Furthermore, “[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”<sup>75</sup> Thus, where “a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property.”<sup>76</sup>

The plurality nonetheless determined that there was no judicial taking in the case because the Florida Supreme Court had not actually changed the state’s property laws.<sup>77</sup> The Florida Supreme Court’s decision was consistent with a 1927 case that had gone unmentioned by the state court opinions, so there was no taking.<sup>78</sup>

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<sup>66</sup> *Id.* at 709–11.

<sup>67</sup> *Id.* at 711.

<sup>68</sup> *Id.* at 709–10.

<sup>69</sup> *Id.* at 711.

<sup>70</sup> *Stop the Beach*, 560 U.S. at 711.

<sup>71</sup> *Id.* at 711–12.

<sup>72</sup> *Id.* at 712.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 713–14.

<sup>75</sup> *Stop the Beach*, 560 U.S. at 714.

<sup>76</sup> *Id.* at 715 (emphasis in original).

<sup>77</sup> *Id.* at 731–32.

<sup>78</sup> *Id.* at 730–33.

Justice Stephen Breyer (joined by Justice Ruth Bader Ginsburg) concurred in part, expressing concerns that the plurality's approach would disturb the balance of federal and state law.<sup>79</sup> He suggested that the plurality's failure to offer limitations or canons of deference would create a serious risk that federal judges would unduly influence state property law, "a matter of significant state interest."<sup>80</sup> Justice Breyer suggested that the Court should follow the doctrine of constitutional avoidance and limit its holding to the finding that the decision at issue was not a judicial taking.<sup>81</sup>

Justice Anthony Kennedy (joined by Justice Sonia Sotomayor) also concurred in part, agreeing with the plurality that there was no taking. He additionally agreed with Justice Breyer that the case did not require the Court to determine "whether, or when" a judicial decision could violate the Takings Clause.<sup>82</sup> He wrote separately to note "certain difficulties" that should be considered before adopting a doctrine of judicial takings.<sup>83</sup>

Justice Kennedy first suggested that the Due Process Clause, not the Takings Clause, was applicable: "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."<sup>84</sup> If we analyze such decisions under the Takings Clause, he argued, we assume that the decision eliminating established property rights is "otherwise constitutional," so long as compensation is paid.<sup>85</sup> This is problematic because the judiciary, unlike the executive and legislative branches, was not "designed to make policy decisions about 'the need for, and likely effectiveness of, regulatory actions.'"<sup>86</sup> Essentially, Justice Kennedy argued that the judicial branch should be regulated with property rules (rather than liability rules) because of the nature of judicial authority. Justice Kennedy also worried that a judicial takings

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<sup>79</sup> *Id.* at 743–44 (Breyer, J., concurring in part and concurring in the judgment).

<sup>80</sup> *Stop the Beach*, 560 U.S. at 744 (Breyer, J., concurring in part and concurring in the judgment).

<sup>81</sup> *Id.* at 744–45.

<sup>82</sup> *Id.* at 733–34 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>83</sup> *Id.* at 734.

<sup>84</sup> *Id.* at 735.

<sup>85</sup> *Stop the Beach*, 560 U.S. at 736 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

<sup>86</sup> *Id.* at 736 (quoting *Lingle*, 544 U.S. at 545).

doctrine would not have the intended effect of constraining courts.<sup>87</sup> Rather, it would empower judges to change property rights in ways that they assumed would benefit the public.<sup>88</sup>

In the wake of *Stop the Beach*, many scholars criticized the judicial takings doctrine.<sup>89</sup> Though the scholarship does not define the doctrine, much of it implicitly argues that the judicial branch, when acting under its own authority, should not be subject to the Takings Clause at all. Given this criticism, the judicial takings doctrine encompasses more than just the idea that changes to the common law of property could be takings. The criticism suggests that the doctrine is implicated whenever a takings case involves “independent judicial action,” meaning judicial actions taken under the judiciary’s independent authority.<sup>90</sup>

This issue of authority is implicit in the disagreement between the plurality opinion and Justice Kennedy’s concurrence over whether we should apply the Takings Clause or the Due Process Clause to certain judicial actions affecting property owners. As Justice Kennedy’s concurrence noted, a taking must be an otherwise legitimate exercise of government power. Does the judiciary have the authority to carry out acts that could be takings, or is that power limited to the executive and legislative branches? If the judiciary has no such authority, then Justice Kennedy is right: the Due Process Clause is the correct framework. But, if there are certain areas where the judiciary does have this authority, the Takings Clause is the better framework.<sup>91</sup>

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<sup>87</sup> *Id.* at 739.

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., *infra* Part II.A.

<sup>90</sup> When the judiciary interprets or enforces existing statutes, those actions do not fall under this definition of “judicial takings.” The key distinction is whether the judiciary is acting on its own authority or whether it is relying on an existing framework promulgated by another branch. Prior to *Stop the Beach*, the Supreme Court seemed to assume that at least some judicial actions were subject to the Takings Clause, though it did not directly confront the issue. In the two cases that came close to the issue, the judicial takings doctrine was not implicated: in both cases, plaintiffs alleged that the court’s interpretation of a statute or state constitution was a taking. See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–65 (1980) (analyzing whether a state court’s interpretation of a statute was a taking); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980) (analyzing whether a state court’s interpretation of the California state constitution was a taking). When the court is interpreting the actions of another branch (or the Constitution), there is no “independent judicial action,” so the doctrine of judicial takings is not implicated. In adopting this definition, this Comment aims to isolate those instances that raise the question of whether the judiciary has the independent authority to “take.”

<sup>91</sup> In the plurality opinion, Justice Antonin Scalia suggested that the usual remedy for a judicial taking would be to abrogate the at-issue judicial action rather than to pay

Parts II and III of this Comment argue that courts' power over procedure is one such area.

Justice Breyer's concurrence also suggested that if we are to have a doctrine of judicial takings, we need to find ways to limit its reach so that federal courts do not unduly interfere with state law. This issue is addressed in Part IV.

## II. JUDICIAL RULEMAKING AS A SITE OF TAKINGS

There are two common threads running through criticism of the judicial takings doctrine. First, as noted in Justice Kennedy's concurrence, many critics suggest that the judiciary does not have the authority to engage in potential takings. Second, critics also argue that the Court's concerns about the government singling out certain property owners are not applicable to the judicial branch.<sup>92</sup> Taken together, these critiques suggest that independent judicial action should not be subject to the Takings Clause. These separation of powers critiques are discussed in Part II.A.

Part II.B argues that state courts' power over procedural rulemaking both blurs the boundaries between the branches and suggests that the judicial branch can single out individual property owners. States have adopted varied approaches governing judicial procedure. In some states, the legislature is responsible for making rules of procedure; in others, rulemaking authority is vested in the judiciary. Given these varied approaches, and the potential for certain procedural rules to constitute takings if enacted by the legislature, state court rules should be subject to the Takings Clause, regardless of their source. Part II.C notes that the federal judiciary, too, may have some independent authority to make procedural rules outside of a legislative delegation of power. Given this authority, all procedural rules should be subject to the Takings Clause.

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damages. *Stop the Beach*, 560 U.S. at 723–24. If we accept this argument, the remedial distinction between the Takings Clause and Due Process Clause disappears, and the benefits of the takings approach are de minimis. Yet Justice Scalia's suggestion is not entirely grounded. For one, under the Court's existing takings jurisprudence, even when the government rescinds an action, it must still pay damages for the taking while it was in effect. *First Eng.*, 482 U.S. at 321. Second, Justice Scalia did not argue that damages would be unavailable, only that the usual remedy would be to invalidate the decision. *Stop the Beach*, 560 U.S. at 723–24. Finally, *Stop the Beach* is a plurality opinion: there is no holding that the remedy for judicial takings is abrogation. This Comment assumes that the damages remedy remains available for judicial takings, as it is in all other takings cases.

<sup>92</sup> These singling-out concerns are discussed in Part I.B.

### A. Separation of Powers Arguments Against Judicial Takings

Many critics suggest that the doctrine of judicial takings is inappropriate because it does not account for the different kinds of authority given to each branch. Justice Kennedy raised this issue in *Stop the Beach*, noting that courts were not designed to engage in regulatory action.<sup>93</sup> In his seminal article *Why the Judiciary Is Different*, Professor John Echeverria similarly argues that the plurality's opinion "has the ring of oversimplification," because "[c]ourts are, in many ways, different from the other branches in terms of their mission, institutional structure, and method of operation."<sup>94</sup>

Echeverria argues that singling-out concerns are less pressing in the context of the judicial branch because the judiciary was not designed to be a majoritarian institution.<sup>95</sup> Instead, "a primary function of the courts is to check the majority."<sup>96</sup> Even where judges are elected—or "act, or appear to act, more like politicians"—this does not justify a "sweeping doctrine of judicial takings."<sup>97</sup> In addition, Echeverria argues, singling out is less of a concern because changes to common law "tend to apply broadly across the community."<sup>98</sup> Rulings, even those issued in the context of particular disputes, typically apply to similarly situated owners; they do not single out a few individuals.<sup>99</sup>

Echeverria's line of criticism relies on the notion that the existing division between the branches is a normatively desirable way to limit the reach of the Takings Clause. In setting procedural rules, however, courts do not always act like courts. For one, courts can set procedure outside of the traditional adjudicatory process, acting more like a legislature or an agency. And courts' rulemaking power demonstrates that the judiciary can, at least occasionally, single out certain property owners to bear a public burden. In the case of California's Emergency Rule 1, for instance, the judiciary used its rulemaking power to "assist[ ] tenants" at the expense (at least temporarily) of landlords.<sup>100</sup> More fundamentally, Echeverria's criticism suggests a neat

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<sup>93</sup> *Stop the Beach*, 560 U.S. at 736 (quoting *Lingle*, 544 U.S. at 545).

<sup>94</sup> John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 487 (2010).

<sup>95</sup> *Id.* at 488–90.

<sup>96</sup> *Id.* at 488.

<sup>97</sup> *Id.* at 490.

<sup>98</sup> *Id.* at 492–93.

<sup>99</sup> Echeverria, *supra* note 94, at 493.

<sup>100</sup> REPORT TO THE JUDICIAL COUNCIL, *supra* note 13, at 7.

separation of powers among the branches. But what happens in cases where the division between the branches is not so neat? Or when it is inconsistent as between the state and federal levels? Judicial rulemaking exemplifies these issues.

## B. State Rulemaking and the Separation of Powers

The federal government's strict separation of powers does not always map onto the states. In contrast to the federal government, states have taken "varied, pragmatic approach[es] in establishing governments," meaning that some units of state government cannot "easily be classified in the neat categories favored by civics texts."<sup>101</sup>

Rulemaking demonstrates the varied approaches. At the state level, there are two broad systems for rulemaking. A minority of states are "code states," which primarily rely on legislatures to make the rules of civil procedure.<sup>102</sup> The vast majority of states are "rules states," in which the court is empowered to make the rules.<sup>103</sup> In many rules states, the state constitution confers this power directly on the judiciary—that is, unlike in the federal system discussed below, rulemaking power has not been delegated to the judiciary by the legislature.<sup>104</sup> Typically, the legislature has the power to review or revise the rules, though a supermajority is required in a handful of states.<sup>105</sup>

Years before *Stop the Beach*, the Supreme Court offered insight into whether the source of a court rule mattered in its takings analysis. It suggested that, at least when states have adopted the same rules via different processes, the source of the rules is irrelevant. In *Brown v. Legal Foundation of Washington*,<sup>106</sup> the

<sup>101</sup> Avery v. Midland County, 390 U.S. 474, 482 (1968) (quoting Robert Wood, *The Pattern of Local Government*, in *POLITICS AND GOVERNMENT IN THE UNITED STATES* 890, 891–92 (Alan F. Westin ed., 1965)).

<sup>102</sup> Zachary D. Clopton, *Making State Civil Procedure*, 104 *CORNELL L. REV.* 1, 10 (2018). The code states are California, Connecticut, Georgia, Illinois, Kansas, Louisiana, New York, North Carolina, and Oklahoma. *Id.*

<sup>103</sup> *Id.* at 9–11. The remaining forty-one states are rules states. *Id.*

<sup>104</sup> See, e.g., ALA. CONST. art. VI, § 150 ("The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts."); ALASKA CONST. art. IV, § 15 ("The supreme court shall make and promulgate rules governing the administration of all courts."); ARIZ. CONST. art. 6, § 5 ("The supreme court shall have . . . [p]ower to make rules relative to all procedural matters in any court."). For a comprehensive list of the source of states' rulemaking authority, see Clopton, *supra* note 102, at 46–64.

<sup>105</sup> Clopton, *supra* note 102, at 10 n.39.

<sup>106</sup> 538 U.S. 216 (2003).

Court considered state rules that required lawyers to deposit certain clients' funds into trust accounts, called IOLTAs.<sup>107</sup> When attorneys hold clients' funds, they cannot mix the clients' money with their own, but they may pool the clients' funds into a single account.<sup>108</sup> Every state and the District of Columbia has created an IOLTA program whereby lawyers deposit non-interest-bearing client funds into an IOLTA account, and interest from those accounts is used to fund legal services for the "needy."<sup>109</sup> In *Brown*, the plaintiffs claimed the IOLTA requirement was a taking in violation of the Fifth Amendment.<sup>110</sup>

What is interesting for our purposes is the way in which IOLTA programs were adopted. Only five states adopted the programs through their legislature.<sup>111</sup> In the remainder of the states, the programs were adopted by the state's highest court, either under statutory or constitutional authority.<sup>112</sup> In a footnote in *Brown*, the Court observed, "Petitioners appear to suggest that a different constitutional analysis might apply to a legislative program than to one adopted by the State's judiciary. We assume, however, that the procedure followed by the State when promulgating its IOLTA Rules is irrelevant to the takings issue."<sup>113</sup> This foreshadowed the Court's discussion in *Stop the Beach*: the Court focused on the state action itself rather than the identity of the state actor.

The Court then suggested that the IOLTA program could constitute a per se taking: "[T]he interest earned in the IOLTA accounts is the 'private property' of the owner of the principal. If this is so, the transfer of the interest to the Foundation here seems more akin [to a per se takings case]."<sup>114</sup> The Court then assumed that the plaintiffs retained ownership of at least a portion of the deposits in the accounts, that those deposits generated

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<sup>107</sup> *Id.* at 220. IOLTA is an acronym for "interest on lawyers' trust accounts."

<sup>108</sup> *Id.* at 220–21.

<sup>109</sup> *Id.* at 220–23.

<sup>110</sup> *Id.* at 228–29.

<sup>111</sup> *Brown*, 538 U.S. at 221 n.2.

<sup>112</sup> The rule at issue in *Brown* was established by the Washington State Supreme Court under its statutory authority to regulate the practice of law. In other states, the rule was adopted under the courts' constitutional authority. In Indiana, the legislature enacted an IOLTA program, but the Indiana Supreme Court struck it down as an encroachment on the court's authority to regulate the practice of law. *Id.* The Indiana Supreme Court later enacted its own IOLTA program. *Id.*

<sup>113</sup> *Id.* (citations omitted).

<sup>114</sup> *Id.* at 235 (quotation marks and citations omitted) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998)).

interest, and “that their interest was taken for a public use when it was ultimately turned over to the Foundation.”<sup>115</sup>

Even with these assumptions, the Court found there was no constitutional violation because of the way that the IOLTA program was structured.<sup>116</sup> Under the Takings Clause, the just compensation owed to the property owner is measured by the property owner’s loss, not the government’s gain.<sup>117</sup> In Washington, lawyers were required to deposit money into the accounts only if the money, on its own, could not generate net earnings.<sup>118</sup> That is to say, if the money had not been deposited into the accounts, the clients would not have received any interest at all. Thus, even if property were taken, it would not have been taken in violation of the Fifth Amendment because the property owners experienced no net loss.<sup>119</sup>

The Court did not hold that rules promulgated by the judiciary should be analyzed in the same way as rules promulgated by the legislature; it merely assumed as much for the purposes of its opinion. The appeal of this approach is obvious. Where states have taken varied approaches to rulemaking, sometimes involving the judicial branch, the Court should not rely on a formalistic notion of the separation of powers to limit the reach of the Takings Clause. This would create an artificial barrier for takings: IOLTA programs created through state legislatures would be subject to the Takings Clause, while programs created through judiciaries would not be.

*Brown* also demonstrates that the Due Process Clause is not an adequate substitute for the judicial takings doctrine, contrary to Justice Kennedy’s later suggestion in *Stop the Beach*. Justice Kennedy argued that the Court could simply strike down a potential judicial taking under the Due Process Clause because any potential taking would simply exceed the judiciary’s power.<sup>120</sup> In *Brown*—and in the case of California’s Emergency Rule 1, discussed in this Comment’s Introduction—the question of the judiciary’s power to make certain rules is a question for that state’s constitution. To adjudicate either rule under the Due Process Clause would require federal courts to interpret

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<sup>115</sup> *Id.* at 235.

<sup>116</sup> *Brown*, 538 U.S. at 240.

<sup>117</sup> *Id.* at 235–36.

<sup>118</sup> *Id.* at 239.

<sup>119</sup> *Id.* at 239–40.

<sup>120</sup> *Stop the Beach*, 560 U.S. at 735 (Kennedy, J., concurring in part and concurring in the judgment).

(or reinterpret) the scope of the state judiciary's authority. As Justice Antonin Scalia argued in *Stop the Beach*, federal separation of powers principles do not apply to the states, and courts should not impose those principles on the states via the Due Process Clause.<sup>121</sup> It would be inconsistent with the principles of federalism to allow the Court to second-guess a state judiciary's authority under the Due Process Clause, especially in cases where the state constitution vests rulemaking in the judiciary.

Of course, there's a third option here. Federal courts could refuse to analyze these rules under the Due Process Clause for the reasons noted above, and then they could simply find that the rule is constitutional. This approach, however, is incompatible with *Brown* and the Court's takings jurisprudence. As the Court made clear in *Lingle*, a proper takings analysis requires that the Court focus on the result of the government's action.<sup>122</sup> A test that categorically excludes judicially created rules from the Takings Clause is a test that "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated."<sup>123</sup> This kind of categorical rule is unsuited to the purpose of the Takings Clause—namely, identifying when burdens should be spread across society. Furthermore, such a categorical rule could create a troubling incentive to funnel potential takings through the judiciary's rulemaking process. Thus, neither the Due Process Clause nor inaction is an adequate substitute for subjecting court rules to the Takings Clause.

In addition, when rulemaking, courts must take into account the needs of the judicial system and society as a whole. In setting dockets, courts must balance the rights of individual litigants with the system's need to preserve limited judicial resources and society's need for certain cases to be resolved promptly. For instance, Michigan's State Court Administrative Office offered guidance to its courts in "triaging" cases during the pandemic.<sup>124</sup> It recommended that courts prioritize cases where "an immediate liberty and/or safety concern is present" as well as those where "[p]ublic safety concerns are paramount" or "[c]onstitutional rights are primarily implicated."<sup>125</sup>

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<sup>121</sup> *Id.* at 719 (plurality opinion).

<sup>122</sup> *Lingle*, 544 U.S. at 543.

<sup>123</sup> *Id.*

<sup>124</sup> State Ct. Admin. Off., *Process for Triaging Case Actions During the COVID-19 Crisis*, MICH. CTS., <https://perma.cc/GLZ5-GPJH>.

<sup>125</sup> *Id.*

In triaging cases, the Michigan courts weighed society's needs—in promoting liberty and public safety—in addition to the discrete interests of individuals in any given case. This seems reasonable: we would not expect courts to control their dockets by picking cases at random. Yet even if this is desirable, we are asking courts to make something like a political decision. And, given the example of California's Emergency Rule 1, it is not obvious that these decisions are less likely to single out particular individuals. Given these factors, state judicial rule-making is a potential site for takings.

### C. Federal Judicial Rulemaking?

Federal judicial rulemaking is more complicated. At the federal level, the Supreme Court has acknowledged that judicial rulemaking occupies an unclear position within the separation of powers framework. The Court has described judicial rulemaking as falling within a “twilight area,” where the “activities of the separate Branches merge.”<sup>126</sup> Congress has delegated rulemaking power to the Supreme Court through the Rules Enabling Act<sup>127</sup> (REA). When the Supreme Court makes rules under the REA, it seems to be stepping outside of its function as an adjudicator of “Cases and Controversies” under the grant of judicial power in Article III.<sup>128</sup> Nonetheless, “the federal system entertains a fiction that it is not the Supreme Court, in an Article III sense, making these rules.”<sup>129</sup> Rather, judges are acting as an independent agency within the judicial branch.<sup>130</sup>

If judicial rulemaking were limited to the process prescribed by the REA, the federal takings issue might seem simple: we could simply continue with the fiction that the Court is not making rules. Applying the Takings Clause to these rules—or to the Court's interpretation of these rules—would not be a judicial

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<sup>126</sup> *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

<sup>127</sup> 28 U.S.C. §§ 2071–2077.

<sup>128</sup> See *Mistretta*, 488 U.S. at 388–90 (noting that the Judicial Conference of the United States, the Rules Advisory Committees, and the Administrative Office of the United States Courts “do not exercise judicial power in the constitutional sense of deciding cases and controversies”).

<sup>129</sup> Michael Blasie, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 630 (2011).

<sup>130</sup> *Id.* at 630. This fiction is important because it “allows parties to contest the validity of the rules, avoids the prohibition on advisory opinions, and allows the Justices and members of the Judicial Conference to later rule on these issues impartially.” *Id.*

taking. It would just be another application of the Takings Clause to an (indirect) legislative act.<sup>131</sup>

But this does not tell the whole story. First, it is, at the very least, ambiguous whether the Supreme Court has rulemaking authority outside of a legislative delegation of power. Many scholars argue that some form of inherent procedural authority is included in the grant of judicial power in Article III.<sup>132</sup> Professor Michael Blasie, for instance, argues that Article III grants “an inherent power to create rules necessary for the fair and constitutional adjudication of cases.”<sup>133</sup> He argues that relying on statutory authority as the sole basis for the Court’s rulemaking authority “fails to address two crucial” facts.<sup>134</sup> First, courts have not clarified their constitutional authority to make rules outside of a statutory grant because of the REA’s broad grant of authority and the doctrine of constitutional avoidance.<sup>135</sup> Second, statutory authority “fails to account for court rules outside the bounds of, or filling the gaps of, the federal rules.”<sup>136</sup>

In filling in gaps, federal and state courts have asserted their inherent authority to make rules.<sup>137</sup> And, despite statutory authority to make rules, federal courts have occasionally chosen “to exert an *alternative* inherent power to make the rules.”<sup>138</sup> Thus, the federal judiciary may have some independent authority for rulemaking as well.

Given that the bounds of federal courts’ inherent rulemaking powers are unclear and that courts often rely on the statutory grant of authority, the issue of judicial-procedure takings may not arise as often in the federal context. Part III argues that other forms of procedure—including docket control, something indisputably within federal courts’ inherent authority—could also constitute a taking. Thus, perhaps the existing fiction could address takings challenges to federal rules, but the

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<sup>131</sup> See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–64 (1980); cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–83 (1980).

<sup>132</sup> Blasie, *supra* note 129, at 616–17. For another in-depth analysis of the constitutional sources of the Supreme Court’s procedural authority, see generally Barrett, *supra* note 25.

<sup>133</sup> Blasie, *supra* note 129, at 616–17.

<sup>134</sup> *Id.* at 612.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; see also, e.g., *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 560–64, 562 n.6 (3d Cir. 1985).

<sup>138</sup> Blasie, *supra* note 129, at 612 (emphasis added).

doctrine of judicial takings may still be implicated when federal courts make procedure through other means.

To the extent that these sections suggest there is a problem, we might think there is an easy solution: judicial rulemaking should be subject to the Takings Clause because it is akin to an administrative or legislative act and it occurs outside of courts' adjudicatory powers. This seems to be the approach that the Court took in *Brown* when it applied the Takings Clause to IOLTA programs enacted by state judiciaries, although it did not make this explicit.

We could still limit this interpretation of the judicial takings doctrine to apply only to rulemaking. Consistent with this approach, we might still think that when the court is carrying out its core function—that is, when it is adjudicating cases—the Takings Clause should not apply. But that raises some difficulties: courts have the ability to choose the means through which they set procedure and, if we limit application of the judicial takings doctrine to rules alone, there may be an incentive for courts to use the other means at their disposal.

### III. PROCEDURE OUTSIDE OF RULEMAKING AND THE CHOICE-OF-MEANS PROBLEM

Outside of the judicial rulemaking process, judges make procedure through cases themselves—when writing decisions, managing cases, and managing their courtrooms.<sup>139</sup> The fact that the judiciary can choose the means through which to promulgate procedure suggests that we should not necessarily distinguish between rulemaking and other procedural authority in takings cases.

This “choice-of-means” problem also arises in another area of takings jurisprudence: it is one justification for the doctrine of regulatory takings. Condemnation (through eminent domain) and regulation are alternate means by which the government can pursue its substantive ends.<sup>140</sup> Without a doctrine of regulatory takings, the government would “favor” regulation over condemnation in order to avoid paying compensation for its use.<sup>141</sup>

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<sup>139</sup> See Clopton, *supra* note 102, 10–11 (addressing state procedure). See generally Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1194–97 (2012) (addressing federal procedure).

<sup>140</sup> See Krier, *supra* note 37, at 220–21.

<sup>141</sup> See *id.* at 220.

Scholars dispute whether the choice-of-means problem has any application to the judicial branch. Some scholars argue that, because courts have no power of eminent domain, courts are not seeking to evade their constitutional obligation to provide just compensation when they undertake certain actions.<sup>142</sup> Other scholars and the Court in *Stop the Beach*, however, suggest that when evaluating these substitution effects, we should consider the government as one entity rather than looking to each branch in isolation. Professor James Krier observes, “Whether or not courts have the power of eminent domain, governments surely do, and courts . . . are indisputably a branch of the government.”<sup>143</sup> Thus, “just as governments should not be able to evade the obligations of the Takings Clause by substituting regulatory activity for explicit condemnation, they should not be able to evade the obligations by substituting judicial activity for regulatory activity.”<sup>144</sup>

Putting aside the question of whether it is desirable to view the government as one entity for takings purposes, procedure is one area of law where we should be concerned about substitution effects within the judiciary itself. In achieving a procedural end, a court has multiple options: create a rule, issue a court order, write a decision, or adjust the management of its cases. It is rare for a court to have such a multitude of means available in other areas of law. For instance, a court cannot change the common law of property outside of an actual case. Thus, when thinking about courts’ power over procedure, we should think beyond just court rules. In considering other forms of procedure that could result in takings, we can look to two areas of law: requirements that attorneys offer pro bono legal services and the practices that courts use when managing their dockets.

#### A. Mandatory Performance of Legal Services

The Supreme Court once observed that courts have the duty (in certain circumstances) to appoint counsel and that counsel, as officers of the court, are bound to accept such appointments.<sup>145</sup>

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<sup>142</sup> *Id.* (quoting Dana & Merrill, *supra* note 52, at 229–30).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 221.

<sup>145</sup> *See* Powell v. Alabama, 287 U.S. 45, 73 (1932). That said, the Supreme Court has not determined whether federal courts, outside of a statutory grant of authority, have the inherent power to require attorneys to render pro bono legal services for civil plaintiffs. *See* Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296, 310 (1989).

As such, courts have confronted allegations that requiring attorneys to render legal services with little to no compensation is a taking.<sup>146</sup> Such requirements can be enacted by the legislature via statute or by judicial actors through court rules and court orders. This raises two choice-of-means problems. First, if only the legislature were subject to the Takings Clause, these requirements could be funneled through the judiciary. Second, if only court rules were subject to the Takings Clause—a potential solution to the problems raised in Part II—then these requirements could be enacted via court order.

To be clear, it is rare for a court to find that such requirements are a taking, but it is not unprecedented. Several state courts have found that these requirements can violate the Takings Clause under their state constitutions.<sup>147</sup> At least one federal court has suggested that mandatory pro bono work could rise to the level of a taking.<sup>148</sup> Contrasting two cases in this area demonstrates (1) judicial actors' potential authority to take and (2) the choice-of-means problem.

In *Scheehle v. Justices of the Supreme Court of Arizona*,<sup>149</sup> the Ninth Circuit considered whether a court rule requiring an attorney to serve as an arbitrator could constitute a taking.<sup>150</sup> Arizona law required that each superior court provide for arbitration of certain cases by court rule.<sup>151</sup> The local rules of the Superior Court of Maricopa County required that attorneys within the county serve as arbitrators for a flat fee of \$75 per

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The Court has held that federal courts have the inherent authority to appoint private attorneys to prosecute contempt because this is a necessary component of initiating contempt proceedings. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987). Several lower federal courts and state courts have found that they possess a more general inherent power to appoint attorneys. *See, e.g., United States v. Accetturo*, 842 F.2d 1408, 1412 (3d Cir. 1988); *Naranjo v. Thompson*, 809 F.3d 793, 801–04 (5th Cir. 2015); *S.C. Dep't of Soc. Servs. v. Tharp*, 439 S.E.2d 854, 857 (S.C. 1994) (collecting cases). *But see Colbert v. Rickmon*, 747 F. Supp. 518, 527 (W.D. Ark. 1990).

<sup>146</sup> *See, e.g., United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965); *Tharp*, 439 S.E.2d at 857. For an in-depth analysis of this issue, see Bruce Andrew Green, Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 383–90 (1981); and David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 771–84 (1980).

<sup>147</sup> *See Tharp*, 439 S.E.2d at 857 (collecting cases); *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 442 (Alaska 1987).

<sup>148</sup> *Fam. Div. Trial Laws. of the Superior Ct.—D.C., Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984).

<sup>149</sup> 508 F.3d 887 (9th Cir. 2007).

<sup>150</sup> *Id.* at 889.

<sup>151</sup> *Id.*

day.<sup>152</sup> Appointed attorneys could be excused if they had served as an arbitrator for more than two days in a year.<sup>153</sup> The plaintiff was appointed as an arbitrator, and he objected, alleging that the system was unconstitutional.<sup>154</sup>

The district court certified the question of the propriety of the appointment system under Arizona law to the Arizona Supreme Court.<sup>155</sup> The Arizona Supreme Court held that the court rule was a constitutional exercise of the judiciary's power under the Arizona Constitution.<sup>156</sup> The Arizona Constitution gives the judiciary the power to regulate "the practice of law" and to supervise judicial officers, including attorneys.<sup>157</sup> Thus, the court held, "The power extended to this Court by the [Arizona] constitution includes the authority to promulgate regulations assigning limited quasi-judicial functions to lawyers as judicial officers."<sup>158</sup> This includes the "authority to require a lawyer's services, even on a pro bono basis, to assist in the administration of justice."<sup>159</sup> It cabined this power, noting, "Whatever appointment process a court adopts should reflect the principle that lawyers have the right to refuse to be drafted on a systematic basis and put to work at any price to satisfy a county's obligation to provide counsel to indigent defendants."<sup>160</sup> It held that the Maricopa County rule met this requirement.<sup>161</sup>

Under the Arizona Constitution, then, the rule was a permissible exercise of the court's power. The plaintiff alleged that it was nonetheless a taking under the federal Constitution.<sup>162</sup> He argued that the appointment system deprived him of both his services as a lawyer and the out-of-pocket costs necessarily incurred during arbitration.<sup>163</sup> The Ninth Circuit found that this did not constitute a taking.<sup>164</sup> The Ninth Circuit applied *Penn Central*, finding that the imposition was "negligible" because

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Scheehle*, 508 F.3d at 889–90.

<sup>155</sup> *Id.* at 890.

<sup>156</sup> *Scheehle v. Justs. of the Sup. Ct. of the State of Ariz.*, 120 P.3d 1092, 1100 (Ariz. 2005).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1102.

<sup>160</sup> *Id.* (quoting *Zarabia v. Bradshaw*, 912 P.2d 5, 8 (Ariz. 1996)).

<sup>161</sup> *Scheehle*, 120 P.3d at 1102.

<sup>162</sup> *Scheehle*, 508 F.3d at 890.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 893.

(1) it did not hinder his other legal work, (2) it did not interfere with “distinct investment-backed expectations” because he knew of the system when he joined the bar, and (3) it was merely a program “adjusting the benefits and burdens of economic life to promote the public good.”<sup>165</sup>

The appointment system in *Scheehle* was adopted pursuant to a court rule, but attorneys are often appointed as counsel pursuant to court order. In *DeLisio v. Alaska Superior Court*,<sup>166</sup> for instance, the Supreme Court of Alaska considered whether there was a taking in violation of the Alaska Constitution when the court ordered an attorney to represent an indigent defendant without reasonable compensation.<sup>167</sup> The plaintiff, an attorney in private practice, was appointed by the court to represent an indigent person charged with sexual abuse of a minor because the public defender’s office had a conflict of interest.<sup>168</sup> The plaintiff refused the appointment, and he was ordered to commence representation by a certain time or be jailed for contempt until he did.<sup>169</sup> The plaintiff appealed.<sup>170</sup>

The Supreme Court of Alaska held that the appointment of an attorney without reasonable compensation was a taking under the Alaska Constitution.<sup>171</sup> It rejected the argument that an attorney could be denied compensation based on the traditional role of lawyers as “officers of the court.”<sup>172</sup> Under Alaska’s Constitution, property is taken when the state deprives the owner of the economic advantages of ownership.<sup>173</sup> The court held, “When the court appropriates an attorney’s labor, the court has prevented the attorney from selling that labor on the open market and has thus denied to the attorney the economic benefit of that labor.”<sup>174</sup> The property was taken for “public use” because the system of representation was meant to ensure that all defendants received a fair trial.<sup>175</sup> The court continued: “Because the appointment thus benefits all persons equally, the cost of providing such

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<sup>165</sup> *Id.* at 892–93 (quoting *Lingle*, 544 U.S. at 539).

<sup>166</sup> 740 P.2d 437 (Alaska 1987).

<sup>167</sup> *Id.* at 439–43.

<sup>168</sup> *Id.* at 438.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *DeLisio*, 740 P.2d at 442.

<sup>172</sup> *Id.* at 441.

<sup>173</sup> *Id.* at 443.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

representation must be equally borne rather than shunted to specific persons or specifically identified classes of persons.”<sup>176</sup> As such, the appointment of counsel for only nominal compensation was a taking under the Alaska Constitution.<sup>177</sup>

Both *Scheehle* and *DeLisio* accepted that it was within the judiciary’s authority to appoint attorneys for nominal compensation. Yet both acknowledged that such a system could—at least potentially—be a taking.<sup>178</sup> In *Scheehle*, the system was promulgated by court rule. In *DeLisio*, it was promulgated by court order. This raises the choice-of-means problem: because courts can choose the means by which they adopt such a system, both should be subject to the Takings Clause.

One might wonder how controversial this argument really is, given that both sets of opinions assumed that the courts’ requirements were subject to the Takings Clause. Properly understood, however, these are judicial takings cases: they implicate questions of the judiciary’s independent authority to “take.” *Scheehle* acknowledged this: it certified the question of the judiciary’s authority to promulgate the appointment system to the Arizona Supreme Court.<sup>179</sup> Once the Arizona Supreme Court determined that the rule was a permissible exercise of judicial power, the question remained: Was the rule a taking? Even though these opinions implicitly assumed that the Takings Clause should apply to these judicial actions, these are judicial takings cases. The next Section considers yet another form of judicial act that raises the choice-of-means problem: docket management.

## B. Docket Management

Docket management can be a tool of public policy while also uncontroversially falling within both state and federal courts’ inherent powers. The Supreme Court has acknowledged “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”<sup>180</sup> In a leading case on the scope of

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<sup>176</sup> *DeLisio*, 740 P.2d at 443.

<sup>177</sup> *Id.*

<sup>178</sup> *Scheehle* emphasized that the appointment system had a “negligible” impact on the plaintiff’s legal practice, potentially leaving open the possibility that a more significant imposition could work a taking. *Scheehle*, 508 F.3d at 892.

<sup>179</sup> *Id.* at 890.

<sup>180</sup> *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also* *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (acknowledging the existence of courts’ “inherent power,” governed not by rule or statute but by the control necessarily vested in courts to manage

federal courts' inherent power, the Third Circuit observed that it is "not disputed" that courts have an inherent power to manage their dockets.<sup>181</sup> In fact, several state courts have found that control of the docket is within the state judiciary's exclusive control and therefore beyond the legislature's reach.<sup>182</sup> In a particularly forceful opinion, a New York state court found that a statute requiring courts to grant an "immediate trial" in certain circumstances was an unconstitutional violation of the New York Constitution's separation of powers.<sup>183</sup> The court stated, "The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions."<sup>184</sup> The statute was unconstitutional because it interfered with a "fundamental element of inherent judicial power," namely the "authority to control the court's calendar."<sup>185</sup>

The Supreme Court's management of asbestos cases offers a clear example of the intersection of docket control and public policy. In 1997, the Court warned that there was an "asbestos-litigation crisis."<sup>186</sup> Part of the problem was that up to 90% of claimants had "no medically cognizable injury or impairment," and critics became worried that those claims would deplete the limited resources of asbestos defendants.<sup>187</sup>

Federal courts used their authority to manage their docket to address the crisis. The federal asbestos docket prioritized claimants suffering from mesothelioma or lung cancer.<sup>188</sup> In one case, a federal judge dismissed all nonmalignant asbestos claims without prejudice while tolling the statute of limitations.<sup>189</sup> His

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their own affairs so as to achieve the orderly and expeditious disposition of cases"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

<sup>181</sup> *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

<sup>182</sup> *See, e.g., Atchinson v. Long*, 251 P. 486, 489 (Okla. 1926):

The right to control its order of business . . . has always been recognized as inherent in courts, and to strip them of that authority would necessarily render them so impotent and useless as to leave little excuse for their existence and place in the hands of the legislative branch of the state power and control never contemplated by the Constitution.

*See also Lang v. Pataki*, 674 N.Y.S.2d 903, 913 (Sup. Ct. 1998) (collecting cases).

<sup>183</sup> *Lang*, 674 N.Y.S.2d at 914.

<sup>184</sup> *Id.* at 913 (quoting *Riglander v. Star Co.*, 90 N.Y.S. 772, 775 (App. Div. 1904)).

<sup>185</sup> *Id.*; *see also Atchinson*, 251 P. at 489.

<sup>186</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>187</sup> Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 254–56 (2005).

<sup>188</sup> *Id.* at 273–74.

<sup>189</sup> *Id.* at 274.

administrative order emphasized that the court had a responsibility to manage the cases in a way that would “protect the rights of all the parties, yet preserve and maintain any funds available for compensation to victims.”<sup>190</sup> The court worried that the “race to the courthouse” would deplete funds that would otherwise be available to deserving plaintiffs.<sup>191</sup>

In other cases, federal courts used different procedural mechanisms to preserve the resources of asbestos defendants. For instance, a judicial panel in multidistrict litigation declined to remand the issue of punitive damages to transferee courts, though they allowed the compensatory matters to proceed to trial.<sup>192</sup> The Third Circuit declined a writ of mandamus that challenged the practice.<sup>193</sup> While noting that the panel had broad discretion over its assigned functions, the court stated that “[a]n even more compelling reason to adopt the Panel’s interpretation is the public policy underlying the practice of severing punitive damages claims.”<sup>194</sup> The court contended, “It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel’s decision to withhold punitive damage claims on remand.”<sup>195</sup>

States, too, had a multitude of avenues by which they could (and did) respond. Some state legislatures adopted “medical criteria” laws that required asbestos plaintiffs to present evidence of a physical impairment in order to proceed with their claims.<sup>196</sup>

State courts took similar measures through their inherent powers. A number of jurisdictions adopted an “unimpaired asbestos docket,” giving priority to the sick and preserving compensation for those who might become sick in the future.<sup>197</sup> Claims on the unimpaired docket did not age, and a plaintiff could petition to have their case moved to the active docket by presenting medical evidence that they had developed an impairing

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<sup>190</sup> *Id.* at 275 (quoting *In re Asbestos Prods., Liab. Litig.* (No. VI), 2002 WL 32151574, at \*1 (E.D. Pa. Jan. 16, 2002), *vacated*, No. CIV. A. 2:01-MD-875, 2009 WL 2222977 (E.D. Pa. July 17, 2009)).

<sup>191</sup> *Id.* at 275 (quoting *In re Asbestos*, 2002 WL 32151574, at \*1).

<sup>192</sup> See *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 505–06 (2009).

<sup>197</sup> Behrens & López, *supra* note 187, at 262.

medical condition.<sup>198</sup> Such practices were effective: as a New York Appellate Division justice observed, “A preliminary estimate indicates that the Deferred Docket reduced the number of cases actually pending in my court by 80 percent.”<sup>199</sup>

These courts justified this practice as part of their inherent power to manage dockets “in a manner consistent with an economical allocation of judicial resources and the parties’ interests.”<sup>200</sup> Numerous appellate courts agreed that the practice was a “traditional exercise of the court’s authority to control its docket.”<sup>201</sup>

This is a less direct version of the situation in *Brown*. There, legislatures and judiciaries adopted the same rule. In the case of asbestos litigation, legislatures and judiciaries took different actions (medical criteria laws and managing cases, respectively) that had the same result.

As with court-ordered legal services, this multiplicity of means suggests that we should not automatically distinguish between procedure set through court rules and procedure set through other means when considering the applicability of the Takings Clause. If we apply the Takings Clause only to rules, judicial actors could use strategic docket management to reach the same result. For instance, in California’s case, courts could have simply deferred hearing eviction cases until after the pandemic. A primary motivation behind the regulatory takings doctrine is preventing the government from circumventing its obligations. Thus, we should consider all procedure—regardless of the means through which it is promulgated—to be a potential taking. That does not mean that every pro bono requirement or delay will necessarily violate the Takings Clause. Rather, instead of using the separation of powers to limit the Takings Clause’s reach, we can adjust the test for when a taking has occurred.

#### IV. CAN PROCEDURE REALLY TAKE?

Parts II and III offer some functional reasons for applying the Takings Clause to court procedure, but they do not address a more fundamental question: Can procedure really “take”? In

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<sup>198</sup> *Id.* at 276.

<sup>199</sup> Behrens, *supra* note 196, at 524.

<sup>200</sup> See, e.g., Third Amended Order Governing Asbestos Deferred Registry, *In re Asbestos Cases*, No. 98L00000 ¶1 (Ill. Cir. Ct. 1998).

<sup>201</sup> *In re Cuyahoga Cnty. Asbestos Cases*, 713 N.E.2d 20, 25 (Ohio Ct. App. 1998) *abrogated on other grounds by* *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008).

*Brown*, the Court found there was no taking in violation of the Fifth Amendment.<sup>202</sup> As for Emergency Rule 1, similar eviction moratoria enacted by legislatures and executives have consistently survived takings challenges.<sup>203</sup> While some state courts have found that mandatory representation schemes can violate state constitutions, the Ninth Circuit has repeatedly rejected claims that such a system violates the federal Takings Clause.<sup>204</sup> Even assuming that the functional reasons are convincing, “[i]f the courts lack the power to ‘take’ within the meaning of the Takings Clause, their decisions obviously cannot give rise to takings claims.”<sup>205</sup>

The question of whether procedure can “take” will necessarily depend on our definition of takings. In the context of whether taxes can be takings, Professor Calvin Massey notes, “Surely an income tax of 100% imposed on a single individual—for example, Bill Gates—would violate the Takings Clause. If that is so, then the problem becomes a matter of degree.”<sup>206</sup> How do we distinguish between matters of degree within judicial-procedure takings? Court procedure will at least occasionally lead to results that, in other contexts, would be analyzed under the takings framework. When will these procedures—if ever—be takings?

Numerous articles and court decisions have analyzed if and when requiring attorneys to perform legal services could constitute a taking.<sup>207</sup> Courts and scholars have had no difficulty applying the existing takings framework to these requirements—even though the judiciary was the branch that was acting. This Comment argues that such cases should properly be considered judicial takings cases. The fact that these claims could fit so easily within the existing framework suggests that the doctrine of judicial takings may not be as disruptive as some scholars suggest. Given the existing literature, an additional analysis of

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<sup>202</sup> *Brown*, 538 U.S. at 240.

<sup>203</sup> See, e.g., *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162–68 (S.D.N.Y. 2020).

<sup>204</sup> See *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965); *Scheehle*, 508 F.3d at 889. The D.C. Circuit seemed to leave the possibility of takings claims open for mandatory representation schemes. See *Fam. Div. Trial Laws. of Superior Ct.—D.C., Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984).

<sup>205</sup> Echeverria, *supra* note 94, at 487. Echeverria was discussing eminent domain specifically.

<sup>206</sup> Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL’Y 85, 104 (1996).

<sup>207</sup> See, e.g., Green, *supra* note 146, at 383–90; Shapiro, *supra* note 146, at 771–84; *supra* Part III.A.

whether mandatory representation requirements could constitute takings is not necessary in this Comment.

It is less clear whether delays in hearing a case—resulting from, for instance, Emergency Rule 1 or strategic docket management—could be a taking. To that end, Part IV.A first responds to a threshold concern, arguing that legal claims involving an underlying property right are themselves a form of property subject to the Takings Clause. Part IV.B then explores three themes running through the Court’s takings jurisprudence: an emphasis on the form of the burden placed on property owners, a focus on fairness and justice, and a concern about extending takings liability so far that it interferes with government functioning. With these themes in mind, Part IV.B then proposes two additions to the takings test: intent and aggregation. Finally, Part IV.C briefly addresses the concern that it would be problematic to force other branches to pay for judicial-procedure takings. This Section suggests that the judiciary is responsive to political concerns and that it can adequately be kept in check by the legislature.

#### A. Is There a Property Right Involved?

In analyzing takings claims, courts have suggested that the inquiry proceeds in two steps: “First, is the subject matter . . . ‘property’ within the meaning of the fifth amendment? Second, if so, has there been a taking of that property?”<sup>208</sup> In looking to judicial-procedure takings, we have to contend with the question of what kind of property right (if any) is involved. In some cases, that might be clear: in *Brown*, for instance, the property at stake was the interest on clients’ funds.<sup>209</sup> In the case of required representation, the attorneys’ labor may be a form of property under the Fifth Amendment.<sup>210</sup> In cases where the procedure somehow delays a case—as in the case of California’s Emergency Rule 1—the property right is less obvious.

This Section first addresses ambiguity in the case law about whether a Fifth Amendment property right inheres in a legal claim. It then argues that the Takings Clause should apply to legal claims that relate to an underlying property interest—for instance, where the claim is based on a contract or a tort

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<sup>208</sup> *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987).

<sup>209</sup> *Brown*, 538 U.S. at 235.

<sup>210</sup> See *DeLisio*, 740 P.2d at 440.

involving property.<sup>211</sup> This is consistent with both the text and the function of the Takings Clause. Finally, this Section responds to arguments that mere delays in legal cases cannot implicate the Takings Clause.

There is some precedent to suggest that at least some legal claims, especially contract claims, can give rise to a property right under the Fifth Amendment. In the takings context, courts have readily acknowledged that property rights exist in certain kinds of contract claims. In the case of legislative and executive eviction moratoria, courts have understood that contracts—for instance, contracts that permit a landlord to evict a tenant in certain circumstances—can create property rights.<sup>212</sup> The focus in these cases is not the first step of the inquiry, but the second—whether there was a taking of that property.

Courts have distinguished contract and tort claims without fully clarifying whether tort claims are also a form of property under the Fifth Amendment. In *In re Consolidated United States Atmospheric Testing Litigation*,<sup>213</sup> the Ninth Circuit considered this difference.<sup>214</sup> The suit arose out of claims for personal injury and wrongful death resulting from the United States' nuclear weapons testing program.<sup>215</sup> The opinion addressed whether there was a taking when Congress enacted a statute providing that the sole remedy for such injuries was through a suit against the United States rather than a suit against private contractors.<sup>216</sup> The court at first seemed to suggest that there was no vested property right in a tort claim for damages until there was a final judgment.<sup>217</sup> It then pivoted, noting that “a cause of action is considered to be a species of property.”<sup>218</sup> The court then applied the *Penn Central* test to hold that there was no taking: it found that tort claims, unlike contract claims, lacked investment-backed expectations.<sup>219</sup> Thus, despite its initial suggestion that a tort claim might not be property under the Fifth Amendment, the Ninth Circuit's decision ultimately came down to the second

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<sup>211</sup> Trespass, nuisance, conversion, and property damage are examples of torts involving a property interest.

<sup>212</sup> *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 162.

<sup>213</sup> 820 F.2d 982 (9th Cir. 1987).

<sup>214</sup> *Id.* at 989.

<sup>215</sup> *Id.* at 983–84.

<sup>216</sup> *Id.* at 988–89.

<sup>217</sup> *Id.* at 989.

<sup>218</sup> *In re Consol. U.S. Atmospheric*, 820 F.2d at 989.

<sup>219</sup> *Id.*

step of the analysis, indicating that at least some form of property right may inhere in a tort claim.

More recently, the Court of Appeals for the Federal Circuit considered a similar claim. In *Alimanestianu v. United States*,<sup>220</sup> family members of a U.S. citizen killed in a Libyan-state-sponsored terrorist attack received a \$1.297 billion nonfinal judgment for their wrongful death claim against Libya.<sup>221</sup> The United States subsequently entered into a settlement agreement with Libya, obtained vacatur of the family's judgment, and distributed a lesser amount to the family based on that settlement.<sup>222</sup> The family sued, alleging that the settlement was a taking.<sup>223</sup> The court assumed, without deciding, that the family had a "cognizable property interest in their district court claims and non-final judgment."<sup>224</sup> The court then turned to the second part of the test, applied *Penn Central*, and found that there was no taking.<sup>225</sup>

Rather than simply distinguishing between tort and contract claims, there is another option. This Comment proposes that we distinguish between claims where there is an underlying property right and claims where there is not. The text of the Takings Clause allows the government to take "private property" for public use.<sup>226</sup> Textually, then, we should apply the Takings Clause to legal claims that involve some form of property.<sup>227</sup>

This interpretation is supported by policy reasons as well. As noted in Part I.B, the Takings Clause is a form of liability rule, whereas other clauses in the Constitution are property rules. As a reminder, under a liability rule, a person can undertake an action so long as they compensate those affected. Under a property rule, the person is simply prohibited from taking that action. Causes of action relating to underlying property rights can be managed through liability rules because the underlying subject (property) can be taken under the Fifth Amendment so long as just compensation is paid. Causes of action involving

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<sup>220</sup> 888 F.3d 1374 (Fed. Cir. 2018).

<sup>221</sup> *Id.* at 1377.

<sup>222</sup> *Id.* at 1378–79.

<sup>223</sup> *Id.* at 1379.

<sup>224</sup> *Id.* at 1380.

<sup>225</sup> *Alimanestianu*, 888 F.3d at 1383–84.

<sup>226</sup> U.S. CONST. amend V.

<sup>227</sup> For an argument that all legal claims are a form of private property under the Takings Clause, see generally Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373 (2009).

other kinds of rights require stronger constraints—i.e., property rules—to avoid arbitrary deprivations of those rights.

Even assuming there is a property right in certain lawsuits, attorneys Mark Behrens and Manuel López argue that there can be no takings claim based on a delay in hearing a suit because a plaintiff does not have “a property interest in the resolution of his or her lawsuit *quickly or by a particular date*.”<sup>228</sup> This concern, however, is misplaced: existing precedent suggests a willingness, in some circumstances, to consider temporary delays as potential takings. In these cases, the Supreme Court has not analyzed whether the plaintiff has a property right in having a result within a specified time frame. Instead, it considered the delay as a factor in the second step of its analysis, which determines whether there was a taking at all.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>229</sup> for instance, the Court considered whether a moratorium on development constituted a per se taking of property.<sup>230</sup> The Tahoe Regional Planning Agency adopted two directives that imposed a 32-month moratorium on development in Lake Tahoe.<sup>231</sup> The plaintiffs claimed that the moratorium amounted to a per se taking.<sup>232</sup> The Court declined to adopt a per se rule, finding that such claims were better analyzed under the multifactor balancing test from *Penn Central*.<sup>233</sup> The Court noted, “In rejecting petitioners’ per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”<sup>234</sup> It continued: “[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim.”<sup>235</sup> Thus, the Court did not reject the plaintiffs’ claims because they could not show that they had a property right to development within a certain timeframe. Rather, the Court assumed that there was a property right involved and analyzed the nature of the delay under the second step of the inquiry. This is fatal to Behrens and López’s argument: it does not matter that

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<sup>228</sup> Behrens & López, *supra* note 187, at 297 (emphasis in original).

<sup>229</sup> 535 U.S. 302 (2002).

<sup>230</sup> *Id.* at 306.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 320–21.

<sup>233</sup> *Id.* at 342.

<sup>234</sup> *Tahoe-Sierra*, 535 U.S. at 337.

<sup>235</sup> *Id.* at 342.

plaintiffs do not have a property right in having their case resolved in a specific timeframe, so long as some kind of property right is involved. Moreover, *Tahoe-Sierra* explicitly acknowledged that temporary delays could constitute takings under *Penn Central*.<sup>236</sup>

Though Behren and López's specific concern can be dismissed, the question of when a Fifth Amendment property right inheres in legal claims is not developed in the case law. The exact nature of that property right may also have important implications for the compensation due after the reviewing court finds that there has been a judicial-procedure taking. Though there are some difficulties in evaluating the just compensation due for a legal claim, recent scholarship suggests that the difficulties are not insurmountable.<sup>237</sup>

Scholars' hesitance to accept that a Fifth Amendment property right inheres in any legal claim seems partially motivated by practical concerns. Behrens and López argue that applying the Takings Clause to court delays would be "remarkably unworkable" given the frequency of such delays.<sup>238</sup> Such an approach, they argue, "would set an awkward precedent that would call into question everyday scheduling decisions of the trial courts."<sup>239</sup> But diminishing the property right in all legal claims is not the only solution to this problem. Instead, we can focus on the second step of the inquiry and look for ways to cabin our definition of takings in order to ensure the proper functioning of the courts.

## B. Supplementing *Penn Central*

### 1. The existing approach to regulatory takings.

If judicial-procedure takings exist at all, many claims would likely fall within the *Penn Central* category.<sup>240</sup> As noted above, a

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<sup>236</sup> *Id.* at 337.

<sup>237</sup> See Blumenthal, *supra* note 227, at 412–23.

<sup>238</sup> Behrens & López, *supra* note 187, at 298.

<sup>239</sup> *Id.*

<sup>240</sup> Scholars disagree over whether *Stop the Beach* would establish a new per se rule whereby a court's decision that an established property right "no longer exists" will always amount to a taking. Compare Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 258 (2011), <https://perma.cc/5NEW-4WL2> (finding a per se rule), with Kent, *supra* note 64, at 168 (arguing that the existing takings framework would apply). Even if *Stop the Beach* stands for a new per se rule, that rule seems to

plaintiff would likely claim that a delay in hearing a case is functionally equivalent to a taking. The per se rules for permanent physical occupations<sup>241</sup> and deprivations of all economically beneficial use of the property<sup>242</sup> have little application in this context. Thus, these claims are properly analyzed under *Penn Central*. *Tahoe-Sierra* suggests that a temporary delay can constitute a taking, with the length of the delay serving as an “important factor[ ]” in the court’s analysis.<sup>243</sup> The next Section explains *Penn Central* and offers two ways to supplement its test for judicial-procedure takings: intent and aggregation.

In analyzing the Court’s takings jurisprudence, three relevant themes emerge. First, as discussed in Part I.B, the Court is concerned with the fairness and justice of the burdens placed on property owners. Second, the form of the burden matters. Third, the Court has acknowledged the practical impact of its decisions, limiting the reach of its holdings to try to ensure the continued functioning of government.

The first theme is an emphasis on fairness and justice. As noted in Part I.B, the Court’s takings jurisprudence aims to prevent the government from forcing certain property owners to bear public burdens “which, in all fairness and justice, should be borne by the public as a whole.”<sup>244</sup> In doing so, the Takings Clause forces the government to spread the cost of certain regulations across society rather than singling out certain property owners.

The second theme is a focus on the form of the burden. In *Lingle*, the Court emphasized that the doctrine of regulatory takings “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”<sup>245</sup> Under this functional equivalence approach, the form of the burden is important. As the Court noted in *Penn Central*, it is less likely to find a taking when interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>246</sup> In

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have little applicability in the area of judicial-procedure takings because, in setting procedure, courts are not declaring that an established property right no longer exists.

<sup>241</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–26 (1982).

<sup>242</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>243</sup> *Tahoe-Sierra*, 535 U.S. at 342.

<sup>244</sup> *Lingle*, 544 U.S. at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>245</sup> *Id.* at 539.

<sup>246</sup> *Penn Central*, 438 U.S. at 124.

contrast, it is more likely to find a taking if there is a “physical invasion.”<sup>247</sup> When the physical invasion is permanent, such an invasion “eviscerates” the right to exclude, a fundamental property interest.<sup>248</sup> As such, any permanent physical invasion—even if it is minimal—is a per se taking.<sup>249</sup> Thus, the form of the burden matters in determining if there has been a taking.

The third theme is a concern with the government’s continued functioning. The Court has explained that “government regulation—by definition—involves the adjustment of rights for the public good,” and these adjustments often result in economic loss.<sup>250</sup> If the Takings Clause required compensation in all these circumstances, the government could “hardly could go on.”<sup>251</sup>

*Tahoe-Sierra* demonstrates the way in which the Court has tried to strike a balance between the need for regulation and the requirement of compensation in certain circumstances. There, the Court declined—in part due to these practical concerns—to adopt a per se rule finding that certain temporary development moratoria constituted a taking.<sup>252</sup> The Court noted, “A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.”<sup>253</sup> The Court then considered and rejected “narrower [per se] rule[s]” that would have excluded “normal delays associated with processing permits” or that applied only to delays of more than one year, respectively.<sup>254</sup> The Court found that even these rules would seriously hamper the planning process because temporary building moratoria are “an essential tool of successful development.”<sup>255</sup> The Court ultimately found that these practical concerns could be best mitigated by applying *Penn Central* rather than adopting a per se rule.<sup>256</sup>

With these three themes in mind—fairness, form, and the government’s continued functioning—we can think about how to supplement the *Penn Central* test for judicial-procedure takings.

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<sup>247</sup> *Id.*

<sup>248</sup> *Lingle*, 544 U.S. at 539.

<sup>249</sup> *Id.*

<sup>250</sup> *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

<sup>251</sup> *Id.* (quoting *Mahon*, 260 U.S. at 413).

<sup>252</sup> *Tahoe-Sierra*, 535 U.S. at 335–39.

<sup>253</sup> *Id.* at 335.

<sup>254</sup> *Id.* at 337.

<sup>255</sup> *Id.* at 338.

<sup>256</sup> *See id.* at 342.

## 2. Supplementing the analysis: looking to intent.

Intuitively, we might think there is a difference between California's Emergency Rule 1 and other judiciaries' emergency orders. In New York, for instance, the court's closure was part of an effort to mitigate the effects of the pandemic on court staff, officers, and visitors.<sup>257</sup> In California, meanwhile, Emergency Rule 1 was motivated, in part, by a desire to halt evictions themselves. Under the character factor of *Penn Central*, we can distinguish between these situations by considering whether the judiciary intended to use a particular property for public ends. Where the intent is present, that should weigh in favor of finding a taking.

Professors Eduardo Peñalver and Lior Strahilevitz first proposed the idea that we should focus on intent in analyzing judicial takings in the context of changes to the common law of property.<sup>258</sup> In cases where there is no dispute over whether a taking has occurred—for instance, in most eminent domain cases—the “public use” inquiry serves to limit the government's ends.<sup>259</sup> But, in the regulatory takings context, Peñalver and Strahilevitz suggest that we can use the public use inquiry to decide whether a taking has occurred in the first place.<sup>260</sup> Thus, when the judiciary has the *intent* to seize private property in order to achieve a legitimate public end, the Takings Clause is the proper framework.<sup>261</sup> The presence of an intention to seize property for public use “marks off the ‘takings’ subset of the broader category of property losses due to intentional actions of the State (deprivations), a subset that the Fifth Amendment explicitly declares to be legitimate, provided that just compensation is paid.”<sup>262</sup> The presence of this intent, then, can help us determine if a taking has occurred.

Peñalver and Strahilevitz further refine their theory by distinguishing between two kinds of intent: “intentionally submitting property to public use” and “incidentally imposing property losses on particular owners as a result of changes in property

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<sup>257</sup> Procedures to Mitigate the Effects of the COVID-19 Outbreak on the Unified Court System, AO/68/20 (Mar. 16, 2020), <https://perma.cc/CUJ6-CRAR>.

<sup>258</sup> Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 322 (2012).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 323.

law (albeit changes intentionally undertaken . . . for public reasons).”<sup>263</sup> We can identify the first category “by asking whether a *particular* property owner’s loss is itself a means of achieving the relevant public end.”<sup>264</sup> In both cases, the losses are motivated by a public purpose, but it is only in the former case that *particular* property is intentionally used for a public end.<sup>265</sup> In the latter case, the loss is merely an “unintended consequence” of a larger change in property law.<sup>266</sup> The former category is properly evaluated under a judicial takings rubric; the latter is not.<sup>267</sup>

This approach is also somewhat consistent with scattered suggestions in the Court’s jurisprudence on delays. In rejecting the proposed per se rule in *Tahoe-Sierra* (the development moratoria case), the Court noted that “even the weak version of petitioners’ categorical rule would treat these interim measures as takings regardless of the good faith of the planners.”<sup>268</sup> The Court thus implicitly suggested that good faith can help us distinguish between noncompensable government action and takings. Good faith is slightly different from an intent to single out: a government official may, in good faith, enact a regulation that the official believes serves an important public purpose, while still singling out a specific subset of property owners to bear the regulatory burden.<sup>269</sup> Nonetheless, this language suggests that the motives of the government might matter.

Applying this framework to the judiciaries’ limits on evictions, California’s Emergency Rule 1 is a prototypical action for the judicial takings framework. In limiting the procedural remedy of evictions, the Judicial Council targeted a *particular* subset of property owners (landlords) as the means of achieving a public end, assisting tenants and keeping them in the “homes they have been instructed to remain in.”<sup>270</sup>

This is distinct from New York’s rule: the chief administrative judge suspended evictions as part of a larger effort to mitigate the effects of COVID-19 “upon the users, visitors, staff, and

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<sup>263</sup> Peñalver & Strahilevitz, *supra* note 258, at 326.

<sup>264</sup> *Id.* (emphasis added).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Tahoe-Sierra*, 535 U.S. at 338.

<sup>269</sup> See, e.g., *DeLisio*, 740 P.2d at 438.

<sup>270</sup> REPORT TO THE JUDICIAL COUNCIL, *supra* note 13, at 7.

judicial officers of the Unified Court System.”<sup>271</sup> Thus, the court seemed indifferent to the particular property owners affected. Even though the goal of New York’s order—mitigating the effects of COVID-19—might be thought of as a public purpose, the fact that landlords could not evict tenants was an unintended by-product and therefore should not constitute a taking.

Juxtaposing the California and New York rules demonstrates why we cannot focus exclusively on the economic burdens faced by property owners. The burdens on landlords in New York might be identical to the burdens on landlords in California. But the situations are distinct: In California, there was an intent to single out a particular set of property owners. In New York, the judiciary halted all nonessential proceedings; it was indifferent to the way in which the delay affected tenants and landlords specifically. Singling out is a primary motivation for the Takings Clause, so the existence of that intent makes it more likely that California’s rule should be a taking.

It is important to remember that intent only supplements the analysis. Under the other *Penn Central* factors, Emergency Rule 1 alone is likely not a taking: the rule was in effect for only five months,<sup>272</sup> landlords were still owed rent, and landlord-tenant relationships have historically been heavily regulated, meaning that a five-month eviction moratorium likely did not significantly interfere with investment-backed expectations.<sup>273</sup>

That said, depending on the length of the delay, an eviction moratorium could be a taking. The recent cases upholding eviction moratoria all involved moratoria lasting only a few months: the case upholding New York’s moratoria was decided a few months after it was put into place;<sup>274</sup> a Massachusetts moratorium upheld

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<sup>271</sup> Procedures to Mitigate the Effects of the COVID-19 Outbreak on the Unified Court System, AO/68/20.

<sup>272</sup> See Ashley M. Peterson, *Judicial Council Votes to End Emergency Rules 1 & 2*, CAL. LAWS. ASSOC., <https://perma.cc/SA4Q-LJHC>.

<sup>273</sup> Cf. *Baptiste v. Kennealy*, No. 1:20-CV-11335, 2020 WL 5751572, at \*22 (D. Mass. Sept. 25, 2020). In general, landlords face an uphill battle in establishing that limits on evictions are takings because courts do not consider each individual unit to be a separate piece of property. See *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 166. In analyzing the economic impact of the regulation, courts consider the regulation’s impact on the building as a whole. See *id.* In *Elmsford*, for instance, the court suggested that the plaintiffs would need to demonstrate that the moratorium made it “commercially impracticable” for them to operate their buildings as a whole” to succeed on an as-applied challenge under the Takings Clause. *Id.* (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 496 (1987)).

<sup>274</sup> See *Elmsford Apartment Assocs.*, 469 F. Supp. 3d at 155.

by another federal court lasted just six months.<sup>275</sup> California's limits on evictions, meanwhile, last (at the time of this writing) through September 2021—over one year from the enactment of Emergency Rule 1.<sup>276</sup> A landlord may commence an action to recover COVID-19 rental debt, as defined by law, only starting November 1, 2021.<sup>277</sup> It is possible that a landlord could succeed on an as-applied challenge to these restrictions under the Takings Clause. In analyzing the as-applied challenge, this Comment argues that the reviewing court should consider the legislature's *and* the judiciary's limits on evictions together—rather than considering the legislature's limits in isolation.

Intent can supplement the analysis, but intent alone is insufficient. For one, the Court has shown a distaste for analyzing intent in the context of court procedure. In *Shady Grove Orthopedic Associates, P. A. v. Allstate Insurance Co.*,<sup>278</sup> a case concerning a potential conflict between a New York statute and the Federal Rules of Civil Procedure, the Court rejected the notion that it should use “the subjective intentions of the state legislature” to determine whether the state law and federal rule conflicted.<sup>279</sup> The Court noted, “Many laws further more than one aim, and the aim of others may be impossible to discern.”<sup>280</sup> Moreover, “federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart.”<sup>281</sup> Equivalent history for court procedure is likely even less accessible, if it exists at all.

And it can be problematic to allow the government to escape liability by offering the proper reasons for its delay. In a different context, Justice Scalia noted that allowing the government to escape liability by offering a specified reason “amounts to a test of whether the legislature has a stupid staff.”<sup>282</sup> As such, the focus on intent may serve as one convincing factor in analyzing whether a procedure is a taking, but it should not be dispositive.

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<sup>275</sup> See *Baptiste*, 2020 WL 5751572, at \*22.

<sup>276</sup> CAL. CIV. PROC. CODE § 116.223(a)(4).

<sup>277</sup> CAL. CIV. PROC. CODE § 116.223(b)(3).

<sup>278</sup> 559 U.S. 393 (2010).

<sup>279</sup> *Id.* at 404.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 405.

<sup>282</sup> *Lucas*, 505 U.S. at 1025 n.12.

### 3. Looking to aggregation.

The Supreme Court has held that the doctrine of regulatory takings is meant to identify actions that are “functionally equivalent to the classic taking,” meaning the form of the burden matters.<sup>283</sup> As we consider judicial-procedure takings, we can look to form too. There might be procedural changes that (1) have severe economic burdens and interfere with distinct investment-backed expectations (the first two factors under *Penn Central*) and (2) are motivated by an intent to affect one set of parties (our singling-out concern). Yet these changes might still fail to be functionally equivalent to a classic taking.

Unimpaired asbestos dockets offer one example. There, the court is intentionally prioritizing the lawsuits of an identifiable group (sick plaintiffs) while delaying the suits of another group (those with no medically cognizable impairment). One might argue that the property loss—to the extent there is one—is unintentional in that the court is merely choosing to prioritize cases with sick plaintiffs, so any delay for the others is just an unintentional byproduct. One could just as easily argue the delay is intentional: courts are conscious of the fact that “there is not enough money available from traditional defendants to pay for current and future claims,”<sup>284</sup> so they are attempting to preserve resources for the most deserving plaintiffs at the expense of the less deserving. There is, at the very least, a plausible argument that the court is singling out unimpaired asbestos plaintiffs through docket management. But courts—and the government—are engaged in acts allocating limited resources all the time, and that should not necessarily raise the specter of takings. And we have to keep in mind the third theme in the Court’s takings jurisprudence: allowing the government to continue to function.

Professor Lee Fennell proposes a “different way to pour content into the judicial-takings doctrine.”<sup>285</sup> Fennell suggests that the takings framework is appropriate when judicial actions “transform[ ]” distinct property interests through aggregation.<sup>286</sup> A clear example of aggregation is eminent domain.<sup>287</sup> Through

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<sup>283</sup> *Lingle*, 544 U.S. at 539.

<sup>284</sup> *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 72 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 993).

<sup>285</sup> Lee A. Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 109 (2012).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 110.

eminent domain, other political branches “reconfigur[e] sets of rights into larger and more valuable configurations.”<sup>288</sup> For instance, the government may assemble small parcels of land together to build a highway or a park that benefits the community as a whole.

Regulation, too, is a form of aggregation.<sup>289</sup> It allows the government to achieve different “regulatory assemblages” that are more valuable than the regulated parts.<sup>290</sup> To offer a non-takings example, the government may require that all students in a school get vaccinated. The value of any one vaccination is marginal to society, but, by requiring mass vaccination, the government can create herd immunity.<sup>291</sup> This benefits everyone, even unvaccinated students. The advantages of the vaccine requirement are greater than the sum of its parts. In the takings context, *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>292</sup> offers another example of this form of aggregation. There, the government required landlords to permit a cable television company to install cable facilities on its property to facilitate tenant access to cable.<sup>293</sup> This achieved a “regulatory assemblage” by allowing everyone in the neighborhood to access cable. According to the Court of Appeals, this access had “important educational and community aspects,” meaning that the benefits of universal cable outweighed the regulated parts.<sup>294</sup>

Thus, in analyzing potential judicial-procedure takings, we should look to whether the act is aggregative—generating a surplus that we could then use to compensate the losers—or merely allocative. This approach is consistent both with the Court’s emphasis on form as well as fairness and justice. When the court’s procedure creates a surplus, it is fair that the court use that surplus to compensate the losers. When there is no surplus, the court is merely “adjusting the benefits and burdens of economic life”<sup>295</sup> in a world with limited resources. As Fennell argues, this approach “dovetails with the twin goals of allowing courts to carry out their ordinary business without interference, while

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<sup>288</sup> *Id.* at 109–10.

<sup>289</sup> *Id.*

<sup>290</sup> Fennell, *supra* note 285, at 110.

<sup>291</sup> *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 31–33 (1905).

<sup>292</sup> 458 U.S. 419 (1982).

<sup>293</sup> *Id.* at 421.

<sup>294</sup> *Id.* at 425.

<sup>295</sup> *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124).

still keeping them from undertaking acts that, if undertaken by a political actor, would count as takings.”<sup>296</sup>

This focus on aggregation can supplement the intent analysis. With the deferred asbestos dockets, the judiciary is not engaging in an aggregative exercise; there is no surplus. Rather, it is allocating limited resources among plaintiffs, favoring those who have the most serious need (the sick). Under this analysis, the deferred asbestos dockets should not constitute a taking.

In contrast, the IOLTA program from *Brown* might be considered a taking: the program targeted funds that could not generate net interest on their own and required that attorneys put those funds into accounts that could generate interest.<sup>297</sup> The judiciary then used this interest to fund legal services for the “needy” (a public purpose).<sup>298</sup> This could constitute a taking. (There, however, the court found that there were no “losers,” so no compensation was necessary.)<sup>299</sup>

COVID-19 eviction moratoria—whether enacted by the executive, legislative, or judicial branch—also have an element of aggregation. Eviction moratoria can serve as a public health measure. The Centers for Disease Control and Prevention suggest that such moratoria can prevent overcrowding in homeless shelters and other shared living spaces and limit interstate transmission because tenants do not need to move across state lines to live with family.<sup>300</sup> This is akin to the vaccine example: the moratoria create a regulatory surplus by preventing the exponential spread of disease. This should weigh in favor of finding that the moratoria are a taking.

Combining intent and aggregation under the character factor of *Penn Central* is a way to cabin the reach of judicial-procedure takings. It is responsive to the emphasis on form and fairness, while also allowing the government to continue to function.

### C. Who Pays?

There is one final concern to address in the context of judicial takings: the question of just compensation. The judiciary

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<sup>296</sup> Fennell, *supra* note 285, at 111.

<sup>297</sup> *Brown*, 538 U.S. at 226–27 (quoting *In re IOLTA Adoption Order*, 102 Wash. 2d 1101, 1113–14 (1984)).

<sup>298</sup> *Id.* at 220–22.

<sup>299</sup> *Id.* at 240.

<sup>300</sup> Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,734 (Mar. 31, 2021).

does not have the power of the purse, so it may seem problematic to force the other branches to pay for judicial takings. As Professors Frederic Bloom and Christopher Serkin put it, under the judicial takings doctrine, “courts can pry open a state’s coffers and face little political reprisal when they do.”<sup>301</sup> They argue that this concern is real but also that it is “easy to overstate.”<sup>302</sup> For one, judges are not entirely politically insulated. Elected judges are an obvious example, but a substantial body of scholarship demonstrates that even unelected judges respond to political pressures.<sup>303</sup> Bloom and Serkin also note that courts already “open state coffers elsewhere,” in the cases of educational reform litigation, tort claims against government actors, and, of course, classic regulatory takings cases.<sup>304</sup>

Legislatures also have an array of tools to affect judicial decision-making. They may withhold court funding or threaten to pack the court.<sup>305</sup> In the case of judicial-procedure takings, legislatures, in most cases, may enact substantive laws to override the promulgated procedure. Even in states that give power to the judiciary to enact rules, there is often an option for legislative override.<sup>306</sup> The issue of who pays the just compensation due under the Takings Clause is not unique to judicial-procedure takings. It is implicated in all judicial takings, and there is reason to think that this problem alone is not insurmountable.

### CONCLUSION

In Justice Kennedy’s concurrence in *Stop the Beach*, he warned against establishing a doctrine of judicial takings because “the Takings Clause implicitly recognizes a governmental power while placing limits upon that power.”<sup>307</sup> There might be some cases, however, where we think the judiciary should have the authority to take actions that, in other contexts, would be analyzed under the Takings Clause. The Introduction of this

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<sup>301</sup> Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 588 (2012).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 589.

<sup>305</sup> *Id.* at 588.

<sup>306</sup> Clopton, *supra* note 102, at 10 n.39. This may be complicated in the minority of states where the judiciary has asserted independent authority to control its docket, but a more in-depth analysis of that issue is for another day.

<sup>307</sup> *Stop the Beach*, 560 U.S. at 736 (Kennedy, J., concurring in part and concurring in the judgment).

Comment defined procedure as “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”<sup>308</sup> In justly administering the law, we may want courts to have the flexibility to take the needs of society into account. This might include limiting evictions during a pandemic, appointing counsel for indigent litigants, or intentionally prioritizing the most injured plaintiffs in asbestos litigation. At the very least, we should uphold the principles of federalism by acknowledging that states may give their courts more leeway to enact procedures that would otherwise seem legislative. In doing so, states can serve as laboratories of democracy,<sup>309</sup> and we can learn from the various ways of allocating power among the branches of government.

Applying the Takings Clause to these procedures “implicitly recognizes [the courts’] power while placing limits upon that power.”<sup>310</sup> The Due Process Clause, in contrast, would simply limit the judiciaries’ authority. And doing nothing might create an incentive for the legislature to funnel its potential takings through the judiciary.

It may seem unlikely that this extension of the Takings Clause will have significant effects in practice. Despite the uproar following *Stop the Beach*, courts have rarely, if ever, found that a judicial action is a taking. Given the difficulty in proving a violation of the Takings Clause, it is hard to identify a procedure that will invariably mandate compensation. So much depends on the “ad hoc” *Penn Central* test, the specific circumstances of the case, and the judicial actor’s authority under either the state or federal constitution. What this Comment argues, then, may seem theoretical.

Or not. Outside of judicial takings, regulatory takings are exceedingly rare, but the doctrine still has value. The cases in which a court finds a regulatory taking are significant, and the doctrine enables compensation. The doctrine may also have some deterrent effect on government. Likewise, the doctrine of judicial-procedure takings—even if such takings are rare—may encourage the judiciary to better internalize the costs of its

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<sup>308</sup> *Shady Grove*, 559 U.S. at 407 (quoting *Sibbach*, 312 U.S. at 14).

<sup>309</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

<sup>310</sup> *Stop the Beach*, 560 U.S. at 736 (Kennedy, J., concurring in part and concurring in the judgment).

decisions. Rather than adopting a categorical rule holding that procedure could never constitute a taking, we should allow plaintiffs to make their case by demonstrating that the procedure represents an unfair burden—one that, “in all fairness and justice, should be borne by the public as a whole.”<sup>311</sup>

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<sup>311</sup> *Lingle*, 544 U.S. at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).