Vanderbilt Law Review

Volume 52
Issue 1 *Issue 1 - January 1999*

Article 9

1-1999

The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law

Robert Brauneis

The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law

Robert Brauneis

52 Vand. L. Rev. 57 (1999)

This Article traces the change in the remedial framework of nineteenth-century owner-initiated state constitutional just compensation litigation, and explores the relationship between that change and substantive changes in just compensation doctrine. Through the Civil War, owners complaining of government-sanctioned seizure of their property brought common-law tort actions against whomever might be held liable under ordinary tort and agency law. Defendants in those suits claimed that some piece of legislation altered tort law to shield them from liability for their acts. Plaintiff owners responded that the legislation on which defendants relied was void, because it purported to authorize acts that amounted to takings of private property, but did not provide for just compensation. Within this framework, just compensation provisions in constitutions imposed disabilities on the legislature but did not impose remedial duties or provide rights of action. Part I of the Article reconstructs both the remedial framework and the basic substantive doctrine that governed antebellum just compensation litigation, and explains why that litigation took the form it did.

In the 1870s and 1880s, state courts began to articulate a new framework for owner-initiated just compensation litigation, suggesting that a right of action for just compensation was either implied or explicit in just compensation provisions themselves. Part II of this Article traces the emergence of this new framework, and explores both the possible causes of the change and its practical significance for owners. It concludes that the change in framework had strong ties to the emergenee of just compensation amendments that expanded protection to cover not just "taking" of private property, but "taking or damage." Those amendments led courts to think of just compensation provisions as positive enactments rather than as declarations, making available a tradition of recognizing implied private rights of action under statutes, and made it difficult for courts to continue to use the common-law tort action framework, because the protection afforded by the amendments was arguably greater in some cases than common-law tort protection. In turn, the change in framework seemed to result in at least one important substantive change: owners became able to seek permanent damages in just compensation suits. On the other hand, the new implied right of action framework had little immediate impact on the doctrine of sovereign immunity.

The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law

Robert Brauneis[*]

* Associate Professor of Law, George Washington University Law School. I would like to thank Philip Hamburger, Mike Selmi, Bob Tuttle and the members of the GW Law School Rough Draft Roundtable for their comments on earlier drafts. I would also like to thank Deans Jack Friedenthal and Michael Young for financial support, and Olivier Taillieu and Alison Wilson for their diligent research assistance.

I. INTRODUCTION

A decade after *First English Evangelical Lutheran Church v. County of Los Angeles*,[1] the idea that the federal and state just compensation clauses provide a private right of action for damages is a familiar one. Indeed, it is tempting to think that just compensation clauses have always been read te impose a judicially enforceable duty to pay just compensation that is triggered when a government takes or authorizes the taking of private property. Most legal commentators point to the 1971 case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] as the first instance in which the Supreme Court suggested that individual rights provisions in the Federal Constitution generally could give rise to damages actions.[3]

---

1. First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 321 (1987) (holding that the Fifth Amendment Just Compensation Clause, as incorporated against the states by the Fourteenth Amendment, mandates a damages remedy for the period a confiscatory land-use regulation has been in effect).

2. Biveus v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971) (holding that petitioner was entitled to recover damages upen proof of injuries suffered when federal agents entered and searched his apartment without a warrant and arrested him on narcotics charges without probable cause, in contravention of the Fourth Amendment).

3. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.2, at 526 (2d ed. 1994) ("Prior to [*Bivens*], although courts protected constitutional rights through injunctive relief and doctrines such as the exclusionary rule, plaintiffs were not allowed to sue federal officers for monetary remedies in federal court."); KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.5, at 253 (3d ed. 1994) ("The Court created a whole new category of torts in [*Bivens*]."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1508 n.321 (1987) [hereinafter Amar, *Of Sovereignty*] (stating that *Bivens* extended the notion that the Constitution provided a self-executing cause of action to suits for damages at law; this had been previously acknowledged by the Supreme Court with regard to suits in equity in *Ex parte Young*, 209 U.S. 123 (1908)).

More recently, scholars such as Michael Collins and Ann Woolhandler have argued that even in the nineteenth century, the Supreme Court approved of actious for damages that may be best described as actious implied under the Constitution, because the Court considered the actions as raising a federal question even under the well-pleaded complaint rule, or because the Court was not punctilious in respecting state rules of procedure even though the plaintiff's cause of action was supposed to be a state common law action. *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1517-25 (1989) (describing a line of Supreme Court cases recognizing damage claims that the Court held raised a federal question on the face of a well-pleaded complaint); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedics*, 107 YALE L.J.

Although the term "constitutional tort" was apparently coined six years before *Bivens*,[4] it has become closely associatod with the *Bivens* Court's recognition of a damages remedy springing directly from the Constitution.[5] But the courts and litigants in *Bivens*, while disagreeing about whether individual rights provisions generally (and the Fourth Amendment in particular) could serve as swords rather than as shields,[6] all agreed on one thing: the Just Compensation Clause was a sword. The Second Circuit's opinion in *Bivens* generally rejected a private damages action under the Constitution, but specifically distinguished the Takings Clause as "a purer example of a constitutional right with a necessarily implied remedy."[7] Because "[t]he right to just compensation [could] scarcely be vindicated other than by securing just compensation," Chief Judge Lumbard wrote, the Supreme Court had held the Takings Clause to "creat[e] a duty to pay upon the government even in the absence of specific statutory authorization for suits to enforce the right to just compensation."[8] Defending the Second Circuit's judgment in the Supreme Court, the United States argued that "the purpose of the Fourth Amendment was [solely] to insure that similar defenses would be disallowed in stato common law actions,"[9] but conceded that the Just Compensation Clause had been held to ground a right of action for damages against the government, a holding that it attributed to the Clause's direct mention of just compensation.[10] Sixteen years lator, in *First English*,

---

77, 102-11 (1997) (arguing that federal procedure was often more favorable than state procedure to litigants raising federal constitutional claims). The phenomena Collins and Woolhandler describe are intoresting and important, but fall far short of a self-conscious, articulatod decision by the nineteenth-century Supreme Court that the Constitution provides a damages action independent of the coaimon law or the general law. As this Article will show, *see infra* text accompanying notos 239-46, post-Civil War state courts did articulate such a decision with regard to state just compensation clauses.

4. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 277 (1965) (coining this term in the article's title).

5. *See* T. Hunter Jefferson, Noto, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions against State Governments*, 50 VAND. L. REV. 1525, 1528 (1997) ("The concept of a 'constitutional tort' first entered the American legal landscape in *Bivens* . . . in 1971.") (footuote omitted).

6. The metaphor comes from Walter Dellinger's famous commentary on *Bivens*. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

7. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

8. *Id.* (citing Jacobs v. United Statos, 290 U.S. 13, 16 (1933)). The Supreme Court, reversing the Second Circuit, citod *Jacobs* as precedent for allowing an individual te redress his injury by means of damages. *See Bivens*, 403 U.S. at 397.

9. Brief for the Respondents at 4, *Bivens*, 403 U.S. 388 (1971) (No. 301).

10. *See id.* at 15-16 (discussing *Jacobs*, 290 U.S. at 16).

the United States attempted to retract its concession, submitting an amicus brief arguing that the Just Compensation Clause did not mandate a damages remedy.[11] The Supreme Court, however, brushed aside this volte-face and held that the Just Compensation Clause required retrospective damages for the period a confiscatory land-use regulation was in effect. Moreover, the Court hinted that the Clause may abrogate sovereign immunity, allowing a property owner to name a state or the United States in just compensation litigation.[12] That would give property owners an advantage that even the *Bivens* Court, riding on the Warren-era wave of remedial expansiveness, was unwilling to give constitutional rightholders generally.[13]

The truth, however, is that for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities.[14] An antebellum court did not ask whether a legislatively authorized act amounted to a taking of private property, and enter a judgment for just compensation if it did. Rather, the court asked whether the act purportedly authorized by the legislation amounted to a taking, and if so, whether the legislation itself provided for just compensation.[15] If not, the legislation was void: the legislature had exceeded its competence, which the Constitution limited to the authorization of "takings-with-just-

---

11. *See* Brief for the United States as amicus curiae at 9-26, First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987) (No. 85-1199).

12. *See First English*, 482 U.S. at 316 n.9 (rejecting the Solicitor General's argument "that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision") (internal citation omitted); RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1002 (4th ed. 1996) (commenting that footnote nine of *First English* suggests that "[s]overeign immunity appears to play a more limited role in 'takings' cases"). I discuss *First English* further, *infra* note 344.

13. For the Court's more recent confirmation of its unwillingness to go any further with constitutional rights generally, see *FDIC v. Meyer*, 510 U.S. 471, 484-85 (1994) (holding that a *Bivens* action could not be brought against a federal agency). Although the preservation of procedural sovereign immunity was not immediately at issue—the Court found that the agency in question had waived its sovereign immunity, *see id.* at 483—the refusal to recognize a damages action against federal agencies for constitutional violations provides an even stronger substantive immunity.

14. On the difference between legislative duties and disabilities, see H.L.A. HART, THE CONCEPT OF LAW 64-89 (1961). As Hart explains:

> A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing (or at any rate need not impose) duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities. "Limits" here implies not the presence of duty but the absence of legal power.

Id. at 68.

15. *See infra* text accompanying notes 31-32.

compensation." Although the qualification in that limitation happened to involve the payment of money, the legal effect of exceeding the limitation was, in theory, no different than exceeding a constitutional limitation incorporating a non-monetary qualification, such as the Fourth Amendment's limitation of warrants to those that were "issue[d] . . . upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[16] The Constitution embodied a directive to courts to treat nonconforming property legislation, like a nonconforming warrant, as a nullity.

My goal in this Article is to trace the transition from that traditional understanding of just compensation provisions, as limitations on legislative competence, to the modern notion that just compensation provisions provide owners a cause of action for damages when their property is taken. My focus will be on the transition in state constitutional law, for three principal reasons. First, the older understanding was much more fully developed in the states, because state supreme courts decided hundreds of just compensation cases in the nineteenth century, while the United States Supreme Court decided only a handful. Second, a focus on state constitutions avoids the complicating factor of federalism;[17] though that factor is an important one, it may be worthwhile te consider the evolution of just compenstion doctrine in a simpler context. Third, the state constitutional transition occurred earlier, and to my knowledge provided the first examples of American courts explicitly reading constitutional provisions to create private damage actions—hence my claim that the Article will describe the creation of the "first constitutional tort."

One might assume that, under the traditional understanding, property owners subject to uncompensated, state-authorized appropriations simply could not recover damages absent legislation establishing a procedure for doing so. If that were true, the story of the

---

16. U.S. CONST. amend. IV.

17. Federalism-related reasons loomed very large, I suspect, in the creation of federal constitutional torts generally. First, with the waxing of the principle that there is no federal general common law, *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), federal courts lost doctrinal control over the common law of terts, which was integral to the older "justification-stripping" model of constitutional enforcement. (I describe the justification-stripping model below at text accompanying notes 31-32.) To maintain control of federal constitutional enforcement, federal courts needed a new model. Second, many federal judges became concerned that federal rights would only be effectively enforced in federal courts; the justification-stripping model, when combined with one version of the well-pleaded complaint rule, left federal courts without jurisdiction over litigation initiated by rightsholders. On the relationship of the justification-stripping model and the well-pleaded complaint rule, see Woolhandler, *supra* note 3, at 100-05.

transition from old to new understandings would be a story about how property owners gained a damages remedy. That assumption, however, is not a valid one, and the truth makes the story of the transition much more complicated. Although just compensation provisions, like many other constitutional provisions, were originally framed as limitations on legislative competence, those limitations were designed to operate within a vast, complicated, pre-existing common law context, including common law damage remedies.[18] A just compensation provision's limitation on the competence of the legislature was, in part, a limitation on its competence to abolish those pre-existing damage remedies; it could do so only if it provided an alternative remedy that a court found to be constitutionally adequate.[19]

Thus, to figure out what kind of story to tell about the transition from a "legislative competence" understanding of just compensation provisions to a "remedial duty" understanding, we need to broaden our perspective. We might define a useful horizon by considering, in legal realist fashion, that a property owner's just compensation rights are defined by the full set of rules specifying or accurately predicting what a court will and will not do for him—rules that detail when and from whom the owner can recover damages, what measure of damages the owner can recover, and when and against whom the owner can obtain injunctive relief. In the antebellum era, only a portion of those operative rules were expressed on the constitutional plane. To recover the complete set, one must also look beyond the Constitution, to common law forms of action such as trespass and trespass on the case; to the common law of agency; to the common law of sovereign immunity, governmental immunity, and individual officer immunity; and to traditional principles of statutory interpretation.

Once we have recovered that set of rules, we are in a position to inquire further into the meaning of the transition between old and new understandings. In the body of this Article, I will attempt to sketch the meaning that the transition actually had for state courts. As an introductory matter, one might consider the range of possible

---

18. Even this statement fails to capture fully the integration of common law and constitution, because many constitutional provisions, including just compensation provisions, were thought to express and preserve pre-existing common law principles. Thus, just compensation provisions represent a principle that English judges, without a written constitution, enforced as a strong canon of statutory construction, and occasionally as an absolute limit on legislative power, *see infra* text accompanying notes 113, 118-26; many American state judges, faced with state constitutions that did not contain just compensation provisions for most or all of the antebellum period, did the same thing. *See infra* text accompanying notes 114-16. When constitutional draftsmen penned just compensation provisions, they articulated this particular principle, but left unarticulated its accompanying remedial framework.

19. *See infra* note 34.

meanings. It is possible that the transition would have no effect whatsoever on the operative rules for property owners. One could coustruct a constitutional cause of action that duplicated the rules previously scattered throughout the common law, so that when a taking occurred, the obligation to pay just compensation rested on exactly those parties, and in exactly those amounts, as it did previously after working through the multiple layers of common law forms of action, agency law, the law of immunities, and so on. Under this option, the reconceptualization of just compensation provisions as themselves providing a cause of action for damages could be seen as a kind of "judicial codification": an effort on the part of courts to collect existing rules and rationally order them, while clarifying their constitutional basis.

Alternatively, the shift to a "remedial duty" understanding of just compensation provisions might be accompanied by some change in operative rules. If it were, one could then inquire into the relationship between the shift in understanding and the change in operative rules. One might first ask whether there was any logical link between the two, and if so, how tight it was. For example, one change in the operative rules that appears to have actually accompanied the shift in understanding in the state courts concerns the ability of a property owner to obtain a judgment for permanent damages. Under the old model, owners were subject to the common law rule that successful plaintiffs in trespass and case could recover ouly retrospective damages, and could get prospective relief only in the form of an injunction or judgment in ejectment.[20] About the same time that courts began to understand just compensation provisions to provide causes of action, however, they also began to allow suits for permanent damages, and to refuse injunctive relief more often. Was there a logical link between the two, or was it just coincidence? If there was a link, in which direction did the line of causation run? Were courts led to believe that an action for permanent damages was appropriate, which then led them to reconceive just compensation provisions as self-contained causes of action not subject to inappropriate common law rules? Or, conversely, did courts reconceive just compensation provisions as remedial provisions for other reasons, which reconception then led them to think more in terms of presumptively permanent "takings for public use" for which "just compensation" would naturally be permanent damages?

---

20. *See infra* text accompanying notes 182-90.

Yet another possibility is that courts were led to modify the operative rules because of a change in the language of just compensation provisions themselves, and that this modification of operative rules influenced courts to break out of the old understanding of just compensation provisious as limits on legislative competence. Although the Fifth Amendment Just Compensation Clause has never been amended, stato just compensation provisions were frequently amended in the nineteenth century, and some amendments moved from state to state in waves of concern about some matter or another. Popular amendments included provisious more precisely specifying the measure of just compensation in partial condenmation cases;[21] provisions specifying that compensation needed to be paid or deposited before the taking;[22] and provisions specifying a mode of assessing compensation (often requiring a jury).[23] The most popular amendment, however, was one that was intended to expand the scope of just compensation protection, typically by providing that just compensation was required, not just when property was "taken," but when property was "taken or damaged."[24] Faced with this amendment, courts did decide that it required them to extend the scope of just compensation protection. Did that alteration of operative rules lead to the demise of the legislative competence understanding? These are the kind of questious I think are worth asking and attempting to answer.

The first section of Part II of this Article undertakes the task of recovering the contours of antebellum owner-initiated just compensation litigation. It sketches the various doctrines that defined a property owner's remedial options when he believed he had been aggrieved by acts purportedly authorized by the legislature. At the same time, it reveals the common law procedural framework in which these doctrines were organized. Owner-initiated just compensation litigation before the Civil War typically proceeded in three stages. An owner who believed that his property had been taken by eminent domain, like an owner who believed that his property had been sub-

21. *See, e.g.*, IOWA CONST. of 1846, art. I, § 18 (specifying that a jury assessing just compensation "shall not take into consideration any advantages that may result to said owner on account of the improvement for which [the private property] is taken").

22. *See, e.g.*, CAL. CONST. of 1879, art. I, § 14 ("Private property shall not be taken or damaged for public use without just compensation *having been first made to, or paid into Court for, the owner* . . . .") (emphasis added).

23. *See, e.g.*, ILL. CONST. of 1870, art. II, § 13 ("[Just] compensation, when not made by the state, shall be ascertained by a jury, as shall be proscribed by law.").

24. *See infra* text accompanying notes 265-72.

ject to an unlawful search or seizure,[25] brought an ordinary common law action of trespass or trespass on the case against whomever might be held liable at common law for the occupation or asportation of his property.[26] These defendants might include the individuals who actually committed the acts and the corporate or political bodies potentially liable for those acts under the common law of agency (so long as the common law of sovereign immunity did not render those bodies unreachable).[27] If the defendant's acts would otherwise give rise to liability at common law, the defendant could proceed to the second stage of litigation and seek to justify those acts by appealing to legislation that authorized them and thus altered the common law.

It was then up to the plaintiff to introduce a third stage, by appealing to a just compensation provision (or, if there was no specific just compensation provision, the common law principle of just compensation, perhaps as implicitly encompassed in some other constitutional provision), and arguing that the legislation invoked by the defendant violated that provision, because it authorized acts that worked a taking of private property, but provided no just compensation to those whose property had been taken. Here, finally, the disabling character of just compensation provisions became evident. If the plaintiff's argument prevailed, the court declared the legislation void, and the defendant's justification failed. Once the defendant was stripped of his justification, the plaintiff could recover the retrospective damages normally allowed under his common law action, and could obtain prospective relief by means of an action of ejectment or a suit in equity seeking an injunction.

The second section of Part II takes the project of developing antebellum just compensation doctrine one step further by inquiring into the reasons why just compensation litigation took this "justification-stripping" form[28]—why plaintiffs initiated legal proceedings by bringing a common law action, to which defendants typically responded by appealing to a legislative justification, which plaintiffs in turn argued should be nullified. One common explanation is that this form was developed to circumvent sovereign immunity, because it allowed plaintiffs to recover damages from individuals and entities that could not claim the absolute immunity

25. *See infra* text accompanying notes 201-06 (discussing the traditional remedial structure under the Fourth Amendment).

26. *See infra* text accompanying notes 36-46.

27. *See infra* text accompanying notes 47-107.

28. I use the term "justification-stripping" instead of the commonly used term "immunity-stripping." *See infra* note 32.

from suit enjoyed by the state. While acknowledging that this explanation has some appeal, I explore an alternative or supplemental explanation, arguing that the structure was well-established as a device te discipline executive action, and that it was adapted to the project of disciplining the legislature as that became of greater concern to constitutional framers and courts.

The first section of Part III documents the transition in state courts to the modern understanding of just compensation provisious as directly imposing remedial duties. That transition, I argue, occurred largely between 1870 and 1890. Courts often began te use language suggesting that the state constitution's just compensation provision gave rise to a damages action without further explanation or acknowledgment that they were doing something new. When they did attempt some further explanation, they most often appealed to the tradition of actions upon statutes—of implying private rights of action in statutes that did not explicitly grant them.

In the remainder of Part III, I explore the relationship between this transition and the operative rules defining a property owner's just compensation rights, with the aim of determining more broadly the meaning of the transition. My approach is selective; rather than canvassing every possible relationship, I focus on what may be the most important and interesting one: the relationship to the "taking or damage" amendments eventually adopted by over half of the states.[29] The primary inspiration for these amendments was an Act of Parliament that English courts had interpreted as granting property owners a cause of action for damages; that fact alone made it natural for courts to think that the amendment was similarly intended to grant a damages action, and brought inte play an existing tradition of implying damages actious in statutes. Perhaps more importantly, many courts also interpreted the "taking or damage" clauses to render actionable some injuries that were not actionable at common law. The expansion of constitutional liability beyond common law liability may have made it difficult to continue use of the justification-stripping model, because under that model owners initiated litigation under a common law form of action, and recovered according to common law rules of liability when the defendant's attempt to justify failed. Oddly enough, many courts concluded that the "taking or damage" amendments expanded liability "beyond that known at common law" because the courts considered the principal general rule limiting takings liability—the rule deeming consequential injuries

29. *See infra* text accompanying notes 247-72.

that were privately actionable not te be takings[30]—to be a common law rule. 1 argue that this was symptomatic of a realization by courts that the rules defining the powers of public entities with regard to private property could not be reduced to the rules governing relationships between owners and other private parties. The realization that just compensation law was irreducibly public may have contributed to the rejection of the old model, which through its reliance on common law actions embodied the assumption that constitutional liability was coterminons with, or a simple subset of, private liability.

Having given full consideration to the relationship between the transition to a remedial duty model of just compensation provisions and courts' attempts to come to grips with the "taking or damage" amendments, I close by briefly exploring the relationship between that transition and two other sets of operative rules: the rules about the availability of permanent damages and injunctive relief, and the rules of agency and immunity law determining the parties against whom just compensation judgments can be entered.

II. OWNER-INITIATED NON-STATUTORY JUST COMPENSATION LITIGATION IN THE ANTEBELLUM ERA

Sometime before the Civil War, an owner comes to believe that his property has been appropriated under state authorization without just compensation. He wants to bring a lawsuit to vindicate his right under the state constitution's just compensation clause. How will litigation proceed? In this Part, I will first describe the typical form of owner-initiated just compensation litigation in the first half of the nineteenth century, and the legal rules and choices encountered at each stage. I will then place just compensation litigation in the context of other litigation of that era to explain why it took the form it did.

A. The Justification-Stripping Form and its Contents

Owner-initiated just compensation litigation before the Civil War typically proceeded in three stages, with the constitutional issue entering only at the third stage. First, a property owner would bring a common law action of trespass or trespass on the case against a

30. *See infra* text accompanying notes 301-03.

government official or a corporation. Second, the defendant would seek to justify acts otherwise remediable at common law by invoking a statute that authorized him to do those acts. Third, the plaintiff would argue that the statute, if it indeed purported to authorize the defendant's acts, was unconstitutional, because the authorized acts amounted to a taking and the statute did not provide for just compensation. If the court found the statute to be unconstitutional, it would proclaim it void and without effect, thus depriving the defendant of his justification and re-exposing him to common law liability. Chief Justice Shaw of the Massachusetts Supreme Judicial Court explained that, by 1836, courts took this remedial structure for granted:

> [S]upposing that [an] act could be so construed, as to confer a power on [a] corporation to take private property for public nse, without providing for an equitable assessment, and for the payment of an adequate indemnity, the act would, in this respect, be in contravention of the constitution of this Commonwealth, and in this respect void; and so would not afford the justification relied on. The consequence would be, that the party damaged would be remitted to his remedy at common law; the wrongful act would stand unjustified by legislative grant. This has been so often decided in this Commonwealth, that it must be taken as a settled principle.[31]

Because, under this model of litigation, the just compensation provision operates to deny the defendant his statutory justification, I will call it the "justification-stripping" model.[32]

---

31. Thacher v. Dartmouth Bridge Co., 35 Mass. (18 Pick.) 501, 502 (1836) (citing Stevens v. Proprietors of the Middlesex Canal, 12 Mass. (11 Tyng) 466 (1815); Chadwick v. Proprietors of Haverhill Bridge, 2 Dane's Abr. 686 (Mass. 1787)).

32. I am aware that this method of enforcing constitutional provisions often goes by the name "immunity-stripping." I use the term "justification-stripping" to avoid a particular type of confusion that might be engendered by "immunity-stripping." Under the model I am describing, just compensation clauses operated only to strip defendants of a statutory justification, and thus only came into play if the defendant needed that statutory justification to avoid common law liability. A defendant might avoid liability without statutory justification by invoking common law sovereign immunity, defined broadly to include what now might be identified separately as governmental immunity and official immunity. Because a just compensation clause did not strip defendants of these common law immunities, the model I am describing is not, in this sense, an "immunity-stripping" model. *Cf.* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 409 n.62 (1987) ("Legal justification protects only an official who has acted legally, while an immunity may be defined as protection for illegal acts.").

Other scholars have developed slightly different terminology te describe the aspects of nineteenth-century constitutional litigation that they find important. Ann Woolhandler has distinguished the "legality model" from the "discretion model." *Id.* at 410-11. The legality model is justification-stripping without any official immunity doctrine, and flows from an emphasis on "harms te the citizen's liberty or property interests . . . ." *Id.* at 410. The discretion model adds an immunity doctrine protecting officials from liability for discretionary acts, and results from a focus "upon the need to protect the governmental actor rather than the citizen . . . ." *Id.*

1. Forms of Action

A property owner who sought to vindicate his constitutional right to just compensation in the courts faced two major initial issues: what type of action to bring and whom to name as defendant. Occasionally, the legislature provided a special statutory procedure for claiming just compensation that could be initiated by owners who believed their property to have been taken.[33] If a court found that procedure to be adequato and exclusive, the owner would have to follow it.[34] Legislatures also sometimes provided procedures for as-

---

Eric Grant calls the justification-stripping model the "equitable" remedy, to distinguish it from the inverse condemnation model in which the Constitution directly provides an action for damages, which he calls the "legal" remedy. Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 202 (1996). Grant uses this nomenclature because of his view of the differonce between justification-stripping and inverse condemnation: Under the legal remedy (inverse condemnation), the Just Compensation Clause provides a property owner with an action at law against the government, whereas under the equitable remedy (justification-stripping), the Just Compensation Clause allows an owner to obtain a declaratory judgment voiding a statuto that authorizes a taking without providing just compensation. *See id.* This mapping of legal/equitable relief onto inverse condemnation/justification-stripping has some truth, but may be more confusing than enlightening. Under the justification-stripping model, the effect of the Just Compensation Clause is to void a statute, but that does not mean that the property owner is seeking declaratory relief; in most cases, property owners using the justification-stripping model sought damages in an action at law.

33. Such procedural provisions usually formed part of statutes authorizing particular public works, or special charters of corporations formed to construct and operato canals, turnpikes, railroads, and so on. *See, e.g.*, Stevens v. Proprietors of the Middlesex Canal, 12 Mass. (11 Tyng) 466, 468 (1815) (discussing statutory procedures for claiming damages for injuries caused by canal coustruction). I know of no antebellum statuto that provided a general owner-initiated procedure for obtaining just compensation for takings.

34. Courts varied widely in their willingness to hold that statutory remedies implicitly displaced common law remedies. *Compare* Crittenden v. Wilson, 5 Cow. 165, 167 (N.Y. Sup. Ct. 1825) (holding that statutery procedures for appraising and paying damages caused by construction of dam were merely cumulative as to common law action), *with Stevens*, 12 Mass. (11 Tyng) at 468 (holding that statutery procedures for appraising and paying damages caused by construction of canal displaced common law action). For a comprehensive review of cases addressing the issue of remedial exclusivity, see 2 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN § 468, at 1232-42 (2d ed. 1917).

An 1853 Indiana opinion reasoned that no common law action was available when a statute provided a method of obtaining just compensation becanse any taking within the scope of that statute was constitutional and therefore ceuld be justified under the statute. *See* Null v. Whito Water Valley Canal Co., 4 Ind. 431, 435 (1853). Philip Nichols made the same peint in his treatise, without citing *Null*. *See* 2 NICHOLS, *supra*, § 468, at 1236-38. This argument anticipated the logic of a recent line of Supreme Court cases. *See, e.g.*, Preseault v. ICC, 494 U.S. 1, 11 (1990) (holding that Just Compensation Clause claims against the federal government are premature until the property owner has sought compensation through the procedures provided by the Tucker Act); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985) (holding that a landowner's Just Compensation Clause claim was not ripe because it had not sought compensation through the procedures that the state had made available). The issue of ripeness is related to the issue of timing of compensation. The U.S. Supreme Court held as early as 1890 that the Just Compensation Clause did not require compensation to be paid

sessing and paying damages that only the condemnor could initiate; courts sometimes held that, if a condemnor failed to initiate the procedure when it should have, owners could petition for a writ of mandamus to force it to do so.[35] Often, however, the aggrieved owner conld not find an applicable statutory procedure. In that circumstance, he had to pick an appropriate common law form of action and find a defendant who was not shielded by a common law immunity doctrine.

Two forms of action loomed largest: trespass—usually a particular type called trespass *quare clausum fregit*[36]—and trespass on the case, sometimes abbreviated as "case."[37] Courts drew the distinction between the two forms of action in a number of ways.[38] The most

---

before a taking, but it did require that, at the time of the taking, an owner have "reasonable, certain and adequate provision for obtaining compensation . . . ." Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 659 (1890).

35. *See, e.g*, People *ex rel.* Utley v. Hayden, 6 Hill 359, 360 (N.Y. Sup. Ct. 1844) (holding mandamus is the appropriate remedy when appraisers refuse to undertake their statutory duty to assess damages when canal commissioners have appropriated land for public use); People *ex rel.* Doyle v. Green, 10 N.Y. Sup. Ct. 755, 759 (N.Y. App. Div. 1875) (holding mandamus is the appropriate remedy to require officials to perform statutory duties with respect to assessment list, especially when relator's damages are *damnum absque injuria* at common law); Gilligan v. Board of Aldermen, 11 R.I. 258, 258 (1875) (granting writ of mandamus te force beard of aldermen of Providence te make appointments required under statutery procedure for awarding compensation for changes in grade); 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 614, at 1316-17 (2d ed. 1900) (discussing cases where plaintiffs proceeded on mandamus writs to compel damage assessments). The writ of mandamus was creatod by the King's Bench in England as one of the prerogative writs issuable against royal officers notwithstanding the sovereign immunity of the King. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 176-92 (1965). As a distinctively public law remedy, mandamus stands outside the tradition of attempting to fit public law litigation into private law molds like the justification-stripping model. It is irreducibly public in the same way that the substantive law of highways came te be seen as irreducibly public. I discuss the phenomenon of courts coming to view the law of highways as irreducibly public below at text accompanying notes 304-12. In some alternative course of history, courts might have more explicitly drawn on mandamus as a model for the distinctively public inverse condemnation action.

36. "Quare clausum fregit" literally translates as "by breaking his close" and refers to the modern sense of intentional intrusion onto another's land. RESTATEMENT (SECOND) OF TORTS § 168 (1965).

37. The other common law form of action that is worth mentioning is *assumpsit*, an action predicated on the defendant's express or implied promise. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *157-*165. I have found no case in which an antobellum state court allowed owners to sue in *assumpsit* on the theory that a government that took property impliedly promised to pay just compensation for it, and there are only a few postbellum cases. *See* Boise Valley Constr. Co. v. Kroegor, 105 P. 1070, 1073-74 (Idaho 1909); 2 NICHOLS, *supra* note 34, § 478, at 1280.

Toward the end of the nineteenth century, however, the implied promise theory became orthodoxy for just compensation claims against the United States. *See infra* note 342 (discussing this development).

38. For detailed discussions of the development of the trespass/case distinction, see generally Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1175-86 (1990); M.J. Prichard, *Trespass, Case and the Rule in* Williams v. Holland, 1964 CAMBRIDGE L.J. 234. Kaczorowski contends that:

common was to contrast immediate and indirect injuries. Thus, trespass was the appropriate form of action for an act that was "in itself an immediate injury to another's person or property."[39] Trespass on the case was appropriate "where the act [was] not immediately injurious, but only by *consequence* and collaterally . . . ."[40] Another popular formulation of the distinction involved the presence or absence of force. Trespass was sometimes called *"trespass vi et armis"*—"with force and arms"[41]—to indicate that it was appropriate to remedy injuries accompanied by force. Trespass on the case, by contrast, was a remedy given for "wrongs or injuries unaccompanied by force."[42] Further, courts and commentators sometimes held trespass to be appropriate to redress injuries caused by willful acts, whereas case was appropriate "where there [was] no act done, but only a culpable omission."[43] Finally, the distinction was occasionally drawn in terms of the lawfulness of the act. As Nathan Dane put it:

> The true distinction seems to be this, *if the act itself be lawful*, as my putting up a spout on my house, and is followed by an injury to another, the proper action is case, especially if the injury happen at a time subsequent to the putting up of the spout. *But if the act itself be unlawful* . . . then, *trespass vi et armis* is the proper action.[44]

The distinction between trespass and case with respect to injuries to land was always in some dispute.[45] Despite this, courts

---

> Depending on the specific facts of a case, English courts decided whether trespass or case was the appropriate action on four criteria: Whether the act was wilful, whether it was lawful, whether the act was committed by the defendant or his servant, and whether the injury was immediate or consequential.

Kaczorowski, *supra*, at 1177. My presentation of the distinction differs slightly because I have not found the criterion of whether an act was committed by master or servant to be important in just compensation cases (though it was used in other cases) and because I have added the presence or absence of force as another criterion, following Blackstone.

39. 3 BLACKSTONE, *supra* note 37, at *123.

40. *Id.* (emphasis in original); *see also* JOSEPH CHITTY, A TREATISE ON PLEADING AND PARTIES TO ACTIONS *126-*127 (9th American ed. 1840) ("An injury is considered as immediato when the act complained of itself, and not merely a consequence of that act, occasions the injury.").

41. BLACK'S LAW DICTIONARY 1504 (6th ed. 1990).

42. 3 BLACKSTONE, *supra* note 37, at *122.

43. *Id.* at *123.

44. 2 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 487 (1823) (discussing Reynolds v. Clark, 92 Eng. Rep. 822 (K.B. 1725)). The trespass/case distinction was further muddied by the erratic use of a legal fiction designed te provide heightened protection against unwarranted entry onto land: In Blackstone's words, "[t]he law always couples the idea of force with that of intrusion onto the preperty of another." 3 BLACKSTONE, *supra* note 37, at *211.

45. For example, Nathan Dane noted that diversion of water onte another's land was treated by one court as actionable in trespass, and by another as actionable only in case. *See* 2

deciding just compensation cases in the first three-quarters of the nineteenth century drew heavily on the trespass/case distinction to limit the scope of just compensation clause protection, often holding that "immediate injuries" were takings but "consequential injuries" were not.[46]

2. Potential Defendants and Common-Law Immunities

Having decided upon a form of action, an owner would next face the issue of whom to name as defendant or defendants. As a legal matter, this choice would be shaped by common law doctrines of sovereign immunity and of the liability of other public and private organizations and their agents. During this era, different rules emerged for states, "quasi-corporations," municipal and private corporations proper, and individuals.

State courts in the nineteenth century generally accepted the common law principle that a state could not be sued in its own courts without its cousent.[47] Under this principle, an owner could not bring an action seeking payment of damages from the state treasury, even if the state legislature had directed a state official to commit acts otherwise actionable in trespass or case.[48]

Counties, townships, school districts, and similar organizations were also generally immune from suit in tort.[49] State courts consid-

---

DANE, *supra* note 44, at 492 (comparing Courtney v. Collett, 91 Eng. Rep. 1079 (K.B. 1697) with Haward v. Bankes, 97 Eng. Rep. 740 (K.B. 1760)).

46. As I detail below, the eighteenth-century dispute over the proper form of action for injury caused by diversion of water onte one's land was repeated in the nineteenth century as a dispute over whether such injury amounted to a taking. *See infra* toxt accompanying notes 148-50.

47. *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 371 n.(e) (14th ed. 1851) (citing Michigan State Bank v. Hastings, Walker's Cb. 9 (Mich. Ch. 1842)). An aggrieved property owner who sought to vindicate his state constitutional right to just compensation in federal court under diversity jurisdiction, as owners sometimes did, would have to consider the scope of the Eleventh Amendment, but I will not address that issue here.

48. Beginning in the mid-nineteenth century, a number of states constitutionalized this common law immunity principle; I discuss the example of Illinois below at text accompanying notes 338-41.

49. This fact might surprise students of federal jurisdiction familiar with the Supreme Court doctrine that counties do not enjoy Eleventh Amendment immunity. *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529 (1890). *Luning* explicitly refused to draw a distinction between corporations and quasi-corporations: A county "is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Id.* at 530. In an earlier case involving the liability of the District of Columbia for negligence in the maintenance of its streets, the Court recognized in dictum the lack of liability in tort of "involuntary quasi corporations," which, the Court stated, "are auxiliaries of the State merely," and corporations "of the very lowest grade, and invested with the smallest amount of power." Barnes v. District of Columbia, 91 U.S. 540, 552 (1875).

ered counties to be "quasi-corporations" that were not subject to "private action for neglect of corporate duty, unless given by statute . . . ."[50] The English case to which this doctrine is traceable, *Russell v. Men of Devon*,[51] restod, from an American perspective, on dubious grounds. The *Russell* court had held that a county could not be sued because it had neither a corporate fund nor a means for securing assets,[52] but many American counties had both corporate funds and powers of taxation.[53] American courts, however, found two other intertwined rationales for distinguishing quasi-corporations from corporations proper (the latter encompassing both municipal and privato corporations). First, proper corporations were created by solicitation or consent of the persons composing them, whereas quasi-corporations were created by unilateral acts of the legislature. Thus, a state legislature would charter a city as a municipal corporation only upon petition of its inhabitants, and many areas of the state remained unincorporated. In contrast, the legislature would divide the state's entire territory into counties, regardless of the wishes of the inhabitants.[54] Second, proper corporations, including municipal corporations, were thought to act primarily for the interests and convenience of their members, whereas quasi-corporations were thought te act for the interests of all the state's citizens.[55] As Justice Gray put it in the 1812 case of *Mower v. Inhabitants of Leicester*: "Corporations created for their own benefit stand on the same ground . . . as individuals. But *quasi*-corporations, created by the legislature for purposes of public policy, are . . . not liable to an action for [the neglect of duties enjoined on them], unless the action be given

50. *See* 2 KENT, *supra* note 47, at 420.

51. Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788).

52. *Id.* at 362-63.

53. For commentators noting the mismatch of English rationale and American fact, see 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 962, at 1171-72 n.2 (4th ed. 1890); James D. Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 259 (1936); Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 41-45 (1924).

54. *See* Board of Comm'rs v. Mighels, 7 Ohio St. 109, 119 (1857) ("The [municipal corporation] is asked for, or at least assented to, by the people it embraces; the [county] is superimposed by a sovereign and paramount authority."); 1 DILLON, *supra* noto 53, § 23, at 42 (distinguishing corporations from quasi-corporations and quoting *Mighels*).

55. *See Mighels*, 7 Ohio St. at 119 ("A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is creatod almost exclusively with a view to the policy of the State at large . . . ."); 1 DILLON, *supra* note 53, § 23, at 42.

by some statute."[56] In many states, counties, townships, school districts, and even towns would be classified as quasi-corporations and could not be sued.[57]

Until about 1840, the law regarding tort liability reflected the lack of distinction between private business corporations and public municipal corporations.[58] Both corporations that we would now recognize as private business corporations and corporations that we would now recognize as municipalities, were in most courts suable in tort.[59] Thus, owners alleging appropriations of their property could

---

56. Mower v. Inhabitants of Leicester, 9 Mass. (8 Tyng) 247, 249 (1812) (emphasis in original); *see* 1 DILLON, *supra* note 53, §§ 26-27, at 45-46 (noting and approving of these grounds for the distinction between municipal corporations proper and quasi-corporations in relation to tort liability).

57. *See Mower*, 9 Mass. (8 Tyng) at 249; Riddle v. Proprietors of the Locks and Canals, 7 Mass. (6 Tyng) 169, 187 (1810); 2 DILLON, *supra* note 53, § 961, at 1169. As John Dillon noted, the status of organizations such as school districts differed from state te state. In some states, school districts were local corporations proper. In others, they were quasi-corporations created unilaterally by the state. *See* 1 DILLON, *supra* note 53, § 24, at 43. Not until the mid-twentieth century was there a broad movement in state courts tewards abolishing the common law immunity of these entities. *See, e.g.*, Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961); Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959); Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795 (Minn. 1962); Holytz v. Milwaukee, 115 N.W.2d 618 (Wis. 1962). For deviations from the majority rule in the early te mid-1800s in Ohio, New Hampshire, and Pennsylvania, see Barnett, *supra* note 53, at 266 n.65; for the rejection of *Mower* in Maryland, see *County Commissioners v. Duckett*, 20 Md. 468 (1864).

58. *See, e.g.*, EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 14-17 (1954); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 185-92 (1983); Barnett, *supra* note 53, at 259; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1099-109 (1980).

59. Earlier eighteenth-century authority sometimes held that corporations could not be sued in tort, particularly in trespass. *See* 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 223-25 (1793). By the early nineteenth century, however, American courts routinely held corporations to be suable in tort. *See, e.g.*, *Riddle*, 7 Mass. (6 Tyng) at 185-87; Chesnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawle 6, 17-18 (Pa. 1818); JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 457-67 (1858). There was generally no distinction drawn botween municipal and private corporations. *See* Thayer v. Boston, 36 Mass. (19 Pick.) 511, 516 (1837) ("That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled te be questioned . . . . And there seems no sufficient ground for distinction in this respect between cities and towns and other corporatious."); Barnett, *supra* note 53, at 259 n.35 (citing numerous cases).

The case of *Fowle v. Alexandria*, 28 U.S. (3 Pet.) 398 (1830), has sometimes been read to hold that municipal corporations are not liable in tert. *See* Barnett, *supra* note 53, at 260. Chief Justice Marshall's opinion, however, is written more narrowly. In *Fowle*, the plaintiff argued that the city of Alexandria should be liable for losses incurred when an auctioneer with whom he had placed property for sale became insolvent, because the city had licensed the auctioneer without requiring him te post a bond, in contravention of its own licensing ordinance. *Fowle*, 28 U.S. (3 Pet.) at 405-06. The Court held that although private corporations were generally liable in tort, a "legislative corporation" was not liable "for losses sustained by a nonfeasance, by an omission of the corporate bedy te observe a law of its own, in which no penalty is provided." *Id.* at 409. This statement hardly declares a municipality to bo immune from all suits sounding in tort, and could fit comfortably with a number of narrower spheres of nonliability, such as nonliability for governmental functions, for discretionary functions, and for

and did sue both turnpike, canal, and railroad companies on the one hand, and cities on the other.[60]

Although private corporations remained generally liable, towards the middle of the nineteenth century, courts began to distinguish between the governmental and proprietary functions of municipalities, and to grant immunity in tort to municipalities for the performance of their governmental functions.[61] Courts defined and justified this bifurcation of municipal functions by referring to the established rationale for the distinction between corporations and quasi-corporations. Municipalities were said to be liable for wrongful acts "from which they derive some special or immediato advantage or emolument,"[62] but not for wrongful acts done "in the discharge of duties imposed for the public or general (not corporate) benefit."[63] By use of this doctrine and a corollary,[64] courts jnstified their decisions not to hold municipalities liable for the acts of police officers,[65] firemen,[66] and health officers,[67] among others.[68]

Despite this new recognition that municipalities should benefit from governmental immunity, courts continued to hold municipalities liable in some circumstances. Perhaps most importantly to landowners, courts sometimes circumvented the entire doctrine of immunity for governmental functions by holding that municipalities were liable for the acts of their officers even when performing a governmental function when those acts involved "a direct trespass to real estate, or

---

ultra vires acts. *See infra* text accompanying notes 61-77. At least one state court seems to have taken the more extreme position that municipal corporations were never liable in tert. *See* White v. Charlesten, 20 S.C.L. (2 Hill) 571, 574 (1835); Barnett, *supra* note 53, at 261 n.43 (collecting cases).

60. *See, e.g.*, Barron v. Baltimore (Baltimore County Ct. 1828), *reprinted in* 2 AM. JURIST 203 (1829) (involving a municipal corporation); Thacher v. Dartmouth Bridge Co., 35 Mass. (18 Pick.) 501 (1836) (involving a private corporation).

61. The landmark case for this governmental/proprietary split is generally acknowledged te be *Bailey v. City of New York*, 3 Hill 531 (N.Y. 1842). *See* Barnett, *supra* note 53, at 267-68.

62. 2 DILLON, *supra* noto 53, § 966, at 1180.

63. *Id.*

64. The corollary was that individuals who exercised governmental functions were agents of the state rather than the municipal corporation, even though the corporation had appointed them. *See id.* § 974, at 1193; FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES & OFFICERS § 850, at 572-73 (1890) [hereinafter MECHEM ON PUBLIC OFFICERS].

65. *See* Stedman v. San Francisco, 63 Cal. 193, 193 (1883) (holding municipality not liable for wrongful taking and detention of property by pelice officers); 2 DILLON, *supra* note 53, § 975, at 1196-98.

66. *See* 2 DILLON, *supra* note 53, § 976, at 1198-1200.

67. *See id.* § 977, at 1200-01.

68. Courts sometimes held that municipalities were not liable for acts of road surveyors, *see, e.g.*, Walcott v. Swampscott, 83 Mass. (1 Allen) 101, 102 (1861), although the cases were not uniform, and often impesed liability, *see, e.g.*, Rochester White Lead Co. v. Rochester, 3 N.Y. 463, 466 (1850); *see generally* 2 DILLON, *supra* note 53, § 979, at 1202-03 (comparing cases).

the creation or maintenance of a nuisance."[69] Similarly, although courts developed a principle that municipal corporations were not liable for their good faith exercise of discretionary powers, courts often made an exception for those exercises of discretionary power that caused *"a positive and direct invasion"* of an owner's private property,[70] or created "a nuisance public or private."[71]

Courts used the *ultra vires* concept to limit municipal liability in two ways. First, a municipality was not liable for the wholly unauthorized acts of its officers.[72] Courts sometimes used this principle to deny relief to owners for the taking or destruction of their property: a Pennsylvania court, for example, held that a person whose property was wrongfully seized by an officer for the alleged violation of an ordinance could not recover against the municipal corporation when the corporation did not authorize or ratify the act.[73] The lack of liability for *ultra vires* acts of officers, however, was substantially limited by the development of a broad understanding of municipal grants of authority, announced perhaps most prominently by Chief Justice Shaw's opinion in *Thayer v. City of Boston*.[74] Municipal corporations, Shaw wrote, should be liable for acts "done by [its] officers having competent authority . . . to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,"[75] even if the act turned out later, upon judicial inquiry, to have been unlawful. Thus, in *Thayer* itself, the court held that the city of Boston was potentially liable for landowners' loss of access to a street when its officers removed the pavement and rented the land out to others who built stalls, booths, and fences on it. Even though the city had not empowered its officers to close public highways, of which this street was one, it would be liable if it had granted the officers general authority over city streets, and the officers had professed to close the street by virtue of their offices, for the benefit of the city.[76]

---

69. James Fleming, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 629 (1955); *see also* 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.11, at 217-18 (3d ed. 1993).

70. 2 DILLON, *supra* note 53, § 1047, at 1329 (emphasis in original); *see also* Ashley v. Port Huron, 35 Mich. 296, 301 (1877).

71. 2 DILLON, *supra* note 53, § 1047, at 1330.

72. *See id.* § 972, at 1189-90.

73. *See* Fox v. Northern Liberties, 3 Watts & Serg. 103, 105-06 (Pa. 1841); *see also* 2 DILLON, *supra* note 53, § 972, at 1190.

74. Thayer v. City of Boston, 36 Mass. (19 Pick.) 511 (1837). *See generally* 2 DILLON, *supra* note 53, § 972, at 1189 n.3 (citing sources).

75. *Thayer*, 36 Mass. (19 Pick.) at 515.

76. *See id.* at 516-17.

Secondly, courts developed the doctrine that municipal corporations would not be liable for acts wholly outside the powers that the state had granted the corporation. Thus, for example, New York's highest court decided that the village of Rochester would not be liable when its officers appropriated land for a street in defiance of a provision in the village's charter expressly prohibiting it from laying out a street on any parcel where building removal costs would exceed one hundred dollars.[77]

Suits against individuals[78] typically raised issues of agency law, issues of liability under trespass and case, and, when the individual was acting as an agent for a public body, issues of official immunity. Public officials were far more likely than individual agents of private corporations[79] to be named as defendants in just compensation

---

77. *See* Cuyler v. Rochester, 12 Wend. 165, 168 (N.Y. 1834); *see also* 2 DILLON, *supra* note 53, § 970, at 1186.

78. The individual sued would usually be acting as an agent for a corporation or governmental bedy, since eminent domain power was rarely delegated directly te individuals. The most prominent exception to the rule was the private road statute, which granted property owners, individual or corporate, the power to condemn rights of way across neighboring land in certain cases of necessity or convenience. For examples of such statutes existing in the nineteenth century (including a Pennsylvania statute in force since 1735 and a Kentucky statute in force since 1820), see 1 LEWIS, *supra* note 35, § 167, at 427.

79. Just compensation suits naming individual agents of private corporations were relatively rare. For one such suit, see *Perry v. Wilson*, 7 Mass. (6 Tyng) 393, 395 (1811) (naming one of the proprietors of a Massachussetts corporation chartered to maintain side-booms on the Androscoggin river). This might have been due in some small part to the private agency law principle of *respondeat superior*, which not only made the principal vicariously liable for injuries caused by its agent in the course of employment, but also shielded the agent from liability for his nonfeasance and onnissions of duty. Thus, for example, an agent who managed a plantation was not liable to a neighboring plantation owner for flooding caused by the agent's failure to keep a drain open. The agent owed that duty only to his principal, who could seek indemnification from the agent were she found liable to her neighbor. *See* Feltus v. Swan, 62 Miss. 415, 417 (1884). For the general principle, see FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 569-70, at 400-02 (1889) [hereinafter MECHEM ON AGENCY]; JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 308, at 402-03 (8th ed. 1874) [hereinafter STORY ON AGENCY]. For an excellent explanation of the role of agency law in officer suits under federal law, see David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 15-19 (1972).

Just compensation litigation, however, typically involved allegations, not that an agent had neglected to perform a duty, but that an agent had committed a positive wrong, such as intentionally occupying the plaintiff's preperty, or interfering with the plaintiff's access to a public street. An agent was still liable for misfeasances and pesitive wrongs, even when he was following the directions of his principal, and even if he was ignorant of the wrongful nature of his actions (because, for example, his principal had misrepresented the principal's ownership of particular land). *See* MECHEM ON AGENCY, *supra*, § 571, at 402-03; STORY ON AGENCY, *supra*, § 308, at 402. The duped agent, of course, could seek indemnification from the mendacious principal. *See id.* § 339, at 433-34. Thus, the paucity of just compensation suits naming agents of private corporations is probably due not to agency law's limitation of an agent's liability, but rather te the amenability of private corporations to suit, and to the likelihood that corporations were in a far botter pesition than their individual agents to satisfy a judgment for damages. The availability of corporate funds to pay judgments that a corporation's agents could not afford

litigation, because the only potential organizational defendant—a state, county, or public corporation—often enjoyed jurisdictional or substantive immunity. When the public principal was not subject to *respondeat superior* liability for the acts of its agents—a status enjoyed by the United States,[80] the states,[81] and municipal corporations with respect to agents exercising governmental functions[82]—the individual agent was liable both for nonfeasance and for misfeasance or positive wrongs.[83] For Justice Story, this was not merely a coincidence; rather, the imperative of providing a remedy to an injured party led to the expansion of the agent's liability as the principal's liability waned:

> [T]he very consideration, that the public superiors are not responsible for the acts and omissions of their subordinates in their official conduct, distinguishes the case from that of mere private agencies, and lets in the doctrine, that, under such circumstances, [the subordinates] shall be held personally responsible therefor to third persons who are injured thereby.[84]

Thus, agency law was unlikely to give public officials a defense in just compensation litigation.[85]

A public official, rebuffed by agency law, might seek protection in the law of official immunities. For most of the nineteenth century, however, officials likely to be named in a just compensation suit enjoyed far narrower immunities than they would under modern law.

---

to pay did not escape early nineteenth-century courts. In rejecting a corporation's argument that it was immune from suit, the Pennsylvania Supreme Court noted that the argument was "mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of labourers who have no property to answer the damages recovered against them." Chesnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawle 6, 17 (Pa. 1818).

80. *See* Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868); *see also* MECHEM ON PUBLIC OFFICERS, *supra* note 64, § 848, at 571-72.

81. *See* Lewis v. State, 96 N.Y. 71, 74-75 (1884); Clodfelter v. State, 86 N.C. 67, 68 (1882); *see also* MECHEM ON PUBLIC OFFICERS, *supra* note 64, § 849, at 572; STORY ON AGENCY, *supra* note 79, § 319, at 411-12.

82. *See supra* text accompanying notes 61-68.

83. *See* STORY ON AGENCY, *supra* note 79, §§ 319b, 320, at 414-15. The liability of the public agent here, however, is subject to a very important limitation: If the agent does not act in excess of his lawful authority, then he is not liable, even though his acts may injure a third party. *See id.* § 320, at 415. This "lawful authority" is the "justification" in the justification-stripping model; to the extent the grant of authority violates a just compensation provision, it is not "lawful," and the agent is liable.

84. *Id.* § 319b, at 414.

85. Presumably, because municipal corporations were vicariously liable for the torts their agents committed while exercising corporate functions, *see supra* text accompanying notes 62-68, municipal agents exercising those functions would have the same defense as private corporations' agents to actions alleging nonfeasance. This would rarely be of moment to just compensation litigation, however, because that litigation typically involved allegations of positive wrong. *See supra* note 79.

The general principle in the Anglo-American tradition was that executive officials enjoyed no immunity whatsoever for acts that they were not authorized to perform by a valid statute.[86] For example, in the 1804 case of *Little v. Barreme*, the Supreme Court ruled that the captain of a Unitod States warship was personally liable for damages when he seized a ship that was on a voyage *from* a French port while the relevant Act of Congress authorized only the seizure of ships sailing *towards* French ports, even though he was acting under orders from the President.[87]

In the 1840s, courts began to articulate a doctrine of "quasi-judicial" immunity, under which an official granted discretionary powers enjoyed exemption from civil liability at least for the good faith, honest exercise of those powers, if not for acts with corrupt motives.[88] Many officials likely to be named in just compensation

---

86. For A.V. Dicey, this was one of the three principal meanings of the "rule of law" in England: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (8th ed. reprint 1982).

87. Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804). Chief Justice Marshall, writing for the Court, accepted the doctrine that non-military officials, acting within United States territery, would be personally liable for all acts that turned out not to have been authorized by law. *See id.* at 179. Marshall stated in the opinion that he initially believed military officers acting on the high seas should enjoy some level of immunity. Subsequently, he stated, he became convinced that his initial opinion was mistaken. *See id.* He did not say why he became so convinced.

In a similar case heard by the Court the same torm, the Court held another captain personally liable for having seized a ship owned by someone who the Court ruled was, although American by birth, temporarily clothed with Danish nationality, and therefore not subject to the Nonintercourse Act. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 67-69 (1804). The captains in *Little* and *Murray* both sought relief from Congress, which eventually passed special acts arranging for payment of the judgments against them. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 632 n.80 (1996).

88. *See, e.g.*, Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845); Wilson v. Mayor of New York, 1 Demio 595, 600 (N.Y. 1845). As of the late nineteenth century, the scope of quasi-judicial immunity was still in dispute. For a review of the cases on either side of the issue whether quasi-judicial immunity was limited to acts performed in good faith, see MECHEM ON PUBLIC OFFICERS, *supra* note 64, § 640, at 427. For contrasting views of treatise writers, compare *id.* (asserting that even malicious quasi-judicial action should be protected so that officers are not constantly forced to defend their motives), with JCEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 789, at 367 (1st ed. 1889) (arguing that "[f]rom the ground on which this doctrine rests, it follows that, if the *quasi*-judicial act is corrupt . . . it will not be protected").

Morton Horwitz suggests that *Sayre v. Northwestern Turnpike Road*, 37 Va. (10 Leigh) 454 (1839), was "[o]ne of the first cases opeuly te recognize an immunity limited to public officials." MORTON J. HORWITZ, THE TRANSFCRMATION OF AMERICAN LAW 1780-1860, at 294 n.86 (1977). The two-sentence opinion in *Sayre*, however, is quite obscure, and nowhere suggests that the officers of the Northwestern Turnpike Road were boing sued as individuals. The one operative sentence in the opinion is:

> The court . . . are [sic] unanimously of opinion that the action does not lie in this case against the northwestern turnpike company, composed as it is exclusively of officers of

litigation—highway commissioners, for example[89]—exercised discretionary powers entitling them to quasi-judicial immunity.[90]

The actual workings of nineteenth-century quasi-judicial immunity as applied to a highway surveyor can be seen in the 1871 New Hampshire case of *Waldron v. Berry*.[91] Waldron, an owner of land adjacent to a highway, sued Berry, a highway surveyor, for removing a wall and sidewalk Berry had built within the highway boundaries.[92] The *Waldron* court examined the statutes defining the authority of highway surveyors. It noted that the statutes generally empowered highway surveyors to repair and alter highways, but specifically withheld the power to make uncovered ditches on the side of highways adjacent te a dwelling house.[93] An earlier case had found a surveyor who had made such an uncovered ditch personally liable for the injury to an adjacent owner.[94] As the *Waldron* court explained, this was "because [the surveyor] did what he had no authority to do; he

---

> the government, having no personal interest in it, or in its concerns, and only acting as the organ of the commonwealth in effecting a great public improvement.

Sayre, 37 Va. (10 Leigh) at 456. This sounds to me much more like an extension of quasi-corporation immunity, already well-established, to the turnpike company, rather than the creation of an immunity protecting public officials sued personally.

89. *See* Sage v. Laurain, 19 Mich. 137, 141-42 (1869); Rowe v. Addison, 34 N.H. 306, 313 (1857); *see also* MECHEM ON PUBLIC OFFICERS, *supra* note 64, § 639, at 422.

90. Mid-nineteenth century quasi-judicial immunity, however, was little more than a restatement of existing principles of agency law and statutory justification, and had little in common with modern official immunity. Modern official immunity shields an official from personal liability precisely when he cannot justify his acts under a statute, either because no statute authorized such acts, or because the statute that purported te authorize such acts was unconstitutional and therefore void. The immunity always shields an officer from liability for acts that are otherwise recognized te violate statutery or constitutional rights.

Although twentieth-century courts and commentators have found support for this modern official immunity doctrine in mid-nineteenth century cases such as *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), such cases did not contemplate an immunity for unjustifiable acts. As David Engdahl has argued:

> The rule which all of these authorities endorsed was that certain wrongs may be done on behalf of the state, and *if authorized both* in fact *and* in contemplation of law they are not personal wrongs of the officer; but in each case not only must it be shown that the act was one legally capable of being authorized, but also the act must be found within the terms of authority actually given.

Engdahl, *supra* note 79, at 48 (emphasis in original).

91. Waldron v. Berry, 51 N.H. 136 (1871).

92. *See id.* at 137 ("The plaintiff had built a side-walk and hank wall on his land in the highway; and the defendant, as highway surveyor, removed the wall, and used the earth of the side-walk . . . in filling up and repairing the road."). To make sense of the statement that the plaintiff had built "on his land in the highway," one must recall the traditional rule that the public had only a right-of-way easement in highways, and the underlying fee simple remained in the abutting owners. *See, e.g.*, 3 KENT, *supra* note 47, at 666-71. Thus, Waldron built on that portion of the highway to which he retained the fee simple, subject te the public's right of way.

93. *See Waldron*, 51 N.H. at 144.

94. *See* Adams v. Richardson, 43 N.H. 212, 213 (1861).

acted outside of and beyond his jurisdiction."[95] The court did not state whether the surveyor reasonably believed that he had the power to make uncovered ditches because that was irrelevant to its analysis; the quasi-judicial immunity of this era did not protect an officer outside the bounds of statutory authority. Nor did it protect an officer when the statute under which he sought to justify his actions was unconstitutional.[96]

In *Waldron*, because the surveyor was acting within the scope of his statutory authority, and the constitutionality of that statute, which provided damages for any injury to adjacent private land,[97] was not challenged, he could not be held liable for his judgment that the removal of Berry's wall and sidewalk was necessary for road repairs so long as he acted in good faith and "according to the best of his abilities."[98] The good faith doctrine avoids liability for negligence. In general, courts developed a doctrine under which statutory authorization to perform some act did not shield the authorized party from liability for negligent performance of that act.[99] *Waldron*, however, specifically rejected negligence liability for an officer protected by quasi-judicial immunity:

> The question of *reasonable* care and skill, or of *ordinary* care and skill, can have no place here. If the surveyor acts in good faith and in the exercise of *his own* best skill and judgment, that is all he is responsible for. His skill and judgment may not amount to the ordinary degree among men in general, but that is not his fault. All the law requires of him is to do the best he can with such an amount of judgment, or of care and skill, as he possesses: beyond that he is not responsible.[100]

---

95. *Waldron*, 51 N.H. at 145.

96. Two of the cases *Waldron* discusses as exemplifying application of quasi-judicial immunity, *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 430-31 (1823) and *Benden v. Nashua*, 17 N.H. 477, 478 (1845), are careful to hold that the authorizing statute does not violate the state just compensation clause because that clause does not reach consequential injuries. *See Waldron*, 51 N.H. at 143 (discussing *Callender* and *Benden*). The distinction between direct and consequential injury was the most important distinction in early to mid-nineteenth century just compensation law, and *Callender* was the leading American case. I discuss the distinction below at text accompanying notes 118-47.

97. *Waldron*, 51 N.H. at 144.

98. *Id.* at 147.

99. *See* Engdahl, *supra* note 79, at 48 (noting that "under the doctrines judicially developed and consistently applied during the nineteenth century, an official was liable notwithstanding his superior's orders not only for any act that contravened the Constitution but also for constitutionally pormissible acts which were tortious because they violated standards of reasonable necessity or due care . . . ."); *infra* text accompanying notes 159-67.

100. *Waldron*, 51 N.H. at 147 (emphasis in original).

Not until the early twentieth century did quasi-judicial immunity begin to be transformed into modern official immunity doctrine.[101]

If the general doctrine of quasi-judicial immunity left any doubt about whether a property owner could recover from a public officer for injury to his property, a more specific rule developed after the Civil War by John Dillon and Thomas Cooley laid owners' worries to rest. In a concurrence in the 1868 case of *McCord v. High*, Dillon, then Chief Judge of the Iowa Supreme Court, concluded that whatever the scope of quasi-judicial immunity, it had to be limited so as to allow vindication of property rights.[102] Like Justice Story before him, Dillon formulated a rule that explicitly took into account the availability of other remedies. He noted that, in *McCord*, neither the road district, nor the township, nor the county was subject to suit, "so that although the injury done the plaintiff is a direct invasion of his rights of property, and actionable in its nature, he is without remedy, unless it be against the defendant."[103] Dillon then concluded "that where a public officer other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure."[104] Fifteen years later, Thomas Cooley, as a Michigan Supreme Court Justice, wrote an opinion in *Cubit v. O'Dett*[105] that was paired with Dillon's concurrence in *McCord* in later cases and treatises,[106] but might be read to express the more traditional principle that officers could not be authorized to commit acts amounting to an unconstitutional taking, and would be liable for those acts without regard to their good faith.[107] Whether the expression of a traditional principle, or the development of a particular rule to protect property,

---

101. *See* Engdahl, *supra* note 79, at 52; Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585-86 (1927) (noting that as of 1927, the "great weight of authority" was still that a public official could never justify action under a statute subsequently declared unconstitutional; the first case to suggest otherwise was decided in 1880).

102. McCord v. High, 24 Iowa 336, 350 (1868).

103. *Id.*

104. *Id.*

105. Cubit v. O'Dett, 51 Mich. 347 (1883).

106. *See, e.g.*, Lowe v. Conroy, 97 N.W. 942, 945 (Wis. 1904); MECHEM ON PUBLIC OFFICERS, *supra* note 64, § 642, at 428-29.

107. *See Cubit*, 51 Mich. at 351:

> Highway authorities have no more right than private persons to cut drains the necessary result of which will be te flood the lands of individuals .... This rule sometimes, when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it.

the doctrine of *McCord* and *Cubit* left most individual officials in just compensation litigation vulnerable to liability in damages.

3. Justification: Statutory Interpretation and Coustitutional Limits

Assume that an aggrieved property owner has sued a party who caimot claim common law immumity, and has proven that the party's acts amount to trespass or trespass on the case at common law. In typical just compensation litigation, the defendant would answer that those acts were justified by a statute that altered common law liability; the plaintiff would reply that the statute was unconstitutional and therefore could not serve as a justification. Although the issues raised by the defendant's answer and the plaintiff's reply—what the legislature meant to do and whether it had the power te do it—are in theory analytically distinct, many nineteenth-century American courts muddied that distinction, and variously framed the doctrine they developed as canons of statutory interpretation, constitutional principles, or interpretive principles based on the common law. Three reasons contributed to the blending and wavering of the antebellum just compensation doctrine among statutory interpretation, constitutional limitation, and common law elaboration.

First, the statutes to which just compensation defendants appealed for justification almost never explicitly addressed the issue of conferring immumity, leaving courts free to develop a doctrine of implied justification that could draw on both common law traditions and constitutional concerns. Most attempts at statutory justification in just compensation litigation involved appeals, not to general legislation legalizing acts that would otherwise amount to trespasses or nuisances,[108] but to acts granting authority to particular public officers,[109] authorizing particular public works,[110] or, most importantly,

---

108. For a fairly rare example of nineteenth-century litigation involving general legislation legalizing nuisances, see *Sawyer v. Davis*, 136 Mass. 239, 243-44 (1884) (upholding a law empowering municipalities to license businesses to ring bells that would otherwise amount to nuisances).

109. *See, e.g.*, Callender v. Marsh, 18 Mass. (1 Pick.) 418, 426-30 (1823) (a surveyor of highways named as a defendant in an action of trespass on the case successfully justifies his acts by reference to a statute defining the authority of surveyors of highways).

110. *See, e.g.*, Rogers v. Bradshaw, 20 Johns. Ch. 735, 735 (N.Y. Ch. 1823) (defendants in a trespass action "pleaded a justification, under the several acts relative to canals," that is, acts authorizing the building of canals); Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 163 (N.Y. Ch. 1816) (trustees of village unsuccessfully attempt to defend against action for injunction by invoking statute authorizing them to obtain a water supply for the village).

chartering particular corporations.[111] Through the mid-nineteenth century, American state legislatures created virtually all corporations by special charter or franchise, with particular powers and privileges and for particular purposes.[112] Typically, then, a corporate defendant would argue that its charter implicitly legalized all acts necessary to further the purposes for which the charter was granted. A public defendant would argue, similarly, that an act specifically authorizing a public works project or creating an office responsible for public works implicitly legalized acts reasonably in furtherance of that project or within the scope of that office.

A second reason for blending statutory, constitutional, and common law analysis in considering the defendant's justification in just compensation cases was that American courts considered the most important precedent in the area to be English cases that acknowledged Parliament's plenary power to appropriato property and leave owners without a remedy.[113] The English courts that had de-

---

111. *See, e.g.*, Thacher v. Dartmouth Bridge Co., 35 Mass. (18 Pick.) 501, 501 (1836) (bridge company's appeal to its act of incorporation to justify its trespass unavailing, because grant of eminent domain power must be explicit and grant of such power without provision for just compensation would be void); Monongahela Navigation Corp. v. Coons, 6 Watts & Serg. 101, 114-15 (Pa. 1843) (holding company not liable for consequential damages caused by damming the Monongahela River because legislature's incorporation of company was valid exercise of authority).

112. *See* University of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 88 (1805) (noting that "[i]n every institution of that kind, the ground of establishment is some public good or purpose intended te be promoted . . . ."); 1 KYD, *supra* note 59, at 320 ("Corporations having been established at different periods, and with different views, the particular constitution of each depends on the provisions of the charter, by which it was erected, or on the prescriptive usage which time has imperceptibly introduced."). Specially-chartered corporations accounted for most of the activity that would lead to complaints of appropriation of proporty: building roads, bridges, canals, and railroads, and providing services such as water and sewage. Most early American "private" corporations were chartered for the purpose of building infrastructure (and a banking system) rather than manufacturing. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 10 (1932) (stating that of the 335 profit-seeking corporations incorporated in the United States by 1800, 219 were turnpike, bridge, and canal companies; 36 furnished water and fire protection or dock facilities; 67 were banks and insurance companies; and only six were manufacturers).

113. English courts had not always recognized parliamentary omnipotence. Edward Coke's opimion in *Dr. Bonham's Case* is the most famous proof of this notion. *See* Dr. Bonham's case, 77 Eng. Rep. 638, 652 (C.P. 1610) ("[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason . . . the common law will controul it, and adjudge such Act to be void . . . ."). After the Revolution of 1688, however, the principle of parliamentary sovereignty became quite solidly established, and was orthodoxy by the time the first relevant just compensation case was decided in 1773. *See* Leader v. Moxon, 96 Eng. Rep. 546 (C.P. 1773), *reported sub nom.* Leader v. Moxton, 95 Eng. Rep. 1157. Philip Hamburger argues persuasively that Chief Justice Holt's opinion in *City of London v. Wood*, 88 Eng. Rep. 1592 (K.B. 1796), acknowledged parliamentary sovereignty, in spite of earlier views that it asserted a power of judicial review. *See* Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of Lendon v. Wood, 94 COLUM. L. REV. 2091, 2095 (1994).

cided those cases developed an alternative tradition of crafting canons of statutory interpretation to reflect "constitutional" principles, including just compensation principles, and of applying these canons quite obstinately when the occasion demanded.

A third reason for blending of analyses was the novelty of judicial review in the early nineteenth-century United States. Written constitutions enforceable by courts were of recent vintage—many state constitutions did not have just compensation provisions until well inte the nineteenth century.[114] As a result, even those courts operating under written just compensation provisions often decided cases on statutery grounds,[115] and courts relying on unwritten constitutional principles were usually even more circumspect about confronting the legislature with its limitations.[116] For these reasons, the most important distinctions that shaped antebellum just compensation doctrine had both interpretive and constitutional dimensions, and I will therefore consider those dimensions together.[117]

a. Direct and Consequential Injuries

The most important distinction that shaped antebellum just compensation doctrine, that between direct and consequential injuries, drew its support from a string of English cases decided between 1792 and 1824, and was eventually undermined by an influential 1871 case.

In 1773, the English Court of Common Pleas decided *Leader v. Moxon*, which held a group of road commissioners liable for raising the grade of a street in front of a group of houses by more than six

114. Of the first 14 states, only three had a just compensation provision in 1800, only seven in 1850, and only nine even in 1868. *See* J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931). On the development of extratextual just compensation limitations on the legislature in the first half of the nineteenth century, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 140-42 (1998) [hereinafter AMAR, THE BILL OF RIGHTS].

115. *See, e.g.*, *Thacher*, 35 Mass. (18 Pick.) at 502; Perry v. Wilson, 7 Mass. (6 Tyng) 393, 394-95 (1811).

116. For prominent just compensation cases in states without a constitutional provision that were actually decided on statutory grounds, see *Sinnickson v. Johnson*, 17 N.J.L. 129, 145-46 (1839), and *Gardner v. Newburgh*, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816) ("I am persuaded that the Legislature never intended, by the Act in question, to violate or interfere with this great and sacred principle of private right.").

117. The distinctions between public and private agents and between public and private nuisance liability also had this split character. Only the distinction between negligent and non-negligent acts did not seem te have any developed constitutional dimension.

feet, blocking passage, light, and air to the houses.[118] Sir William Blackstone, who sat on the *Leader* court and reported the case, had completed his *Commentaries on the Law of England* just four years earlier.[119] The *Commentaries* contained two statements that, read literally and in isolation, seemed to contradict each other. On the one hand, Blackstone acknowledged the absolute sovereignty of Parliament: It could "do every thing that is not naturally impossible . . . what the parliament doth, no authority on earth can undo."[120] On the other hand, Blackstone stated that when the legislature took an individual's property, it did so "[n]ot by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[121] *Leader* suggests how Blackstone, following and reinforcing the English tradition,[122] reconciled parliamentary sovereignty with the just compensation principle: through a strong interpretive presumption. The *Leader* court, Blackstone reports, reasoned that "had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individuals might have sustained thereby."[123] Thus, although Parliament had authorized the road commissioners "to pave, repair, sink and alter the streets,"[124] it was not "consistent with common sense that the plaintiff must pay [a street improvement assessment] to have her houses buried, and the lights and free passage of her houses obstructed and hindered."[125] The commissioners, therefore, acted outside of their statutory authorization, and were liable in tort; Blackstone apparently even thought that punitive damages were appropriate.[126]

Although the tradition of enforcing unwritten coustitutional norms through interpretive presumptions survived into the nineteenth century, the specific presumption in *Leader* did not. Beginning

118. Leader v. Moxon, 96 Eng. Rep. 546, 547 (C.P. 1773), *reported sub nom.* Leader v. Moxton, 95 Eng. Rep. 1156.

119. The four volumes of the *Commentaries* were published between 1765 and 1769. *See* George Sharswood, *A Memoir of Sir William Blackstone*, *in* WILLIAM BLACKSTONE, COMMENTARIES v, xiv (George Sharswood ed., 1886).

120. 1 BLACKSTONE, *supra* note 37, at *161.

121. *Id.* at *139.

122. *See supra* text accompanying note 113.

123. *Moxon*, 96 Eng. Rep. at 547.

124. Leader v. Moxton, 95 Eng. Rep. 1156, 1160 (C.P. 1773) (Blackstene, J.).

125. *Id.*

126. *See id.* ("I think the commissioners have acted arbitrarily and tyranically, and that the damages are too small.").

in 1792, English courts decided three influential cases drawing a distinction between direct and consequential injuries, and holding that public officials acting under turnpike and road improvement acts were not liable for consequential injuries caused by road construction: *Governor v. Meredith*,[127] *Sutton v. Clarke*,[128] and *Boulton v. Crowther*.[129] In *Boulton*, Justice Littledale announced a broad interpretive presumption against holding road commissioners liable:

> [W]here an Act of Parliament vests a power in trustees or commissioners, to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the Legislature must be taken to have intended, that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit.[130]

Significantly, however, Parliament had authorized compensation, in all three cases, for those whose land was directly physically occupied by the public work.[131] The allegation in *Boulton*,[132] like the allegations in the two earlier cases holding the commissioners not liable,[133] charged only that the commissioners had "ma[de] some alterations in the road, from which a consequential injury ar[ose] to the plaintiff."[134] Thus, the cases came to stand for the somewhat narrower presumption that Parliament intended to offer no compensation for "consequential injuries" when an Act did not explicitly provide for

---

127. Governor v. Meredith, 100 Eng. Rep. 1306, 1308 (K.B. 1792).

128. Sutton v. Clarke, 128 Eng. Rep. 943, 949 (C.P. 1815).

129. Boulton v. Crowther, 107 Eng. Rep. 544, 546-47 (K.B. 1824).

130. *Id.* at 547. *Meredith*, *Boulton*, and *Sutton* all had trouble distinguishing *Leader*. In *Meredith*, Lord Kenyon said that he "doubt[ed] the accuracy of the report" of *Leader*. *Meredith*, 100 Eng. Rep. at 1307. In *Boulton*, Justices Bayley and Littledale stated rather conclusorily that *Leader* was distinguishable because the Commissioners had there exceeded their authority. *Boulton*, 107 Eng. Rep. at 546-47. *Sutton* made *Leader* into, essentially, a negligence case, as I will discuss below. *See infra* text accompanying notes 159-67.

131. *See Boulton*, 107 Eng. Rep. at 545; *Sutton*, 128 Eng. Rep. at 944; *Meredith*, 100 Eng. Rep. at 1307 n.(b).

132. The plaintiffs in *Boulton* alleged principally that the commissioners had changed the grade of the road in front of the main entrance to the plaintiff's land, rendering access to the land more difficult. *Boulton*, 107 Eng. Rep. at 545. The plaintiffs also alleged that "part of the materials of the road had fallen into the plaintiff's premises, and damaged his hedge and plantations." *Id.*

133. In *Meredith*, the plaintiffs alleged that commissioners appointed by a Paving Act had raised the grade of the street in front of the gate leading to their plate glass warehouses, reducing the clearance of the gate so that they could not drive wagons loaded with glass in and out of it. *Meredith*, 100 Eng. Rep. at 1306. In *Sutton*, the plaintiff alleged that the trustees had, in the course of improving a road, built a drainage ditch that discharged water onto the plaintiff's land (although the ditch itself was not located on plaintiff's land). *Sutton*, 128 Eng. Rep. at 943.

134. *Boulton*, 107 Eng. Rep. at 547.

such compensation. In the antebellum United States, the cases became the leading precedent for limiting just compensation provisions, which were widely interpreted to extend only to direct injuries.[135]

As I have suggestod above,[136] the distinction between "direct" and "consequential" injuries drew on the distinction between the common law forms of action of trespass and trespass on the case. Consequential injuries were those for which one could not maintain a trespass action, but had to use case. Thus, if certain acts could uncontroversially support an action of trespass or trespass *quare clausum fregit*, purported statutory authorization of those acts without provision of just compensation would be void, often leading courts to construe statutes not to attempt such authorization. In the 1811 case of *Perry v. Wilson*, for example, Perry brought an action of trespass *quare clausum fregit* alleging that Wilson had entered Perry's land and stored logs there, injuring the land.[137] Perry alleged neither that Wilson had taken any logs or other property belonging to Perry, nor that he had excluded Perry from possession, but only that he had invaded Perry's land and damaged it.[138] Wilson attempted to justify his acts under a Massachusetts special charter creating a corporation, of which he was a proprieter, to transport logs down the Androscoggin River. The court, however, held that the charter, if construed to authorize such an invasion of Perry's land, would be void, because it

---

135. For leading American just compensation cases citing these English cases, see *Transportation Corp. v. Chicago*, 99 U.S. 635, 641 (1878); *Hollister v. Union Co.*, 9 Conn. 435, 445-46 (1833); *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 434-35 (1823); *Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. (11 Tyng) 466, 468 (1815); *City of St. Louis v. Gurno*, 12 Mo. 414, 424 (1849); *Radcliff's Executors v. Mayor of Brooklyn*, 4 N.Y. 195, 204 (1850); *Wilson v. Mayor of New York*, 1 Denio 595, 597-98 (N.Y. 1845); *Green v. Borough of Reading*, 9 Watts 382, 385 (Pa. 1840); *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49, 64 (1852). For prominent treatment of the English cases in an American treatise, see JOSEPH K. ANGELL & THOMAS DURFEE, A TREATISE ON THE LAW OF HIGHWAYS §§ 208-10, at 181-85 (1857).

Seemingly alone among American courts, those of Ohio rejected the distinction between direct and consequential injuries, and held that municipal corporations were liable for consequential injuries occasioned by legislatively authorized, non-negligent acts. *See* Town Council v. McComb, 18 Ohio 229, 231-32 (1849); McCombs v. Town Council, 15 Ohio 474, 479 (1846); Rhodes v. City of Cleveland, 10 Ohio 159, 161 (1840).

136. *See supra* text accompanying notes 36-46.

137. Perry v. Wilson, 7 Mass. (6 Tyng) 393, 394 (1811).

138. William Michael Treanor describes *Perry* as involving the taking of logs belonging to Perry. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 706-07 n.71 (1985) (citing *Perry* for the proposition that the Massachusetts Constitution's just compensation clause was held to require compensation for the taking of personal property, and describing the case as involving "logs taken for use in canal construction"). In fact, although Wilson "carr[ied] away . . . logs," *Perry*, 7 Mass. (6 Tyng) at 393, Wilson, not Perry, was the "owner of the logs carried away," *id.* at 394; Perry alleged only that Wilson had "placed them [on Perry's land] . . . and . . . carried them away, without paying [Perry] any compensation for the damage done him by their being placed upon, or their removal from his [land]." *Id.*

provided no compensation for the invasion.[139] Therefore, Perry prevailed in his trespass action.[140] On the other hand, courts generally agreed that if certain acts could not support a trespass action, uncompensated statutory authorization of those acts did not run afoul of the constitution.[141]

The term "consequential" was also used, often in compound phrases like "remote and consequential," to indicate the lack of proximate causation, barring recovery under any common law form of action, independent of statutory justification.[142] Thus, for example, a New Jersey court held that a turnpike company could not recover damages for loss of tolls from a railroad company even though the railroad company had no statutory justification under New Jersey doctrine. The damage, held the court, was only "a consequence which results from the fears, prejudices, passions or caprices of the public"—fear and discomfort from having steam engines run adjacent to the turnpike—and hence not "the direct and natural result of the act itself."[143] Courts bolstered acceptance of the notion that a legislature could eliminate recovery for injuries actionable in case by conflating or mixing the two meanings of "consequential." Many of the cases holding that legislatures could shield corporations from liability for consequential damage used language suggesting that the damage was likely to be trivial, unforeseeable, or otherwise undeserving of sympathy. In *Hollister v. Union Co.*, for example, the Connecticut Supreme Court denied recovery for erosion of riparian land caused by changes in the river flow made by a corporation charged with improving river navigation.[144] "The defendants," reasoned the court, "have, under the

---

139. *See id.* at 394-95.

140. *See id.*

141. Perhaps the most common type of case of that kind in the first half of the nineteenth century was the street grading case, in which the plaintiff alleged that a change in grade of a street on which his property abutted diminished the value of that property. *See, e.g.*, Smith v. Corporation of Wash., 61 U.S. 135 (1857); Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823); City of St. Louis v. Gurno, 12 Mo. 414 (1849); Wilson v. Mayor of New York, 1 Demo 595 (N.Y. 1845); O'Connor v. Pittsburgh, 18 Pa. 187 (1851); Green v. Borough of Reading, 9 Watts 382 (Pa. 1840). Ohio courts, the sole dissenters from this early to mid-nineteenth-century consensus, held that cities were liable for changes in street grade if (1) they had previously established the grade of a street and (2) an abutting owner had built in reliance on that established grade. *See, e.g.*, Crawford v. Village of Del., 7 Ohio St. 459 (1857). I further consider street grading and the judicial recognition of "easements of access" below at text accompanying notes 306-11.

142. *See, e.g.*, THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 112 (2d ed. 1852) (concluding that in assessing damages for terts, "[t]he general rule . . . is, to adhere as closely as posible to the maxim, that the natural and proximato consequences of the act are alone to be taken into consideration.").

143. Bordentown & S. Amboy Turnpike Rd. v. Camden & Amboy R.R. & Transp. Co., 17 N.J.L. 314, 320-21 (1839).

144. Hollister v. Union Co., 9 Conn. 430, 446 (1833).

sanction of the authority of the legislature . . . operated upon this river so as to produce an inconvenience—a remote and consequential injury to the plaintiff's land."[145]

Although there was some conflation of lack of actionability in trespass and lack of proximate causation, in the end most courts drew a distinction between the two; while the latter defined the limits of private liability in tort, the former defined the narrower limits of the constitutional just compensation obligation. As a result, the eminent domain power was understood to be not merely the power to take property with just compensation, as we now think of it,[146] but also the power to inflict certain privately actionable injuries without compensation. When a defendant claimed statutory authorization as a defense to a tort action, he was understood to be claiming that the state had delegated its power of eminent domain to him, and that any injuries caused by his exercise of that power did not give rise to a just compensation claim, although they might otherwise have been actionable as torts. As Chief Justice Gibson explained in *Monongahela Navigation Corp. v. Coon*, incorporating a discussion of the limitation added by a just compensation clause:

> The state itself is answerable for private damage no further than it is expressly made so by the provision of the constitution which forbids private property to be taken for public use, without compensation made for it. A grant of this eminent domain, so far as it is not specially restricted, passes the immunity from responsibility which pertained to it while it was in the hands of the state; and a corporation invested with it, being the *locum tenens* of the state, is liable to consequential damage to private property no further than it is declared to be so in the act of its incorporation.[147]

---

145. *Id.*; *see also* Lansing v. Smith, 8 Cow. 146, 149, 151 (N.Y. 1828) ("[W]here the injury sustained is remote and consequential, it is *damnum absque injuria*"; it is a matter of "partial individual convenience"; when inconveniences are "consequential, slight and temporary, it is *damnum absque injuria*, for which no action can be sustained."). On the development of "consequential damages" as a limiting principle, see HORWITZ, *supra* note 88, at 71-74.

146. By the early years of the twentieth century, eminent domain had come to be understood more narrowly as the power to take with compensation, often opposed te the police power, considered as the power to modify property rights without compensation. *See, e.g.*, Block v. Hirsch, 256 U.S. 135, 156 (1921) (Holmes, J.) ("For just as there comes a point at which the police power ceases and leaves only the power of eminent domain, regulations of the letting of building may be pressed to a point where they amount to a taking of property without due process of law."); Louisville & Nashville R.R. Co. v. Central Steck Yards Co., 212 U.S. 132, 150 (1909) (McKenna, J., dissenting) ("By the exercise of the . . . [eminent domain] pewer property is taken and compensation for it is a necessary condition; by the exercise of the . . . [police] power property is subjected te regulation and a provision for compensation is not necessary.")

147. Monongahela Navigation Corp. v. Coon, 6 Pa. 379, 382 (1847). For similar discussions, see *Transportation Co. v. Chicago*, 99 U.S. 635, 641 (1878); *O'Connor v. Pittsburgh*, 18 Pa. 187, 189 (1851) (Gibson, C.J.); ANGELL & DURFEE, *supra* note 135, § 207, at 181 ("The public acts,

The preeminence of the direct/consequential injury distinction in limiting just compensation liability lasted until 1871, when two influential cases called the distinction into question and signaled its demise. Both cases addressed the issue whether acts causing flooding of neighboring land amounted to takings. Just as flooding cases had led mid-eighteenth century courts to disagree whether trespass or case actions were appropriate,[148] they had led mid-nineteenth century courts to disagree whether just compensation was required.[149] Faced with cases in this persistently-disputed area, both the New Hampshire Supreme Court and the United States Supreme Court discarded the direct/consequential distinction altogether, and formulated new takings tests. The opinion in *Eaton v. Boston,*

---

and is amenable, only through its officers, whose powers are commonly defined by statutes, and who, so long as they do not exceed those powers, cannot be held to answer for the consequences of their acts, unless the statutes themselves are void."); SEDGWICK, *supra* note 142, at 111 ("The proper light in which to regard the matter is to consider the grantee of the franchise, or the public agent, so long as he does not transcend the authority conferred on him, as representing the government, and the government as acting under its right of eminent domain, subject, of course, to its liability to make compensation, and to that liability only."); *On the Liability of the Grantee of a Franchise to an Action at Law for Consequential Damages, from its Exercise*, 1 AM. L. MAG. 52, 60 (1843) ("The proper light in which to regard the subject, is to consider the grantee of a franchise as representing the government. Then, whatever are the rights of the government, belong to the grantee, and the same liabilities which affect the government, attend the exercise of the franchise.").

143. *See generally* 2 DANE, *supra* note 44, at 492 (comparing Courtney v. Collett, 91 Eng. Rep. 1079 (K.B. 1697) with Haward v. Banks, 97 Eng. Rep. 740 (K.B. 1760)).

149. Missouri, New York, and Pennsylvania cases held that flooding of land caused by public works was merely consequential injury that could be statuterily authorized without just compensation. *See* City of St. Louis v. Gurno, 12 Mo. 414, 418 (1849); Wilson v. Mayor of New York, 1 Demo 595, 600 (N.Y. 1845); West Branch & Sesquehanna Canal Co. v. Mulliner, 68 Pa. 357, 360 (1871); Monongahela Navigation Co. v. Coons, 6 Watts & Serg. 101, 113 (Pa. 1843); *cf.* Mayor v. Randolph, 4 Watts & Serg. 514, 516-17 (Pa. 1842) (holding that a municipal corporation is not liable for statuterily authorized acts causing flooding, but not explicitly considering whether such authorization would violate a just compensation clause). Connecticut and Vermont cases held that flooding required compensation. *See* Hooker v. New-Haven & Northampton Co., 14 Conn. 146, 157 (1841) (holding that charter of canal could not immunize canal company from liability for flooding without providing just compensation); Hatch v. Vermont Cent. R.R. Co., 25 Vt. 49, 68-70 (1852). The law in Connecticut was somewhat complicated. *Hooker* purported to distinguish, rather than overrule, an earlier case, *Hollister v. Union Co.*, 9 Conn. 435 (1833), which had held that a canal company authorized by the legislature was not liable for flooding damages. *Hooker* later returned to the Connecticut Supreme Court and was decided on different grounds, namely, that immunity would not be implied in the charter of a private corporation, as opposed to legislation creating a public agency. *See* Hooker v. New-Haven & Northampton Co., 15 Conn. 312 (1843); *infra* text accompanying notes 168-76 (discussing the private/public agent distinction). For treatises noting the split in authority between states about protection from liability for damages from flooding, see ANGELL & DURFEE, *supra* note 135, §§ 217-218, at 192-94; 1 LEWIS, *supra* note 35, § 103, at 224.

Concord & Montreal Railroad,[150] the New Hampshire case, contained the more explicit assault on the direct/consequential distinction.

The *Eaton* court noted that the distinction gathered much of its intuitive appeal from a conflation of the boundary between trespass and case with the issue of proximate causation; once that conflation was exposed, contended the court, the intuitive appeal faded, and the rule that injury actionable in case could not amount to a taking seemed "arbitrary."[151] The *Eaton* court's sense that the trespass/case distinction was arbitrary, however, was a result of much more than the exposure of that particular conflation. For several decades before *Eaton* was decided, law reformers had attacked common law pleading as unjustifiably convoluted, and had succeeded in many states in procuring the passage of legislation abolishing the forms of action, beginning with the famous 1848 New York Code of Civil Procedure, masterminded by David Dudley Field.[152] Acceptance of those procedural reforms, in turn, reinforced the sense that any legal doctrine depending on a distinction between two forms of action was arbitrary and outmoded. *Eaton* explicitly discussed these developments and noted their effect:

> "We are not to suppose that the framers of the constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and incumbered." Such a test would be inapplicable in a large proportion of the States, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action.[153]

---

150. Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504 (1872).

151. The *Eaton* court went on to note that:

> When . . . it is said that a land-owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would have not been actionable at common law if done by a private individual, the proposition is correct . . . . If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitary rule that such damage can in no event amount to a "taking of property."

Id. at 520.

152. *See* 1848 N.Y. Laws ch. 379, pt. 2, tit. VI.

153. *Eaton*, 51 N.H. at 520 (citations omitted). *Eaton* does not cite the source of its quotations, but the first one is from Chief Justice Gibson's opinion in *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101, 114 (Pa. 1843). The intended effect is one of irony. Gibson's opinion in *Monongahela Navigation Co.* is one of the landmark cases adopting the direct/consequential distinction and classifying damages from flooding as consequential; in the quotod excerpt, Gibson is rejecting the pleading categories predating the forms of action of trespass and case, under which a victim of flooding apparently had the election of proceeding

Despite some language that suggested that public liability for takings should be equivalent to common law private liability for torts, *Eaton* did not strongly advocate making all torts takings.[154] The principle suggested by *Eaton*'s discussion is that a tort will be a taking when it is defined and permanent enough that it is as if the tertfeasor subjected the owner's property to an easement, removing a strand from the owner's bundle of rights.[155] The United States Supreme Court used a similar approach in *Pumpelly v. Green Bay Co.*[156] Applying the Wisconsin Constitution in a diversity action, the Court held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectively destroy its usefulness, it is a taking, within the meaning of the Constitution."[157] Descendants of these tests continue to determine whether governmentally-sanctioned activities amount to takings.[158]

b. Negligent and Non-Negligent Acts

A second distinction that found a place in the antebellum just compensation law was that between negligent and non-negligent acts. Recall that the 1773 case of *Leader v. Moxon* held road commissioners liable for blocking passage, light, and air of abutting houses, a holding that later English cases had difficulty distinguishing.[159] In 1815, in *Sutton v. Clarke*, Chief Justice Gibbs argued that the commissioners in *Leader* did not exceed their jurisdiction, but acted "wantonly and

---

either under the action that was the predecessor to trespass, or under the action that was the predecessor to case:

> It is true, that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had remedy for it by assize of novel disseisin, or assize of nuisance, at his election; but we are not te suppose that the framers of the Constitution meant te entangle their meaning in the mazes of the *jus antiquum*.

Id. Thus, the passage in *Eaton* advocating the end of the trespass/case distinction in just compensation law invokes language from an opinion advocating the adoption of that distinction.

154. I discuss this aspect of *Eaton* in more detail below. *See infra* note 286.

155. *See Eaton*, 51 N.H. at 514-15. I discuss *Eaton*'s legal pesitivism and its language limiting takings liability *infra* at text accompanying notes 283-89.

156. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

157. *Id.* at 181.

158. *See* United States v. Causby, 328 U.S. 256, 266 (1946) ("Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land . . . . We agree with the Court of Claims that a servitude has been impesed upon the land."); *see also* Portsmouth Land & Harbor Hotel Co. v. United States, 260 U.S. 327, 330 (1922) (noting that "the specific facts set forth [about regular firing of coastal defense guns over resort hotel grounds] would warrant a finding that a servitude has been imposed.").

159. Leader v. Moxon, 96 Eng. Rep. 546 (1773), *reported sub nom.* Leader v. Moxton, 95 Eng. Rep. 1156.

oppressively," because "the injury might have been avoided by doing the act in a different way."[160] By contrast, Gibbs contended, in *Sutton* itself, "the commissioners, at the time of doing the act, took every precaution to prevent injury to the surrounding land."[161] Further, Gibbs noted that "[n]o imputation of negligence rests on them, and they did the act in the manner, which, according to the best information they could obtain, was the best mode."[162] Out of this effort to distinguish *Leader* eventually arose the doctrine that legislative authorization would not immunize agents from liability for negligence.[163] The courts understood this doctrine te distinguish between the work authorized—say, building a road—and the way that work was accomplished: "The act done being itself lawful, can ouly become unlawful in consequence of the mode in which it is carried inte execution."[164] As the concept of "negligence" more broadly gained its modern cast of objectivity,[165] the implied qualification te legislative authorization followed.[166] By 1847, the North Carolina Supreme Court upheld a judgment against the commissioners of the tewn of Wilmington for failing to exercise "ordinary skill and caution" in reducing the grade of a street, because it concluded that legislative authorization of work always implied "a condition . . . that the work shall be done properly."[167]

---

160. Sutton v. Clarke, 128 Eng. Rep. 943, 948 (C.P. 1815).

161. *Id.*

162. *Id.*

163. Seven years after *Sutton*, the Court of King's Bench put the negligence exception to work, upholding an award against sewer commissioners for damage caused by failing to shore up a sewer during repairs. The court concluded that the jury had found that the commissioners were negligent, and that *Sutton* was for that reason distinguishable. *See* Jones v. Bird, 106 Eng. Rep. 1397, 1399-400 (K.B. 1822). For an example of a treatise tracing to *Leader* the doctrine that statutory authorization does not eliminate liability for negligence, see ANGELL & DURFEE, *supra* note 135, § 219, at 194-95.

164. Boulton v. Crowther, 107 Eng. Rep. 544, 547 (K.B. 1824).

165. The case of *Vaughan v. Menlove*, 132 Eng. Rep. 490, 493-94 (C.P. 1837), is a suggested turning point. It is generally recognized as the first to establish that the test of negligence in tort law is objective. *See* A.W. Brian Simpson, *The Elusive Truth About Holmes*, 95 MICH. L. REV. 2027, 2028 (1997).

166. For a later notorious English case holding that a landowner could not recover for injury caused by fire set by sparks from a passing locomotive when its operation was sanctioned by the legislature and not negligent, see *Vaughan v. Taff Vale Ry.*, 157 Eng. Rep. 1352 (Ex. 1858).

167. Meares v. Commissioners of Wilmington, 31 N.C. (9 Ired.) 73, 76, 81-82 (1848). The court reasoned, somewhat weakly, that whereas a legislature could predict the amount of compensation required for injuries that were a necessary consequence of the project authorized, it could not know in advance the degree te which ordinary skill and care would be lacking in carrying out the project, and therefore could not provide for compensation for the lack of that ordinary skill and care. *See id.* at 81-82.

c. Public and Private Agents

Two of the prominent English cases holding that parliamentary authorization of public works shielded public agents from liability for consequential injuries caused by those works mentioned that the agents were granted powers to exercise, not for their own benefit, but for the benefit of the public.[168] This discussion raised the issue whether courts should apply the same rules of construction about implied grants of immunity to charters of private corporations as they did to charters of municipal corporations, and the issue whether the same rules should apply to municipal corporations whether acting in their governmental or proprietary functions. Courts and commentators split on these issues. On the one hand, Joseph Angell argued that the grant of immunity did not depend on the lack of private benefit and should be extended to a city even when acting in its proprietary capacity.[169] Many courts took Angell's argument one stop further, and read the charters of corporations operated for private profit to grant immunity implicitly from liability for consequential injuries.[170] On the other hand, a number of courts decided that private corporations should not enjoy the same implied immunity as public agents and entities, reflecting and contributing to the developing distinction between private and public corporations.[171] In *Ten Eyck v. Delaware & Raritan Canal Co.*, for example, the New Jersey Supreme Court held that the charter of a private canal company should not be read to grant the immunity from liability for consequential injuries that a public agent would receive.[172] The canal company, the court concluded, actod in its own private interest, and only incidentally in the public interest.[173] The company's charter permitted it to construct a

168. *See Boulton*, 107 Eng. Rep. at 547 (Littledale, J.); Sutton v. Clarke, 128 Eng. Rep. 943, 949 (C.P. 1815).

169. *See* ANGELL & DURFEE, *supra* note 135, § 210, at 185 (citing Mayor v. Randolph, 4 Watts & Serg. 514 (Pa. 1842)).

170. *See, e.g.*, Spring v. Russell, 7 Me. 273, 291 (1831); Monongahela Navigation Co. v. Coon, 6 Pa. 379, 382 (1847).

171. On this development in the context of common law liability, see *supra* text accompanying notes 61-77.

172. Ten Eyck v. Delaware & Raritan Canal Co., 18 N.J.L. 200, 204-05 (1841).

173. *See id.* at 204. In *Meares v. Commissioners of Wilmington*, 31 N.C. (9 Ired.) 73, 80-81, 86 (1848), the court rejected the argument that a municipal corporation should be immune from liability for negligence. Both business and municipal public corporations, argued the court, solicited and accepted grants of legislative power because of the benefit they would derive from them. *See id.* at 80. According to the *Meares* court:

> [A grant of power to a municipal corporation] is accepted because of the benefit which the corporation expects to derive, not by making money directly, but by making it more convenient for the individuals composing the corporation or town, to pass and repass in

canal, but did not compel construction, and allowed the company to abandon the project at any time.[174] Thus, there was no reason to believe that the legislature intonded "to interfere with private and vested rights, without providing a recompense to be paid by the company . . . ."[175] Later in the century, several courts hardened the public/private distinction from a rule of construction to a constitutional limitation on legislative power: legislatures could not confer upon private individuals and corporations the same immunity they conferred upon public agents without paying just compensation.[176]

d. Public and Private Nuisance Liability

Finally, courts sometimes held that the effect of a legislative authorization was to exempt the authorized party from liability for violation of public rights, but not for violation of private rights.[177] For

---

the transaction of business, and to benefit them by holding out greater inducements for others to frequent the town and thereby add to its business.

Id.

174. *See Ten Eyck*, 18 N.J.L. at 204. One writer who argued that corporate charters should be read to grant immunity described charters that did place affirmative duties on corporations. *See On the Liability of the Grantee of a Franchise to an Action at Law for Consequential Damages, from its Exercise*, 1 AM. L. MAG. 52, 64 (1843) ("It is th[e] duty [of a company established by the legislature] (and a duty which they may be compelled to perform) to enter upon the land of individuals, and to exercise the right granted, notwithstanding it may be attended with injurious cousequences to private rights."). Thus, a difference or change in attitude towards private corporate immunity might be due in part te differences or changes in the form of charters themselves.

175. *Ten Eyck*, 18 N.J.L. at 204; *see* Hooker v. New-Haven & Northampton Co., 15 Conn. 312, 320 (1843) (holding that the charter of a private corporation does not impliedly grant immunity from liability for consequential damages); Bordentown & S. Ambey Turnpike Rd. v. Camden & Ambey R.R. & Transp. Co., 17 N.J.L. 314, 320-21 (1839) (holding that a railroad was not liable for damage to a turnpike franchise even though, as a private corporation, it could not justify its acts under its charter, because the damage was too remote and speculative); Sinnickson v. Johnson, 17 N.J.L. 129, 147 (1839) (Dayton, J.); *id.* at 150-51 (Nevius, J.) (also developing the distinction between implied grants of immunity to public agents and private individuals or corporations). A later New Jersey court commented that the legislature did not have a good track record in making owners whole for injuries caused by private individuals and corporations under legislative authorization: "As applied to the acts of the legislature obtained in the interest of individuals or corporations, the hypothesis that the paternal care of the government will shield the citizen from injustice, is not confirmed by practice." Trenton Water Power Co. v. Raff, 36 N.J.L. 335, 340 (1873).

176. *See* Evansville & Crawfordsville R.R. Co. v. Dick, 9 Ind. 433, 435-36 (1857); Pennsylvania R.R. Co. v. Angel, 41 N.J. Eq. 316, 329-30 (1886) (noting that "an act of the legislature cannot confer upen individuals or private corporations, acting primarily for their own profit . . . any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners."); Alexander v. City of Milwaukee, 16 Wis. 204, 271-72 (1862) (noting that liability of municipal corporation working for the public good is more restricted than liability of corporation or individual working for private benefit).

177. *See, e.g., Sinnickson*, 17 N.J.L. at 147, 151-52 (Nevius, J.); Crittenden v. Wilson, 5 Cow. 165, 167 (N.Y. 1825).

example, a party authorized by statute to undertake some project, such as building a dam on a navigable stream, could "plead the act, to any indictment for a nuisance, or against any complaint for an infringement of a public right, but [could not] plead it as a justification for a private injury, which [might] result from the execution of the statute."[178] Such a distinction appeared as early as 1789. The Connecticut Supreme Court, responding to a gristmill owner's argument that he could not be liable to his neighbor for injury caused by a dam erected in connection with the mill, held that "the license, however it may estop the town from proceeding against the dam as a common nuisance, it can be no excuse or justification for an injury done to private property."[179] Courts limited the legal effect of legislative authorization in this way virtually exclusively in cases in which the defendant was a private individual or corporation. Thus, it often appeared in tandem with the doctrine that general immunity from consequential damages was not implied in grants of power to privato entities.[180] Just as some courts hardened the rule of construction about immunizing private corporations inte a constitutional rule, others, including the Supreme Court, hinted that the private/public nuisance distinction might be of constitutional dimensions.[181]

4. Remedial Matters: Retrospective Damages, Prospective Uncertainties

Suppose a property owner prevails in his trespass or case action, having proven acts sufficient to make out trespass or case at common law, and having defeated the defendant's attempt to justify under a statute. What damages can the owner now collect? The tra-

178. *Sinnickson*, 17 N.J.L. at 152 (Nevius, J.).
179. Nichols v. Pixly, 1 Root 129, 129 (Conn. 1789).
180. *See Sinnickson*, 17 N.J.L. at 147 (Dayton, J.); *id.* at 150-52 (Nevius, J.).
181. *See, e.g.*, Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883):

> It admits indeed of grave doubt whether Congress could authorize the [railroad] company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances.
>
> . . .
>
> The acts that a legislature may authorize, which, without such authorization, would constituto nuisances, are those which affect public highways or public streams, or matters in which the public have an intorest and over which the public have control. The legislative authorization . . . does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large.

ditional rule was that the owner could ouly recover retrospective damages, for injury up until the time the owner brought suit.[182] If the injury was continuing, the owner could bring successive actions, but could not bring a single action for permanent damages.[183] As one treatise writer put it:

> [I]f the injured party should receive in one action prospective as well as past damages for a continuing trespass, there would be an assumption of persistence in wrong-doing, an assumption repugnant to the common law, and also a result equally repugnant,—the acquisition of a right by being inulcted in damages for a wrong.[184]

For Chief Justice Gibson of the Pennsylvania Supreme Court, the inability of property owners to sue for permanent damages at common law was one reason, real or rhetorical, that courts should not read just compensation clauses to encompass nonpossessory injury to property, but should await legislative action:

> [I]t must be admitted that, while it is inequitable te injure the property of an individual for the benefit of the many, it would be impossible for a corporation to bear the pressure of successive common law actions for the continuance of a nuisance, each verdict being more severe than the preceding one. The modification of the remedy would be for the legislature, which can turn compensation for a permanent detriment into the price of a prospective license.[185]

The inability to bring suits for permanent damages did not pose a problem for property owners as long as they could sue for ejectment or for an injunction to prevent prospective injury. Indeed, ejectment and injunctive relief were arguably more favorable, because they allowed the owner to demand his asking price, potentially higher than a just compensation award, until condemnation proceedings were brought. And as a general rule, injunctive relief was available to prevent permanent construction on land or changes of a permanent

---

Id. at 331-32 (Field, J.).

182. *See* 2 NICHOLS, *supra* note 34, § 478, at 1276-77.

183. *See id.* As a corollary, one recovery in trespass would not bar a subsequent action. *See, e.g.*, Holmes v. Wilson, 113 Eng. Rep. 190, 193 (K.B. 1839).

184. CARMAN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 308, at 282 (1894).

185. O'Connor v. Pittsburgh, 18 Pa. 187, 189-90 (1851). Chief Justice Gibson's comment that "each [nuisance] verdict [would be] more severe than the preceding one" suggests that he would expect the damages assessed to have a punitive component; without a valid exercise of eminent domain, one could not just maintain a nuisance and pay the price of compensatory damages.

nature.[186] In two circumstances, however, some courts found that property owners did not have a right to an injunction. First, many courts held that owners could lose their right to ejectment or an injunction if they acquiesced in entry onto and construction on their land. This exception appears to have been applied rather liberally to prevent interference with projects thought to be of public importance. Thus, in denying a landowner's action for ejectment against a railroad that had not paid for the land on which it had constructed rails, Chief Judge Redfield of the Vermont Supreme Court commented:

> In these great public works the shortest period of clear acquiesence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to include the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put into operation, whereby the public acquire important intorests in its continuance.[187]

---

186. *See, e.g.*, Rowe v. Granite Bridge Corp., 38 Mass. (21 Pick.) 344, 346-47 (1839); Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 717 (1832); Gardner v. Newburgh, 2 Johns. Ch. 162, 164-65 (N.Y. Ch. 1816). In *Jerome v. Ross*, 7 Johns. Ch. 315 (N.Y. Ch. 1823), Chancellor Kent denied an injunction against removing rock from the plaintiff's land as authorized by the legislature for the purpose of constructing a lock and dam. The opinion expresses two radically different grounds for the denial. On the one hand, Kent contended that the plaintiff did not show that the rock was of any particular value te him, so that the removal of the rock "was susceptible of a perfect pecuniary compensation." *Id.* at 331. In that case, there was no geod reason for the intervention of a court of equity, because "the injury [did] not appear to be irremediable and destructive to the estate, and . . . the ordinary legal remedy in the courts of law [could] afford adequate satisfaction." *Id.* This is an application of traditional rules of equity, but it seems to be quite a stretch; rock had already been removed on several separate occasions, and the plaintiff had pending several actions for damages relating to those separate occasions, *see id.*; ordinarily, equity would intervene to prevent such repeatod misconduct. After disposing of the case on these grounds, however, Kent proceeded to hold that the legislative authorization justified the defendants' acts, so that they were not trespassers, even though the law did not provide expressly for compensation, *see id.* at 337-45. He suggests that the legislature prebably censidered the commissioners to have sufficient discretionary authority to pay for damage such as that caused by removal of the rock, but he seems to think that the validity of the defendants' justification does not depend upon that authority: "The question of componsation is distinct from the right of entry to take and use the land necessary for the purpose of the improvements; and that right I hold to be unquestionable, provided it not be abused in the exercise, through the want of good faith or due discretion." *Id.* at 345. If Kent's pesition was that the availability of a pest-deprivation common law suit for damages satisfied the just compensation requirement, then he was considerably ahead of his time.

187. McAulay v. Western Vt. R.R. Co., 33 Vt. 311, 321-22 (1860); *see also* Goodin v. Cincinnati & Whitowater Canal Co., 18 Ohio St. 169, 180 (1868); 2 NICHOLS, *supra* note 34, § 474, at 1264-67. Nichols speculatod that the probable explanation of the cases that found sufficient acquiescence to deny injunctive relief even when no elements of estoppel were present "is that public sentiment does not support the rigid enforcement of the requirement that compensation be paid in advance of the taking with the necessary delay incident to the ascertainment of the sum te be paid." *Id.* at 1267. For lator cases, see, for example, *Southern Railway Co. v. Hood*, 28 So. 662 (Ala. 1899); *Evansville & Terre Haute Railroad Co. v. Nye*, 15 N.E. 261 (Ind. 1888).

Second, some courts denied injunctions when the injuries alleged, though possibly actionable, were not direct, but consequential.[188] When prospective relief in the form of ejectment or injunction was unavailable, the traditional rule that permanent damages were unavailable in a trespass or case action had more dire consequences for the property owner. Although by 1860 a few courts had relaxed this rule and allowed an owner to waive ejectment and sue for permanent damages, many courts stuck to the rule that permanent damages were unavailable.[189] This problem would become acute once constitutional amendments made consequential damages recoverable in a much wider variety of situations.[190]

B. Why Justification-Stripping? Antebellum Just Compensation Litigation in Context

In modern Eleventh Amendment jurisprudence and commentary, the "officer suit" is routinely characterized as a fiction invented to circumvent Eleventh Amendment immunity.[191] The fiction is often traced to the 1908 Supreme Court case of *Ex parte Young*,[192] but hundreds of state court cases, as well as many Supreme Court cases, confirm David Engdahl's assessment that *Young* was not "a great breakthrough and the origin of a novel principle," but "the last surviving (although enfeebled) vestige of the vigorous traditional scheme for enforcing legal restraints against government."[193] As early as 1823, the use of the justification-stripping model in just compensation litigation was explained as a device to provide some remedy to owners

---

188. In *Bruce v. President of the Delaware & Hudson Canal Co.*, 19 Barb. Ch. 371 (N.Y. 1853), the court noted that:

> The plaintiff's property has not been occupied; all that he complains of is, that it has been injured by means of an act done by the defendants elsewhere. For this injury, he may or may not have a right to recover damages; but, if the act itself was authorized by law, the defendants could not be restrained from doing it because it would result in an injury to the plaintiff.

Id. at 375.

189. For an early case allowing waiver of ejectment and suits for the value of the land, i.e., permanent damages, see *Mayor and Council of Rome v. Perkins*, 30 Ga. 154 (1860).

190. *See infra* text accompanying notes 324-36.

191. *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 621, 117 S. Ct. 2028, 2034 (1997) ("Application of the [exception in *Ex parte Young*, 209 U.S. 123 (1908)] must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("[W]e declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States.").

192. *Ex parte Young*, 209 U.S. 123 (1908).

193. Engdahl, *supra* note 79, at 55 n.255.

who could not sue the state directly. In *Callender v. Marsh*, Chief Justice Parker of the Massachusetts Supreme Judicial Court wrote:

> [I]f by virtue of any legislative act the land of any citizen should be occupied by the public . . . without any means provided to indemnify the owner of the property, the title of the owner could not be devested thereby, and he might maintain his action for possession, or of trespass, against those who were instrumental in the act; because such a statute would be directly contrary to the [Massachusetts Constitution takings clause]; *and as no action can be maintained against the public for damages*, the only way to secure the party in his constitutional rights would be to declare void the public appropriation.[194]

If the "remedial imperative"[195] of providing compensation to those whose property had been confiscated meant that courts were likely to find some device to circumvent sovereign immunity, the question remains: why justification-stripping? The answer is likely that courts were already familiar with the model of justification-stripping in a truncatod form, and had already successfully adapted it from private law to serve public law ends. For centuries, English courts had recognized legislative power to change rules of private conduct; statutos might sanction private conduct otherwise actionable at common law.[196] Those courts began to use their authority to construe those statutes te discipline the executive branch of government, thought in the eighteenth century to be a far greater threat to liberty and property than the legislature.[197] If an executive official committed acts that were actionable at common law and that did not fall within the scope of a legislative grant of authority, a court could hold that official personally liable for damages.[198] When using this model to discipline executives, courts could claim that they were doing no more than consistently applying the rules that they already applied to private litigants. A.V. Dicey's boast, in other words, may have begun life in the defensive form that "[w]ith us, every official . . . is under [no more] responsibility for every act done without legal justification [than] any other citizen."[199] As the civil action model was applied to

194. Callender v. Marsh, 18 Mass. (1 Pick.) 418, 430-31 (1823) (emphasis added).

195. *See* Amar, *Of Sovereignty*, *supra* note 3, at 1484.

196. On the development of legislation in England, see, e.g., CHARLES H. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 42 (1910).

197. I use the abstract term "executive branch" te cover both the King or Queen of England and the President of the United States. Obviously, these are two very different institutions.

198. *See, e.g.*, Wayne v. Varley, 6 Term. R. 443 (K.B. 1795) (holding a public official authorized te seize undried leather liable in trespass when he mistakenly seized what turned out te be dried leather); *supra* text accompanying notes 86-87 (discussing similar American cases).

199. DICEY, *supra* note 86, at 114. For parallel American rheteric, see, for example, *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the

litigation against public officials, the jury gained new importance in public litigation as a representative of the citizenry in times when judges lacked any significant independence from the other branches of government.[200]

With the tradition of disciplining another branch of government by means of common law actions in place, it was easy to adapt the model to enforce constitutional discipline on the legislature. If an official was exposed to a common law damages action when he strayed from the limited protoctive scope of a valid statute, he was similarly vulnerable when the statute was declared void, or void in applicable part, as unconstitutional, and could provide no shield at all. In this manner, courts could present judicial review, still in its controversial infancy, as an extension of an already-existing practice of interbranch discipline in the courts. For this reason, perhaps, justification-stripping became a dominant model of constitutional enforcement, not only with regard to just compeusation clauses, but also with regard to other constitutional provisions. As Akhil Amar has shown, for example, the Framers of the Fourth Amendment and of similar state constitutional search-and-seizure provisions presupposed that they would be enforced by means of common law damages actions against government officials.[201] In many circumstances, the common law permitted searches and arrests;[202] government officials could often defend themselves against damages actions without presenting some special justification. When they needed to justify acts that would otherwise be actionable at common law, however, they turned to the warrant, which was understood to confer immunity on a government official for the acts it authorized, much as a special charter was thought to confer immunity on a corporation for authorized acts.[203] Just as the Fifth Amendment (or its stato counterparts) limited legislative power to immunize by special charter,[204] the Fourth

---

law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are beund to obey it."); *Kendall v. Stokes*, 44 U.S. 87, 92 (1845) (McLean, J., dissenting) ("It is a fundamental principle in our government, that no individual, whether in office or out of office, is above the law. In this our safety consists.").

200. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 13-14 (1997) [hereinafter AMAR, FIRST PRINCIPLES].

201. *See id.* at 20-21.

202. *See id.* at 5-8; 4 BLACKSTONE, *supra* note 37, at *292-94 (enumerating the circumstances under which arrests without warrants may be executed).

203. *See* Entick v. Carrington, 95 Eng. Rep. 807, 817-18 (K.B. 1765) (holding royal agents liable in action for trespass because warrant was invalid); AMAR, FIRST PRINCIPLES, *supra* note 200, at 15-16, 187 nn.80, 84-85; *supra* text accompanying notes 108-12 (discussing the implied grant of immunity associated with special charters).

204. *See supra* text accompanying notes 31-32.

Amendment limited the government's power to immunize its officials by means of warrants. Unless the warrant was issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"[205] the official was stripped of his justification and made liable in damages. The Seventh Amendment reinforced the Fourth by constitutionalizing the use of the jury in such damage actions, following the exhortation of the Maryland Farmer that "no remedy has yet been found equal to the tack of detering and curbing the insolence of office, but a jury . . . [whereas] an American judge, who will be judge and jury too . . . [would probably] spare the public purse, if not favour a brother officer."[206]

Although the Fourth Amendment's framers undoubtedly intonded it to prevent Congress from passing a law purporting to authorize the issuance of warrants that did not meet the Amendment's requirements, their primary concern was probably to discipline the officials who issued and executed the warrants, rather than the legislature. In that context, the stick of personal liability made perfect sense, just as it did in the older statutory scope-of-authority cases. An award of damages against the government, to be satisfied from funds collected by means of legislatively-authorized taxes, would have been a less direct method of disciplining errant officials in the executive branch; personal liability struck a direct blow at the executive official, and left him te seek indemnification at the mercy of the legislature.

The property protection clauses in early state constitutions were undoubtedly also intended to curb oppressive executive practices. Late eighteenth-century jurists were thoroughly familiar with traditions of distrust of the executive (in England, of the Crown) and of trust in representative legislatures. In his 1689 *Second Treatise on Government*, John Locke argued that "[t]he Supream Power cannot take from any Man any part of his Property without his own con-

---

205. U.S. CONST. amend. IV.

206. *Essays by a Farmer* [I], *in* 5 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981); *see also* AMAR, FIRST PRINCIPLES, *supra* note 200, at 14-15. In his article contonding that the Seventh Amendment requires the use of a jury in all Just Compeusation Clause cases, Eric Grant constructs a complex argument that the jury requirement should apply to inverse condemnation cases brought by property owners as well as direct condemnation proceedings instituted by the government. *See* Grant, *supra* note 32, at 192-94. Under the justification-stripping model, however, the Seventh Amendment connection to owner-initiated just compensation litigation is much more direct: owners bring common law tort damage actious, which are the quintessential "actions at law."

sent,"[207] but he considered that requirement of consent satisfied by "the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them."[208] Locke's concern was to wrest the power to take property from the Crown and place it in the hands of a representative legislature; he was not torribly worried about the potential for oppression by such a legislature. As he put it—naively, many of us would now say—the power to take property "is not much to be fear'd in Governments where the Legislative consists, wholly or in part, in Assemblies which are variable, whose Members upon the dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest."[209] The only direct protection for property in the first constitutions of Delaware, Pennsylvania, and Virginia were provisions modeled on Locke's language; in Delaware's formulation, the provision declared that "no Part of a Man's Property can be jnstly taken from him, or applied to public Uses without his own Consent or that of his legal Representatives."[210] Delaware's constitution also made the faith in representative government explicit, declaring that "the Right in the People to participato in the Legislature, is the Foundation of Liberty and of all free Government."[211]

John Jay's 1778 plea to the New York legislature to pass laws governing the appropriation of property for military use pursues the same Lockean theme. Jay complained of the "Practice of impressing Horses, Teems, and Carriages by the military, without the

---

207. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 138, at 360 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

208. *Id.* § 140, at 362.

209. *Id.* § 138, at 361.

210. A DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF THE DELAWARE STATE § 10 (1776), *reprinted in* 2 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 197-98 (William F. Swindler ed., 1973) [hereinafter SOURCES AND DOCUMENTS]; *see also* PA. CONST. of 1776, art. VIII, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra*, at 278 ("[N]o part of a man's property can be justly taken from him, or applied te public uses, without his own consent, or that of his legal representatives . . . ."); VA. CONST. of 1776 § 6, *reprinted in* 10 SOURCES AND DOCUMENTS, *supra*, at 48-49 ("[A]ll men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives . . . elected [in free elections] . . . ."). For the connection between Locke and the early constitutions, see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 566-68, 585-86 (1972). For the opinion that the form of consent provision used in Delaware, Pennsylvania, Virginia, and elsewhere was "very clearly a limitation upen the administrative branch, being an attempt to secure 'a government of laws not of men,' " see Grant, *supra* note 114, at 76 n.48.

211. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF THE DELAWARE STATE § 6 (1776), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 210, at 197-98. Maryland's 1776 Declaration of Rights contained a nearly identical provision: "[T]he right in the people to participate in the Legislature, is the best security of liberty, and the foundation of all free government . . . ." MARYLAND DECLARATION OF RIGHTS art. V (1776), *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 210, at 372-73.

Intervention of a civil Magistrate, and without any Authority from the Law of the Land."[212] That practice, he contended, violated "the undoubted Right and unalienable Priviledge of a Freeman not to be divested . . . of . . . Property, but by Laws to which he has assented, either personally or by his Representatives"[213]—the Lockean formulation. By way of issuing a warning, Jay then adverted to the practice of disciplining errant officials through common law actions:

> It may not be improper to observe that it is no less the Interest of the Quarter Master and their agents than of the People at large that such Laws should take Place. The Time may come when Law and Justice will again pervade the State, and many who now severely feel this kind of oppression, may then bring Actions and recover Damages.[214]

There is some evidence that the Fifth Amendment Just Compensation Clause, and similar stato just compensation clauses, were directed towards the military impressment practices that incensed Jay. In 1803, Henry St. George Tucker wrote that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatsoever."[215] To that extent, the justification-stripping model would have seemed a perfect fit: within that model, the Just Compensation Clause would function to guarantee the availability of the very private damage actions that Jay portended.

The just compensation clauses, however, seem to hint at a distrust of the legislature not reflected in the "consent" provisions.[216]

---

212. John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 312 (Philip B. Kurland & Ralph Lerner eds., 1987).

213. *Id.*

214. *Id.* at 313. Jay's plea for legislative regulation of military appropriation practices also has direct ties to the second half of the Third Amendment, which prohibits soldiers from being quartered in houses "in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

215. 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 305-06 (1803). Jed Rubinfeld and Akhil Amar, citing Jay and St. George Tucker, have beth suggested that military impressment was one of the principal concerns motivating the Just Compensation Clause. See AMAR, THE BILL OF RIGHTS, *supra* note 114, at 79; Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993).

216. Differing views about trust and distrust of representative government also shaped the debate over interpretation of the "law of the land" provisions that were the most popular protections of proporty in colonial charters and early state constitutions. These provisions were all variations on Magna Carta's declaration that "[n]o freeman shall be taken or {and} imprisoned or disseised . . . except by the lawful judgment of his peers or {and} by the law of the land." MAGNA CARTA ch. 39 (1215), *reprinted in* SAMUEL E. THORNE ET AL., THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY 111, 132 (1965) ("*Nullus liber homo capiatur vel imprisonetur, aut disseisiatur . . . nisi per legale judicium parium suorum vel per*

A consent provision would, after all, subject military officials to legislative control, on pain of retroactive damage awards. To one who thought a representative legislature to be sufficiently protective of property rights, any other provision would have been superfluous. Yet states began to add just compensation clauses just the same, and a just compensation clause became part of the 1791 Federal Bill of Rights.[217] The first ratified state constitution to contain a just compensation clause, the Massachusetts Constitution of 1780, was submitted to the convention by the drafting committee with a consent provision just like those in Delaware, Pennsylvania, and Virginia.[218]

---

legem terre."); *see, e.g.*, MARYLAND DECLARATION OF RIGHTS art. XXI (1776), *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 210, at 372-73; A COPPIE OF THE LIBERTIES OF THE MASSACHUSETTS COLONY IN NEW ENGLAND § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 210, at 46 ("[N]o man's goods or estaite shall be taken away from him . . . unless it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published . . . ."); N.Y. CONST. of 1777, art. XIII, *reprinted in* SOURCES AND DOCUMENTS, *supra* note 210, at 175; NEW YORK CHARTER OF LIBERTIES AND PRIVILEGES § 13 (1683), *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 210, at 164-65 ("But by the Lawfull Judgment of his peers and by the law of this province . . . ."); N.C. CONST. of 1776, art. XII, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 210, at 402-03; S.C. CONST. OF 1778, art. XLI, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 210, at 475.

In *State v.* ——, 2 N.C. (2 Hayw.) 38, 43 (1794), for example, Attorney General Haywood argued that "law of the land" meant "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature," and was intended te exclude "the idea of foreigu legislation, of royal or executive prerogative, and of usurped pewer. . . ." Such an interpretation would have given the law of the land clauses a function quite similar te the function of the "consent" clauses modeled on Leckean pehtical philosophy. The court, however, read "by the law of the land" to mean "according to the course of the common law," that is, according to certain procedures that the legislature could not constitutionally alter. *Id.* at 39; *cf.* University of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 88 (1805) ("[L]aw of the land" means "by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution . . . .").

The pesition that the "law of the land" included a substantive just compensation principle also found judicial support before the end of the eighteenth century. In *Lindsay v. Commissioners*, 1 S.C.L. (2 Bay) 16, 23-24 (1796), the court held that the use of eminent domain te acquire land for highways was part of the common law of the state, and hence part of the "law of the land." In dissent, however, Judge Waties argued that the common law "authorize[d] the power of taking private property for public uses [only] 'by providing . . . a full indemnification for it.'" *Id.* at 24 (Waties, J., dissenting) (quoting William Blackstene). As a common law restriction, Waties argued, the just compensation requirement was part of the law of the land, and an attompt te take property without paying just compensation would violate the South Carolina constitution's "law of the land" provision. *See id.* at 24-25 (Waties, J., dissenting).

Later in the century, Justice Miller, rejecting Fourteenth Amendment substantive due process in *Davidson v. New Orleans*, 96 U.S. 97 (1877), interpreted Magna Carta's "law of the land" provision to encompass the common law plus parliamentary legislation. According te Miller, the barons who forced King John te sign Magna Carta interpreted "law of the land" as "the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactments of the laws by the Parliament of England." *Id.* at 102.

217. *See* U.S. CONST. amend. V.

218. *See* JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 38 (1832) [hereinafter JOURNAL OF THE CONVENTION];

The just compensation requirement was added by amendment from the floor; the convention journal does not indicate who was responsible for it.[219] As William Stoebuck puts it:

> [T]o the extent [the just compensation amendment] betrays its author's state of mind, it shows a distrust of the legislative process that was no part of Lockeian theory .... [Locke] reposed great confidence in the legislature, and many American rebels, whom we take te be good enough libertarians, were content with that. But somewhere out there in the hustings ... people sent a delegate who did not trust even representative government all that much.[220]

Perhaps from the very beginning, just compensation clauses did not mesh perfectly with the justification-stripping model. For those worried about legislative power, the executive officials who carried out the legislature's directives were second-best defendants, called into court only because the state itself could not be, as Chief Justice Parker's comment in *Callender v. Marsh* acknowledged.[221]

Importantly, this "second-best defendant" phenomenon does not affect that large portion of nineteenth-century just compensation litigation that involved corporate defendants. Everyone expected that turnpike, canal, and railroad corporations, and usually municipal corporations as well, would bear the costs of property acquired for their benefit. In these cases, the justification-stripping model placed liability on the party all thought should be ultimately responsible for the dispossession or injury.

That still leaves public officials. Louis Jaffe scoffed at the notion that courts should be concerned about the plight of officials

---

Stoebuck, *supra* note 210, at 592-93. The Vermont Constitution of 1777, which also contained a just compenation clause (as well as a consent clause) was never ratified. See VT. CONST. of 1777, ch. I, § II, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 210, at 489. ("That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought te receive an equivalent in money."); *id.* ch. I, § IX, *reprinted in* SOURCES AND DOCUMENTS, *supra* note 210, at 490 ("[N]o part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives.").

219. See JOURNAL OF THE CONVENTION, *supra* note 218, at 194.

220. Stoebuck, *supra* noto 210, at 593. William Michael Treanor argues that the addition of just compensation clauses in the 1780s and 1790s is evidence of a shift from republicanism to liberalism as the reigning American political ideology. *See* Treanor, *supra* note 138, at 704-05. There may well have been some such shift; but in light of the fact that Locke, the quintessential liberal, placed a faith in legislatures that was likely reflected in the early state constitution "consent" provisions, *see supra* toxt accompanying notes 207-11, the proliferation of jnst compensation clauses may have been due to a more general loss of faith in legislatures. The mounting criticism of legislatures in the 1780s is well described in GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 403-09 (1969).

221. Callender v. Marsh, 18 Mass. (1 Pick.) 418, 430-31 (1823); *supra* text accompanying note 194 (discussing *Callender*).

faced with damages liability because their legislatively-authorized action amounted to a taking: "What unrealism in the name of realism! If this is so, the legislature can easily solve the problem by providing indemnity or a direct charge on the treasury."[222] Whether nineteenth-century legislatures actually did regularly agree to indemnify officials in advance, or provide private-bill relief in retrospect, is a matter that needs further study.[223] Only with that study would we know the degree to which there was a factual basis for the concern for public officials that was supposed to have motivated the expansion of official immunity doctrine. What seems undeniable, however, is that there were expressions of such a concern even relatively early in the nineteenth century. Chancellor Kent, for example, supported a very broad view of just compensation clause protection,[224] and speculated that a court might restrain unconstitutional interference with property "until an opportunity was given to the party injured to seek and obtain the compensation."[225] However, Kent did not support the prevailing justification-stripping model, apparently out of concern for government officials:

> [I]t would deserve a very grave consideration, before we undertook to lay down the proposition, that notwithstanding a statute clearly and expressly directed the assumption of private property for a necessary public object, it would still be a nullity, and the officer who undertook to execute it a trespasser, if a

222. Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 227 (1963).

223. Akhil Amar suggests that the government "would typically be forced to indemnify officials who were merely carrying out government policy[,]" because "[w]ithout indemnification, who would agree to work for the government?" AMAR, FIRST PRINCIPLES, *supra* note 200, at 40. Amar, however, cites only one English case, one American dissent, and one federal statute. *See id.* at 198 nn.197, 199, 204. David Engdahl, who Amar also cites, *see id.* at 198 n.199, is in fact somewhat more hesitant. Engdahl says that "[t]he officer's plight was improved somewhat by the recognition that, in some of the most difficult cases, he would enjoy a right of indemnity against the state." *See* Engdahl, *supra* note 79, at 18. The right of indemnity to which Engdahl refers, however, is only the ordinary right that an agent has against a principal who directs him to perform a tortious act that he does not know to be tortious. *See id.* at 18 n.77. As Engdahl acknowledges, this right is still subject to the state's defense of sovereign immunity; the official would get nowhere if the state "was unwilling to honor its obligation and refused to consent to being sued for indemnity." *Id.* at 18. Engdahl does not address the issue of states' actual indemnification practices.

224. Kent decided one of the most prominent early cases finding a taking when there was no physical invasion of the plaintiff's land, but only a diversion of water to which the plaintiff had rights as a riparian owner. *See* Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816). In his *Commentaries*, Kent also criticized *Callender*, 18 Mass. at 418, the landmark case holding that injury caused to neighboring land by street grading was consequential and hence noncompensable, for adopting too narrow a view of takings of property. *See* 2 KENT, *supra* note 47, at 338-40.

225. Rogers v. Bradshaw, 20 Johns. Ch. 735, 745 (N.Y. Ch. 1823).

> provision for compensation did not constitute part and parcel of the act itself.[226]

Thus, as he wrote later in his *Commentaries*, "I think the more reasonable and practicable construction to be, that the statute would be *prima facie* good and binding, and sufficient to justify acts done under it, until a party was restrained by judicial process, founded on the paramount authority of the constitution."[227] Kent's view, however, was clearly a minority one; virtually all American courts chose with Chief Justice Parker to leave public officers vulnerable in order "to secure [a property owner] in his constitutional rights."[228]

III. THE REMEDIAL TURN: TAKING (OR DAMAGE) AS CONSTITUTIONAL TORT

In 1870 the justification-stripping model of just compensation was still dominant. Property owners seeking damages for state-authorized action allegedly amounting to a taking brought common law actions, and the constitutional issue entered as a challenge to the validity of the defendant's statutory justification. By 1890, the scene looked quite different. Many state courts had begun te hold that just compensation provisions were themselves the source of property owners' rights of action for damages. In this Part, I first describe that change in understanding. I then consider the relationship of that change to several selected changes in just compensation doctrine. First, and in greatest detail, I consider the relationship between this change and "taking or damage" amendments that many states adopted after 1870. Second, I consider the relationship of the change

---

226. *Id.* Kent noted:

> I should doubt exceedingly, whether the general principle, that private property is not to be taken for public use without just compensation, is to be carried so far as to make a public officer who enters upon private property by virtue of legislative authority, specially given for a public purpose, a trespasser, if he enters before the property is paid for.

Id. at 744. Kent took this view again in *Jerome v. Ross*, 7 Johns. Ch. 315 (N.Y. Ch. 1823). For another early expression of concern for officers, see *Barron v. Baltimore* (Baltimore Cty. Ct. 1828), *reprinted in* 2 AM. JURIST 203 (1829):

> [T]he policy of every nation might demand, in order to secure the utmost possible exertion of all her agents and officers, that for damages . . . occasioned [by public officials responding to a military invasion or disaster], in seasons of public danger, there should not be a remedy furnished personally against such agents, because if courts of justice are open to every complainant under such circumstances, the ruin of such agents would be the necessary consequence.

Id. at 209.

227. 2 KENT, *supra* note 47, at 526 n.(f).

228. *Callender*, 18 Mass. (1 Pick.) at 430-31.

in understanding to two other areas of doctrine: the availability of permanent damages and injunctive relief and the rules of agency and immunity that determine the parties that can be named in just compensation litigation.

A. The Change in Understanding Described

Some courts that suggested just compensation provisions were the source of property owners' rights of action did so without much elaboration, and seemingly without being conscious that their holding was novel. In the 1876 case of *City of Elgin v. Eaton*, for example, the Illinois Supreme Court used language that could be read as consistent with the justification-stripping model, under which the city would become liable in trespass for its agents' acts if it did not do what was constitutionally necessary to gain title to the property: "[F]ailing to provide compensation for the damages, the city became liable to an action."[229] At the same time, however, the court stated that once the city began improvement of the street that was the subject of the litigation, "*the right to recover damages was given by the constitution*; and inasmuch as the city failed to have them assessed as they might have been under the Eminent Domain Law, then in force, the action will lie for their recovery."[230]

Courts that attempted to provide fuller accounts of what they were doing most often drew on a vision of the common law, not simply as a set of judge-made rules of conduct, but as a source of remedies to protect rights whatever their source.[231] Thus, in the 1880 case of

---

229. City of Elgin v. Eaton, 83 Ill. 535, 537 (1876) (citing Clayburgh v. City of Chicago, 25 Ill. 535 (1861)).

230. *Id.* at 536-37 (emphasis added) (citing People v. McRoberts, 62 Ill. 38 (1871)).

231. The statement echoing this vision that is known to every law student is Chief Justice Marshall's in *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection .... "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, *supra* note 37, at *109). The canonical English formulation is perhaps Chief Justice Holt's dissent in *Ashby v. White*:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

Ashby v. White, 92 Eng. Rep. 126, 136 (K.B. 1703) (Holt, C.J., dissenting).

Johnson v. City of Parkerburg, the West Virginia Supreme Court reasoned:

> Where the constitution forbids a *damage* to the private property of an individual, and points out no remedy, and no statute gives a remedy, for the invasion of his right of property thus secured, the common law, *which gives a remedy for every wrong*, will furnish the appropriate action for the redress of his grievance.[232]

The particular established common law practice that these courts had in mind was the recognition of implied damages actions in statutes. Professor Al Katz has argued that, at early English common law, the recognition of damages actions based on statutes was hardly distinguishable from the broader practice of providing remedies for rights.[233] Only in the seventeenth century, with the ascendance of parliamentary supremacy, did the courts begin to consider legislative intent as a "factor of primary significance" in determining whether or not a damages action should be implied in a statute.[234] Even then, Katz contends, a review of English cases from the seventeenth, eighteenth, and nineteenth centuries leads to the conclusion that deference to legislative intent "was a significant barrier [to a recognition of damages actions] only where the statute specified a mode of proceeding or a fixed sum penalty payable to the plaintiff."[235] Thus, the tradition of the action on the statute was alive and serviceable in the mid-nineteenth century,[236] and state courts hearing just compensation

---

232. Johnson v. City of Parkerburg, 16 W. Va. 402, 426 (1880) (emphasis on "damage" in original; other emphasis added). Some courts read state constitutional provisions as embracing and supporting this common law view of courts as remedial fronts. The Illinois Constitution of 1870, for example, contained a section providing:

> Every person ought to find a certain remedy in the law for all injuries and wrongs which he may receive in his person, property, or reputation; he ought te obtain, hy law, right and justice freely and without being obliged to purchase it, completoly and without denial, promptly, and without delay.

ILL. CONST. of 1870, art. I, § 19. In one of the first cases approving an owner's cause of action for damages under the 1870 constitution's "taking or damage" clause, the Illinois Supreme Court quoted this section. *See* Stene v. Fairbury, Pontiac & Nw. R.R., 68 Ill. 394, 395-96 (1873).

233. *See* Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 20-21 (1968).

234. *Id.* at 21.

235. *Id.* at 29.

236. Thomas Cooley's 1879 treatise on torts suggests that the mid-nineteenth-century American attitude toward implied actions under statutes was similar to the attitude Professor Katz found in England. On the one hand, legislative intent was in theory central: When a statute had no explicit provision about private actions, "the question of civil liability to parties who may bo damnified by the neglect [of statutery duty] can only be determined upon careful consideration of the statute and of the end it was manifestly intended te accomplish." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 651 (1879). On the other hand:

litigation were not afraid to draw on it. The *Eaton* court discussed the tradition at great length, and traced it back through American and English precedent to Coke and Bacon.[237] By 1880, the West Virginia Supreme Court asserted in *Johnson* that it was " 'understood to be well settled, that when a statute gives a right, or forbids the doing of an injury to another, and no action be given therefor in express terms, still the party shall have an action therefor.' "[238]

The next step was to extend this practice to constitutions. In *Householder v. City of Kansas*, the Missouri Supreme Court accomplished the extension in a single sentence, without acknowledging its innovation: The court held that "[w]herever a statuto or organic law creates a right, but is silent to the remedy, the party entitled te the right 'may resort to any common law action which will afford him adequate and appropriate means of redress.'"[239] Yet the cases and treatise passages the court citod to support this proposition concerned statutes; none concerned "organic laws."[240] By contrast, the West Virginia Supreme Court in *Johnson* slyly recognized its innovation: after tracing the history of providing remedies to vindicate statutory rights, the court made a brief argument to support extension of the remedial principle from statutes to constitutions. "A constitutional prohibition forbidding an injury to the property of a citizen," the court asserted, "is certainly as effective as a statute framed for the same purpose . . . ."[241] That is as close as any court came, however, to acknowledging that recognition of damage actions under a constitutional provision was something new.

Recognizing a damage action directly under a constitutional provision, however, was something new, even in the case of just compensation clauses, which seem to make direct reference to a remedy. The justification-stripping model was based on the premise that the just compensation clause, like other constitutional provisions, was a

---

> [T]he authorities . . . recognize the rule as a general one, that when the duty imposed by the statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none.

Id. at 658.

237. *See* Eaton v. Boston, Concord, & Montreal R.R., 51 N.H. 504, 512 (1872); *see also* Johnson v. City of Parkersburg, 16 W. Va. 402, 423-24 (1880).

238. Johnson, 16 W.Va. at 425 (quoting Stearns v. Atlantic & St. Lawrence R.R., 46 Me. 95, 115 (1858)).

239. Householder v. City of Kansas, 83 Mo. 488, 495 (1884) (quoting Tapley v. Forbes, 84 Mass. (2 Allen) 20, 24 (1861)).

240. *See Stearns*, 46 Me. at 114; *Tapley*, 84 Mass. (2 Allen) at 23; Knowlton v. Ackley, 62 Mass. (8 Cush.) 93, 94 (1851); *see also* 1 C.G. ADDISON, A TREATISE ON THE LAW OF TORTS 65-66 (1881).

241. *Johnson*, 16 W. Va. at 425.

limitation on legislative power. "Just compensation" described not a remedy that the constitution required courts to provide if a plaintiff demonstrated that the government had taken certain actions, but a remedy that the constitution required legislators to provide in certain legislation lest the courts declare the legislation void. The innovation was to treat a just compensation clause as a kind of legislation providing a right and remedy to property owners, rather than merely as a limitation on legislative power. The *Householder* court tellingly responded to Kansas City's argument that the just compensation provision was so general that it required legislation to determine the exact injuries that fell within its scope: "The making of a constitution is but legislation; legislation, however, of the most solemn charactor, and if the general assembly can place a construction upon it, binding upon the courts, then it can make and unmake constitutions at its pleasure."[242] The interesting component of this assertion is not the proviso, but the initial statement: The constitution, the court suggests, is just like legislation, and thus can be brought within the tradition of recognizing implied private actions for damages.

The fact that the just compensation clause itself referred to payment for the appropriation of property made the clause a special case even within the tradition of recognizing implied damages actions, for it could be read as the express grant of a damages action. Just compensation clauses were framed as limitations—"private property shall not be taken for public use without just compensation"—rather than as remedial grants—"whenever the state takes property, it will have an obligation to pay just compensation." Yet for many courts, the limitation, turning as it did on compensation, obviously and necessarily encompassed the remedial grant—more obviously and necessarily than if the limitation had been unqualified, even though the violation of an unqualified limitation, like the flat prohibition on takings for private use, should arguably be seen as more serious than the mere failure to pay compensation for what could be forcibly taken so long as it was paid for. Thus, in many of the statements courts made about just compensation clauses in the 1870s and 1880s, there is an interesting ambiguity about whether the common law is supplying the damages remedy or is merely supplying the procedural vehicle for collecting the damages that were more or less expressly provided by the constitution itself. This ambiguity is reflected in Justice Miller's statement that "since the positive declaration of the

242. *Householder*, 83 Mo. at 496.

constitution is that private property shall not be taken or damaged without just compensation, [the city] is bound in some way te make that jnst compensation, and . . . the law shall compel it to do it."[243] It is also reflected in the courts' widespread use of the term "self-executing" to describe just compensation provisions. In one sense, just compensation provisious were always "self-executing." They were not merely hortatory directives to the legislature, but were judicially enforceable limitations on legislative competence. In the terms commonly used in nineteenth-century discnssions, they were not "directery," but "mandatory."[244] Thus, when courts used the terms "self-executing" or "*ex proprio vigore*" to describe the operation of just compensation provisions, they might not have been saying anything new. And yet the use of these terms at least hints at the possibility that just compensation provisions themselves imposed remedial duties. So, for example, when the West Virginia Supreme Court proclaimed that "[t]he first clause of section nine of our bill of rights, *ex proprio vigore* protects the private property of an individual from *damage* for public use without just compensation,"[245] it was poised midway between the old understanding that just compensation provisions merely limited legislative competence and the modern understanding, exemplified by the Supreme Court's statement in *United States v. Clarke* that property owners are entitled te bring inverse condemnation actions because of " 'the self-executing

243. Blanchard v. City of Kansas, 16 F. 444, 446 (W.D. Mo. 1883); *see also Householder*, 83 Mo. at 494 (explaining that if a city takes private property, absent a law authorizing it to do so, the city is liable to the owner).

244. For a discussion of this terminology, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 74-84 (1868). The Supreme Court case most often cited for the proposition that constitutional provisions might be merely directory is *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 495 (1841) (holding that a provision in the Mississippi Constitution of 1832 prohibiting the introduction of slaves into the state for purposes of selling them was merely directory to the legislature, and not a prohibition per se).

245. Johnson v. City of Parkersburg, 16 W. Va. 402, 423 (1880). A punctuation error in the opinion makes it appear that the *Johnson* court is quoting an Illinois case for this language, but the language is not contained in the Illinois case, and the reference to "the first clause of section nine of our Bill of Rights" is a reference to the West Virginia Constitution. For similar language, see *Swift & Co. v. City of Newport News*:

> [W]hen the provision of a Constitution, as does ours . . . forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.

Swift & Co. v. City of Newport News, 52 S.E. 821, 825 (Va. 1906).

character of the constitutional provision *with respect to compensation . . . .*' "[246]

B. The "Taking or Damage" Amendments

How did courts come to see just compensation clauses in this new way? One strong influence seems to have been a constitutional amendment that over half of the states adopted between 1870 and 1910. That amendment expanded the scope of just compensation protection from the "taking" of property to the "taking *or damaging*" of property. In the course of intorpreting and applying this amendment, courts began to see just compensation clauses as supporting a right of action against governmentally authorized invasious of property rights.

1. Legislative Background

The first state to consider and adopt a "taking or damage" amendment was Illinois, which looked to English law to protect landowners from the effects of railroad development and other public works projects. In December of 1869, an assembly convened in Illinois to consider adopting a new state constitution, which would replace the Illinois Constitution of 1848. The Constitution of 1848 had directed the Illinois legislature to "encourage internal improvements by passing liberal laws of incorporation for that purpose,"[247] and had granted the legislature discretion to grant special charters when it determined that general incorporation statutes were insufficient.[248] The legislature understeod that railroads were the chief "internal improvement" the framers had in mind and was happy to promote railroads, but used the special charter as the rule rather than the exception.[249] In the thirteen years between 1848 and 1861, the legislature granted 176 special charters to railroads; in the five

246. United States v. Clarke, 445 U.S. 253, 257 (1980) (emphasis added) (quoting Nichols); *see* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (quoting this language from *Clarke*).

247. ILL. CONST. of 1848, art. X, § 6 (amended 1870).

248. *See id.* art. X, § 1 (empowering the general assembly to create corporations by special act "in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws").

249. For general background on railroad construction in Illinois and associated legal developments, see GEORGE HALL MILLER, RAILROADS AND THE GRANGER LAWS 59-96 (1971); Alan Jones, *Republicanism, Railroads, and Nineteenth-Century Midwestern Constitutionalism*, *in* LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 239-65 (Ellen Frankel Paul & Howard Dickman eds., 1989).

years from 1865 through 1869, it granted 147 such charters.[250] Illinois railroad track mileage exploded—from 110 miles in 1850 to 2,790 miles in 1860[251]—but with that development came the dirt and danger of the machines, the economic and social upheaval of radically new infrastructure, and massive pressure on legislators to play favorites. By the end of the 1860s, the costs of rapid, indiscriminate railroad development had become apparent,[252] and criticism of legislative favoritism to railroads was widespread, in Illinois and throughout the nation.[253]

It was thus no surprise that many delegates to the 1869-1870 Constitutional Convention were interested in reining in railroad corporations. One delegate remarked that "if there is anything like unanimity in this State upon any one thing, it is upon restricting these railroads, these immense corporations."[254] On a number of important points, the delegates looked to English legislative precedent.[255] Before 1845, there was no general law in England about compensation for expropriation of property. Rather, compensation requirements were included in individual private bills creating companies as one qualification of a specific grant of expropriation powers,[256] or in individual acts authorizing the construction of particular public works.[257] The boom in railroad construction led Parliament te pass

---

250. *See* John W. Eilert, *Illinois Business Incorporations, 1816-1869*, 37 BUS. HIST. REV. 169, 174-75 (1963).

251. *See* JOHN F. STOVER, IRON ROAD TO THE WEST: AMERICAN RAILROADS IN THE 1850s, at 119 (1978).

252. A nice early judicial recognition that the costs of railroads were greater than initially thought is found in *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49 (1852). As to the motivation of the legislature in shielding the defendant railroad from liability for consequential injuries, the court commented: "The extent of such [consequential] injuries had not been much considered, perhaps, at that time, and almost all our citizens then esteemed it a desideratum, to bring a railroad as near them as possible, the nearer the better." *Id.* at 60.

253. For criticism in Illinois, see MILLER, *supra* note 249, at 75. The most prominent critique of railroad intorests published shortly before the Illinois convention convened was Charles Francis Adams, Jr.'s *A Chaptcr of Erie*. *See* Charles Francis Adams, Jr., *A Chapter of Erie*, *in* CHARLES FRANCIS ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 1 (1886) (originally published in the July 1869 issue of *North American Review*).

254. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, CONVENED AT THE CITY OF SPRINGFIELD, TUESDAY, DECEMBER 13, 1869, at 1710 (1870) [hereinafter DEBATES AND PROCEEDINGS].

255. In addition to English domain legislation, the Illinois delegates looked to English rate regulation legislation as the basis for constitutional provisions directing the General Assembly to establish maximum rates for railroads and grain elevators. *See* ILL. CONST. of 1870, art. XI, § 12; Munn v. Illinois, 94 U.S. 113, 135-36 (1877) (upholding Illinois grain elevater rato regulation against due process challenge); 2 DEBATES AND PROCEEDINGS, *supra* note 254, at 1641-43.

256. *See* Eric C.E. Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, 1967 B.C. L. REV. 127, 131-32.

257. *See id.* (citing cases about public works authorizations that had their own individual provisions concerning compensation for expropriated property).

three "clauses consolidation acts," providing standard clauses for insertion inte each relevant private bill.[258]

Section 68 of the Lands Clauses Consolidation Act provided compensation "in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the Execution of the Works,"[259] "Works" meaning the undertaking, "of whatever nature," which the private bill was authorizing to be executed.[260] The act did not further specify the circumstances under which land was "injuriously affected,"[261] but by 1870, English courts had decided a number of cases interpreting that phrase, suggesting that it reached injuries that were compensable at common law but had been rendered noncompensable by special charters and public

258. The Railways Clauses Cousolidation Act, 8 & 9 Vict., ch. 20 (1845) (Eng.), furnished standard provisions for railway bills. The Companies Clauses Consolidation Act, 8 & 9 Vict., ch. 16 (1845) (Eng.), furnished provisions for companies generally. Most important for present purposes, the Lands Clauses Consolidation Act, 8 & 9 Vict., ch. 18 (1845) (Eng.), furnished provisions concerning compulsory purchases of land.

259. 8 & 9 Vict., ch. 18, § 68 (1845).

260. *Id.* § 2. The Act also provided arbitration, rather than a jury trial, at the election of the owner; interestingly, it was believed by some that a jury would likely favor railway companies because they were likely to be "mixed up with these railway speculations" in one way or another. Todd, *supra* note 256, at 135 (citing 79 PARL. DEB. (3d ser.) 228 (1845)). Illinois and many other states were moving in the opposito direction, adding requirements for jury trials to protect owners. *See, e.g.*, ILL. CONST. of 1870, art. II, § 13 ("Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law."); 2 DEBATES AND PROCEEDINGS, *supra* note 254, at 1575 (statement of Mr. Springer) ("[P]eople should be entitled to a jury in assessing damages to proporty taken for public use .... The General Assembly has virtually deprived the people of this only sure guarantee against the frauds and oppressions practiced by privato corporations.").

261. At least two commentaters, one contemporary to the Act and one modern, have argued that section 68 was meant to apply only te "partial takings": situations in which one part of an owner's land was actually appropriated, and another part retained by the owner was adversely impacted, or "injuriously affected," by the appropriation. *See* Keith Davies, *"Injurious Affection" and the Land Compensation Act of 1973*, 90 L.Q. REV. 361, 366-67 (1974); *Lands "Injuriously Affected"*, 41 L. TIMES 148, 149 (1865); *see also* Todd, *supra* note 256, at 136 (quoting statement by Lord Campbell on the day the Lands Clauses Consolidation Act became law, complaining that a landowner has no remedy when his land is injuriously affected but none of his land is actually occupied, which suggests that Campbell did not believe that the Act provided such a remedy). Keith Davies argues that section 68 was interpreted more broadly to mitigate the unjust effects of an earlier doctrinal mistake: the doctrine that statutory authority to undertake a certain project (for example, to build and operato a railroad) contains an implied grant of immunity from nuisance liability. *See* Davies, *supra*, at 362-65. This may well be true but is subject to a qualification. Statutory authority was never construed to grant absolute immunity, but only immunity for non-negligent acts. *See* Jones v. Bird, 106 Eng. Rep. 1397, 1399-400 (K.B. 1822); *supra* text accompanying notes 159-67 (discussing the doctrine that statutory authority does not grant immunity for negligent acts). In interpreting section 68, English courts preserved that immunity in regard to operation (as opposed to construction) of a project; "injurious affection" did not include damages from the non-negligent operation of a railroad. *See* Hammersmith Ry. v. Brand, 4 L.R. 171 (H.L. 1868). To that extent, section 68 was not read to correct for prior overgenerosity of the courts in implying grants of immunity.

works authorizations that courts interpreted te shield corporations from liability for consequential injuries.[262]

The Lands Clauses Consolidation Act became the principal inspiration for the Just Compensation Clause that became part of the Illinois Constitution of 1870,[263] although delegates must also have been aware of existing American compensation statutes that provided for compensation in particular circumstances that state constitutional takings clauses would not have covered.[264] That expanded clause provided that "[p]rivate property shall not be taken *or damaged* for public use without just compenation."[265] "Damaged," like "injuriously affected" in the Lands Clauses Consolidation Act, was supposed to indicate that some injuries short of "takings" would be covered by the Just Compensation Clause. The principal kinds of injuries on the minds of the delegates during the convention were twofold: those caused by railroads[266] and those caused by street grading.[267] The con-

---

262. *See, e.g.*, Glover v. North Staffordshire Ry. Co., 117 Eng. Rep. 1132 (Q.B. 1851) (holding that an owner's land had been "injuriously affected" when it was diminished in value because the defendant's railroad tracks made a right of way leading to the land more difficult to use); *cf.* Ricket v. Metropolitan Ry., 2 L.R. 175 (H.L. 1867) (denying recovery for injuries, reasoning that they would not be actionable at common law); Caledonian Ry. v. Ogilvy, 2 Macq. 229, 235 (H.L. Scot. 1856) (same). For my discussion of statutory justification of consequential injuries, see *supra* text accompanying notes 118-47. The Clauses Consolidation Acts were part of the legislative tradition that led Theodore Sedgwick to proclaim that "the protection afforded by the English government te property, is much more complete in this respect than under our system; although Parliament claims to be despotically supreme, and although we beast our submission to constitutional restrictions . . . ." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 524 n. ‡ (1857).

263. *See, e.g.*, 2 DEBATES AND PROCEEDINGS, *supra* note 254, at 1578 (statement of Mr. Wall) ("While I am on the floor, I wish to refer to another provision in this section, that private property shall not be taken or damaged for public use without just compensation . . . . I understand that by an act of parliament a similar provision exists in England."); *id.* (statement of Mr. Allen, of Alexander) (noting that an act was passed "looking to this very question in which the term 'damage' was used. For years thereafter the courts of England were called upon to give constructions to this act, until now, the law with reference to such damage has been well settled.").

264. Many nineteenth-century stato statutes provided for compensation for changes in street grade, for damage caused to neighboring landowners by running railroads in streets, and in other particular cases. *See, e.g.*, 1 LEWIS, *supra* note 35, §§ 206b-220, at 496-518; 2 NICHOLS, *supra* note 34, § 309, at 833-35. Quite a few of them predated the Illinois Constitution of 1870. *See, e.g.*, 1 LEWIS, *supra* note 35, § 213, at 503 (describing an 1852 statute granting damages for grade changes on streets in New York City); *id.* § 214, at 504 (describing an 1854 statute granting damages for grade changes on streets in Philadelphia); 2 NICHOLS, *supra* note 34, § 309, at 824 (describing an 1824 Massachusetts statute granting damages for injuries to property not taken by road construction); *id.* (describing an 1833 Massachusetts statute interpreted to grant damages for railroad construction even when no land was taken). All of these statutes, however, were limited in scope to particular acts such as street grading or railroad construction; the generality of the Lands Clauses Consolidation Act was distinctive.

265. ILL. CONST. of 1870, art. II, § 13 (emphasis added).

266. *See* 2 DEBATES AND PROCEEDINGS, *supra* noto 254, at 1578 (statoment of Mr. Allen, of Alexander) ("Take a railroad, for illustration, which runs within three feet of a residence, and

cern with the dirty and dangerous operation of railroads fit the overall anti-railroad theme of the convention. The concern about street grading, a much older problem on which the leading courts of the country had long deliberated,[268] was especially widespread in Chicago, which was built on a swamp. Street raising projects in Chicago in the mid-nineteenth century, covering the entire downtown area and many nearby neighborhoods, had buried the first floors of many existing buildings.[269]

These concerns caught the imagination of constitutional conventions in many other states as well. By 1880, a mere ten years after Illinois pioneered the "taking or damage" clause, eleven other

---

the smoke from which fills the house and prevents its occupation, that property is naturally 'damaged'—destroyed—for residence purposes, and yet is not 'taken.' "); *id.* at 1579 (statement of Mr. Church):

> If the term "damage" is not satisfactory, use "injury," or whatever will prevent a man's property from being destroyed without compensation . . . because there may be such a construction of a railroad as will expose [a man's] property for all time te come as absolute destruction, by means of fire being brought into almost immediate contact with it, whereby destruction will follow almost as a necessity, and where the moment it is thus exposed, his expenses of insurance, aside from all other damages and dangers to which he is exposed, may be increased five-fold.

267. *See id.* at 1577 (statement of Mr. Underwood):

> The courts have decided that cities, in their grading, may cut down lots so as to almost ruin men and subject them te enormous expense, or they may raise the grade of streets so as te cause water to run upon lots, and make property comparatively worthless, but that is a damage for which landowners are entitled to no compensation . . . . As I understand this article, it will require compensation to be made for those damages which necessarily and naturally arise to a party in consequence of these public improvements.

See also id. at 1578 (statement of Mr. Wall) (The "taken or damaged" provision "is for the purpose . . . of protecting persons whose property is not immediately taken by the exercise of the right of eminent domain, but by reason of . . . a street being leveled or graded up so that their property is injured.").

268. *See supra* note 141 (listing leading street grading cases).

269. Donald Miller describes the enormous scope of the street raising project in Chicago:

> Construction of . . . new sewers and streets forced the city council to raise the grade of the city by as much as ten feet in places. This meant that buildings, too, had to be elevated. Reporters from all over the world went to Chicago to see almost an entire city uprooted and raised to a new height by an engineering "miracle" of enormous cost and difficulty.
>
> Owners of buildings were expocted to pay for elevating them, but some refused to cooperate, leaving their houses and steres in "holes" beside rows of structures that had been hoisted to the new grade.
>
> . . .
>
> The raising of Chicage went on for two decades . . . .

DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 125 (1996); *see also* 2 NICHOLS, *supra* note 34, § 311, at 844:

> It was in the rapidly growing city of Chicago that the most serious injuries to proporty by the construction of public improvements occurred and the attention of the people of that city was focussed upon the hardship of [the rule that there was no liability for the consequential damages of public improvements] by a number of especially striking examples.

states had adopted similar constitutional provisions.[270] By 1912, twenty-five of the forty-eight states had a "taking or damage" provision,[271] and of the thirteen states admitted to the Union after 1870, twelve adopted a "taking or damage" provision in their first constitutions.[272]

2. Judicial Interpretation of the Amendments and the Remedial Turn

Soon after the "taking or damage" amendments became law, property owners began to bring lawsuits relying on them. Even if the legislature had provided a statutory procedure for owners to obtain just compensation, it was often restricted by its terms to cases in which property had been *taken*.[273] As a result, owners seeking compensation for *damage* to their property could not use the statutory procedure, and were forced te bring non-statutery actions; this forced many courts to consider the basis of such actions for the first time.

---

270. The eleven other states were, in chronological order, West Virginia, Pennsylvania, Arkansas, Alabama, Missouri, Nebraska, Colorado, Texas, Georgia, California, and Louisiana. *See* W. VA. CONST. art. III, § 9 (1872); PA. CONST. art. XVI, § 8 (1874) ("taken, injured, or destroyed") (applied only to "[m]unicipal and other corporations and individuals invested with the privilege of taking private property for public use"); ARK. CONST. art. II, § 22 (1874) ("taken, appropriated, or damaged"); ALA. CONST. of 1875, art. XIV, § 7 ("taken, injured, or destroyed") (applied only te "[m]unicipal and other corporations and individuals invested with the privilege of taking private property for public use"); MO. CONST. OF 1875, art. III, § 21; NEB. CONST. art. I, § 21 (1875); COLO. CONST. art. II, § 15 (1876); TEX. CONST. art. I, § 17 (1876) ("taken, damaged, or destroyed for or applied te public use"); GA. CONST. OF 1877, art. I, § III, para. I; CAL. CONST. art. I, § 14 (1879); LA. CONST. of 1879, art. 156.

271. *See* sources cited *supra* noto 270; ILL. CONST. OF 1870, art. III, § 13; MONT. CONST. of 1889, art. III, § 14; N.D. CONST. art. I, § 14 (1889); S.D. CONST. art. VI, § 13 (1889) ("taken for public use, or damaged"); WASH. CONST. art. I, § 16 (1889); WYO. CONST. art. I, § 33 (1889); MISS. CONST. art. III, § 17 (1890); KY. CONST. § 242 (1891) ("taken, injured, or destroyed") (applies only to "[m]unicipal and other corporations, and individuals invested with the privilege of taking private property for public use"); UTAH CONST. art. I, § 22 (1895); MINN. CONST. art. I, § 13 (1857) (amended 1896) (amendment changed "taken" to "taken, destroyed or damaged"); VA. CONST. OF 1902, art. IV, § 58; OKLA. CONST. art. II, § 24 (1907); N.M. CONST. art. II, § 20 (1912); ARIZ. CONST. art. II, § 17 (1912).

272. The only state admitted after 1870 not to include a "taking or damage" clause in its first constitution was Idaho, admitted in 1890. *See* 1 SOURCES AND DOCUMENTS, *supra* note 210, at vi (Idaho admitted on July 3, 1890). The other twelve states admitted after 1870 were Colorado (1876), Montana (1889), North Dakota (1889), South Dakota (1889), Washington (1889), Wyoming (1890), Utah (1896), Oklahoma (1907), Arizona (1912), New Mexico (1912), Alaska (1959), and Hawaii (1959). *See id.*; sources cited *supra* notes 270-71; *see also* ALASKA CONST. art. I, § 18 (1959), *reprinted in* 1 CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE 8 (Shirley S. Abramson ed., 1969); HAW. CONST. art. I, § 18 (1959), *reprinted in* 1 CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE, *supra*, at 4.

273. For cases holding that statutery procedures did not cover claims that property was damaged, see *Indiana Central Railway Co. v. Boden*, 10 Ind. 96, 98 (1858); *Burlington & M. Railrond Co. v. Reinhackle*, 18 N.W. 69, 70-71 (Neb. 1883); *New Mexican Railroad Co. v. Hendricks*, 30 P. 901, 901 (N.M. 1892).

From the beginning, courts recognized that the amendments had been modeled on an Act of Parliament and looked for guidance to English cases interpreting that Act,[274] as well as to American cases interpreting stato statutes providing compensation for injuries that were not "takings."[275] Thus, from the very beginning, courts thought of the "taking or damage" amendments as being like statutos, making it easier for them to bring the amendments within the common law tradition of implying private damage actions under statutes.[276]

More important, however, was the debate about the substantive scope of the "taking or damage" amendments. To what extent did they broaden liability? One possibility was that the amendments simply removed the justification that courts had implied under special charters, leaving corporations in the position that they would have been in had no statute authorized their activities: subject to common law tort liability. This "common law equivalence" interpretation had strong appeal for a number of reasons, not the least of which was that it was perfectly compatible with the justification-stripping model of just compensation litigation. Many statos, however, rejected the idea of common law equivalence in favor of an interpretation under which the "taking or damage" amendment imposed liability that even exceeded common law liability in some cases. This substantive interpretation made it difficult to continue with the traditional justification-stripping model, because that model started with a common law action and could not accommodate additional liability. One cannot

---

274. *See, e.g.*, Rigney v. City of Chicago, 102 Ill. 64, 81 (1882) (citing numerous English cases).

275. One of the first cases to interpret a "taking or damage" amendment, an 1873 Illinois Supreme Court decision, looked te a Massachusetts case interpreting legislation requiring railroad companies to pay for all damages caused by the construction and maintenance of their roads. *See* Stone v. Fairbury, Pontiac & N.W. R.R. Co., 68 Ill. 394, 397-98 (1873) (discussing and quoting Proprietors of Locks & Canals v. Nashua & Lowell R.R. Co., 64 Mass. (10 Cush.) 385 (1852)). The Massachusetts legislative tradition was particularly important because Massachusetts courts, unlike English courts, had held that their statutes allowed recovery in some situations that would not have been actionable at common law. *See* Parker v. Boston & Me. R.R., 57 Mass. (3 Cush.) 107 (1849):

> The claim for damages . . . does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, . . . [because] the [railroad] did not own land; they ouly acquired a spocial right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others.

Id. at 114; *see also* 2 NICHOLS, *supra* note 34, § 310, at 842 n.17. For my discussion of how this recognition of broader-than-common law liability contributed te the breakdown of the justification-stripping model, see *infra* text accompanying note 300.

276. In addition, state constitutions were amended much more frequently and often contained more detailed provisions than the United States Constitution, making state constitutional provisions look less like general declarations of timeless truths, and more like ordinary legislation.

say that it made it "impossible" to continue with the justification-stripping model, because constitutional liability in excess of common law liability coexists with the justification-stripping model in the seminal Supreme Court case of *Ex parte Young*.[277] Yet the tension between common law liability and the justification-stripping model may be one of the reasons why *Young* persists in being enigmatic; and in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court rejected the justification-stripping model, in part, precisely because it thought that model would no longer work once it rejected "the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law."[278]

The common law equivalence interpretation found early favor in an 1851 Queen's Bench case interpreting the Lands Clauses Consolidation Act,[279] and had strong appeal throughout the remainder of the nineteenth century as an interpretation of "taking or damage" amendments.[280] The appeal was at least threefold. First, common law equivalence meant that everyone—individuals, private and public corporations, and the state itself—was subject to the same rule of law, a powerful attraction for many who cherished the ideal of neutral, generally applicable laws affording equality of opportunity.[281] Some

---

277. *Ex parte Young*, 209 U.S. 123 (1908). As Henry Hart put it in his classic article:

> By almost imperceptible steps [the Supreme Court] appears to have come to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable.
>
> . . .
>
> The crucial advance, seemingly, was in *Ex parte Young*, where the personal wrong complained of consisted of threats of a multiplicity of prosecutions, a very dubious tort under state law.

Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 n.124 (1954) (citation omitted). For a stronger statement that *Ex parte Young* did not involve a common law tort, see Amar, *Of Sovereignty*, *supra* note 3, at 1479 n.218 ("*Young* itself, for example, involved no individual private law tort by the defendant; the sole basis for the suit was the claim that defendant, as a *state* official, was about to execute an unconstitutional *state* law that offended the due process clause's restrictions on *state* action.") (emphasis in original).

278. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

279. *See* Glover v. North Staffordshire Ry. Co., 117 Eng. Rep. 1132, 1136 (Q.B. 1851) (Lord Campbell, C.J.) ("The jury find that the land is depreciated in value; and the depreciation is caused by that being done which, but for the powers contained in the Act of Parliament, would have been actionable. That criterion is very fairly suggested by the counsel for the defendants."); *id.* (Wightman, J.) ("A very fair criterion is suggested: suppose no Act of Parliament had passed, and that had been done which has been done, would an action have been maintainable?").

280. *See, e.g.*, 1 LEWIS, *supra* note 35, § 236b, at 555 n.83 (citing cases taking this view).

281. For a later expression of the value of equal rules, see Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 240 (1931):

constitutional convention delegates and courts focused particularly on equivalence between individuals and private corporations, reflecting the reaction to industrial concentration and oligopoly generally, and railroads in particular, in the post-Civil War era. Thus, in the state constitutional convention that adopted a "taking or damage" clause for Kentucky's constitution, one delegate supporting the amendment remarked:

> If it is necessary to protect equal rights to the citizen with the railroad to put railroads on the same footing with individuals, I do not care if it blots out every railroad in the State. I am opposed to the injustice of inequality. I think this Convention was called to produce equality, and if it requires inequality to foster railroads, let them go . . . .[282]

Second, common law equivalence fit the idea, which was gaining in prominence in the 1870s, that the "property" protected by just compensation clauses was not land or physical objects themselves, but the owner's "bundle of rights" in those things.[283] Two years after Illinois adopted its Constitution of 1870, the New Hampshire Supreme Court's opinion in *Eaton v. Boston, Concord & Montreal Railroad* forcefully expressed the view that "[t]he term 'property,' . . . in its legal signification 'means only the rights of the owner in relation to it,' "[284] and cited, among other things, John Austin's *Lectures on Jurisprudence* to indicate the court's affinity for

---

> The assumption of the New Hampshire justices [in *Eaton v. Boston, Concord & Montreal R.R.*, 51 N.H. 504 (1872)], that the property rights of an individual against the public are the same as his rights against other individuals, seems to be entirely justified, as applied to the awarding of compensation in eminent domain proceedings. It is implicit in the nature of such proceedings that society desires to purchase from an individual the property rights recognized in him under a legal system designed to adjust his relations with other individuals. The only difference that should exist between a sale to society and one to an individual is that the former may acquire property that the latter could not buy.

282. 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 4745 (1890) (statement of Mr. Bullitt).

283. John Lewis, writing in his 1888 treatise on eminent domain, may have expressed this idea most clearly:

> If, for damage caused to my land by certain acts of my neighbor done upon his own land for his own use, I may have compensation, and if, for the same damage caused by the same acts done upen the same land by the public or its agents for public use I can have no compensation, it is plain that the right upon which the former action was founded has been taken from me, that so much has been substracted from my property in the land.

1 LEWIS, *supra* note 35, § 56, at 59.

284. Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504, 511 (1872) (quoting Wynehamer v. People, 13 N.Y. 378, 433 (1856)).

positivist analysis.[285] Common law equivalence played a large part in the rhetoric of the *Eaton* opinion.[286] The first sentence, for example, announces that "if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action."[287] This sets the stage for the case's holding that any material abridgement of the "rights of user and of exclusion" are a taking of the plaintiff's property.[288] Those commentators who lauded the positive-law analysis of property in *Eaton*, such as John Lewis, argued that "taking or damage" amendments were intended to prod courts into accepting that analysis.[289]

Third, common law equivalence does not require the slightest change to the justification-stripping model of just compensation litigation. The justification-stripping model begins with a party's rights, duties, immunities, and disabilities at common law; common law

---

285. *See id.* (citing 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 817, 818 (3d ed. 1869)). A.W. Brian Simpson suggested in a recent book review that "[t]here is no reason to suppose that Austin's views on the law of tort, or on any other branch of the law, ever had the least influence." Simpson, *supra* note 165, at 2028 (reviewing DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY (1995)); *see also id.* at 2032 ("No doubt a few masochistic individuals read [Austin's *Lectures*], but I gravely doubt if they included many judges or practicing counsel. I know of no citation to them in legal argument in a tort case.") Simpson may well be right that Austin was cited rarely, but *Eaton* was a tort case. *Eaton* did not cite Austin for his views on negligence, which is Simpson's immediate concern, but Simpson's broader point is that high theory had little or no influence on the actual development of the law. John Lewis copiously cites and quotes Austin, as well as Jeremy Bentham, in support of his argument that "property" is a bundle of rights. *See* 1 LEWIS, *supra* note 35, § 54, at 54.

286. The opinion hedges its rhetoric by suggesting that "the practical result is the same" if "the land itself be regarded as 'property.'" *Eaton*, 51 N.H. at 512. It also accommodates many of the results of a more traditional takings clause interpretation by incorporating two qualifications. First, *Eaton* notes that the injury it is recognizing as a taking is "a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession." *Id.* at 513. Second, *Eaton* distinguishes cases involving "an entry on land for a merely temporary purpose"; such a temporary entry does not amount to a "'taking of property'" because "'[t]he beneficial possession of the owner is not substantially interfered with.'" *Id.* at 525 (citations omitted).

287. *Id.* at 506-07.

288. *Id.* at 511.

289. 1 LEWIS, *supra* note 35, §§ 233-34, at 551. Lewis contended that, if the "property" of just compensation provisions were properly defined to refer to an owner's entire bundle of legal rights, a prohibition on "taking" property without just compensation would encompass all interferences with legal rights. *See id.* The "taking or damage" amendments were only necessary because some courts had defined property too narrowly.

As John Forrest Dillon noted, however, if the real problem was that courts were defining "property" too narrowly, the most straightforward solution would have been to frame an amendment that clarified what "property" was supposed to mean. If that was supposed to be the function of the "taking or damage" amendments, they did not serve that function well, because they did not address the definition of "property," but continued to presuppose some unspecified definition. *See* 2 DILLON, *supra* note 53, § 587c, at 687. Some courts may have seen this weakness as supporting their decision not to interpret the "taking or damage" amendments as mandating common law equivalence.

equivalence begins and ends with the same set of rights, duties, immunities, and disabilities. To the extent that jurists saw this as natural, common law equivalence preserved and reinforced that view.[290] One of the most striking features of the *Eaton* opinion is its juxtaposition of a supposedly novel, modern treatment of the substantive protection of a takings clause with one of the most detailed accounts anywhere of the strictly traditional justification-stripping model of takings clause litigation. The plaintiff in *Eaton* brought a common law tort action; the first sentence of the opinion, as I have noted above, indicatos that absent statutory justification the plaintiff would prevail in that action; the defendants then claim "that they cannot be made liable as tort-feasors for doing what the legislature [implicitly] authorized them to do" in their special charter;[291] and the court, assuming that the legislature intended such an implicit authorization, frames the question presented as one of whether the legislature has the power to pass a statute so authorizing "without making any provision for . . . compensation."[292] The constitutional provision operates to deny the defendant its authorization or justification, because, as the court held, the legislature did not have the constitutional power to authorize the defendant's challenged activity without compensation: "[T]heir enactment is not 'law,' and can afford no justification."[293] *Eaton* also specifically mentions and leaves intact the immunity of municipal corporations acting in a governmental capacity, another part of the traditional common law structure.[294]

In spite of the appeal of common law equivalence, however, most courts ended up rejecting that model; while common law liability remained a facter in shaping liability under "taking or damage" clauses, courts began to conclude that liability under those clauses

290. An echo of the view that common law rights and remedies were natural appears in Henry Mills's 1879 treatise on eminent domain: "For an entry on land, or the taking or destruction of property, of another, the common law gave the injured party the remedies of trespass, trespass on the case, or ejectment. These remedies gave the owner complete compensation for the invasion of his rights of property." HENRY E. MILLS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 88, at 116 (1879). Mills assumes that an owner's rights of property are quite independent of the remedies recognized at common law, so that those remedies can be evaluated in terms of whether they completely or incompletely vindicate the owner's rights. Mills concludes, however, that the remedies are complete, and that therefore the common law perfectly reflects an owner's pre-existing property rights, although the exact source of those rights remains unclear.

291. *Eaton*, 51 N.H. at 510.

292. *Id.*

293. *Id.* at 516 ("If the enactment is oppesed to the constitution, it is in fact 'no law at all.'") (quoting COOLEY, *supra* note 236, at 3).

294. *See id.* at 526-27.

was both broader and narrower than the liability of private parties at common law. For my purposes, the more important of the two directions is that towards broadening liability, because that is the direction that could not be accommodated by the justification-stripping model. Throughout the nineteenth century, the general rule in partial condemnation cases was that the owner could recover, not just the market value of the condemned portion of his land, but the diminution in value of the portion retained by the owner caused by the severance and the likely use of the condemned portion.[295] Although courts sometimes excluded evidence of potential causes of diminution in value of the retained portion as too remote or otherwise inappropriate,[296] they took into account many causes that clearly would not be actionable against neighbors at common law.[297] For example, diminution in value caused by the mere unsightliness of a railroad constructed on the condemned parcel was an accepted element of damages in partial condemnation cases, as was diminution caused by the increased risk of fire and loss of privacy occasioned by railroad operation.[298] Some courts interpreting "takings or damage" clauses, notably those in Nebraska, concluded that the clauses extended the protection granted retained land in partial condemnation cases to land no part of which was taken, but which was merely adversely affected by nearby public works projects.[299] Not surprisingly, Nebraska courts took the position

---

295. *See, e.g.*, 2 LEWIS, *supra* note 35, § 464, at 998 ("Upon this point there is entire unanimity of opinion.")

296. *See, e.g.*, Louisville & Nashville R.R. Co. v. Hall, 136 S.W. 905, 906 (Ky. 1911) (holding that when a farm is partially taken for railroad tracks, the possible use of a barn on the remaining portion by tramps need not be considered as an element of damages); Petition of the Mount Wash. Rd. Co., 35 N.H. 134, 146-47 (1857) (holding that "just compensation" for a partial taking for a toll road did not include competitive injury to a horse rental business conducted on the remaining portion); 2 NICHOLS, *supra* note 34, § 239, at 736-37 (collecting cases).

297. For a general statement of the proposition that partial takings damages go beyond what is actionable against neighbors, see *In re Utica, Chenango & Susquehanna Valley Railroad Co.*, 56 Barb. 456, 460-61 (N.Y. App. Div. 1868). While applying, at least nominally, a common law equivalence requirement for compensation for injury te land none of which was taken, the English courts explicitly held that compensation for partial takings was broader. *See In re* Stockport, Timperley & Altrinchim Ry. Co., 33 L.J.Q.B. 251 (1864).

298. *See, e.g.*, Louisville & Nashville R.R. Co. v. White Villa Club, 159 S.W. 983, 984, 986 (Ky. 1913) (unsightliness); Webber v. Eastern R.R. Co., 43 Mass. (2 Met.) 147, 149 (1840) (increased risk of fire); *Utica*, 56 Barb. at 464 (increased risk of fire); Idaho & W. Ry. Co. v. Coey, 131 P. 810, 810-11 (Wash. 1913) (increased risk of fire, unsightliness, danger from probable breeding of squirrels and gophers); Duke of Buccleuch v. Metropolitan Bd. of Works, [1861-73] All E.R. Rep. 654, 659 (H.L. 1872) (annoyance and inconvenience from public use of new highway); 2 NICHOLS, *supra* note 34, § 238, at 729-35; RANDOLPH, *supra* note 184, § 260, at 241.

299. On this view, the "taking or damage" clause was adopted to rectify a kind of injustice of unequal treatment, but not the unequal treatment between individual and corporate or public defendants rectified by common law equivalence:

that, although the Nebraska legislature had only provided a procedure for owners to sue for damages when their property was "taken," owners still had a cause of action, implied directly by the constitution, for damages when property was "damaged." The justification-stripping model would no longer work when the constitution afforded protection greater than that afforded by the common law.[300]

The interpretation championed by the Nebraska courts was never generally accepted; the liability it imposed was too broad. Far more states rejected common law equivalence on other grounds. Many courts viewed the rule that municipal corporations were not liable for consequential damages from street grade changes as a *common law rule*, and thus decided that any provision that exposed municipalities to liability for such damages must create a new cause of action not known at common law.[301] This may initially seem to involve a basic legal mistake. The English cases originating the doctrine that public entities were not liable for consequential damages from street grading relied, not on the common law, but on statutory

---

> Under [the Nebraska Constitution of 1867], if any portion of a porson's real estate was taken for public use, he could recover all the damages sustained by the taking, but, if none of his real estate was taken for public use, he could recover nothing, although his proporty had been greatly damaged by such use. The ["taking or damage"] provision, therefore, is remedial in its nature, and the well-known rule, that in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy . . . is to be applied.

City of Omaha v. Kramer, 41 N.W. 295, 296 (Neb. 1889) (citation omitted); *see also* Omaha Horse Ry. Co. v. Cable Tram-Way Co., 32 F. 727, 734 (D. Neb. 1887) (applying Nebraska law, but formulating a general rule for "taking or damage" clauses):

> Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a damage within the scopo and protection of this constitutional provision, and entitling the owner to compensation.

See also 2 NICHOLS, *supra* noto 34, § 312, at 846. In support of its broad view of the "taking or damage" provision, the *Kramer* court cites cases, including previous Nebraska cases, that clearly take a narrower view; it is not clear whether this represents disingenuity, misreading, or hesitancy about the breadth of its own holding. *See Kramer*, 41 N.W. at 296 (citing, among other cases, Rigney v. City of Chicago, 102 Ill. 64 (1882) and Gottschalk v. Chicago Burlington & Quincy R.R. Co., 16 N.W. 475 (Neb. 1883)).

300. *See* Burlington & M. R.R. Co. v. Reinhackle, 18 N.W. 69, 70 (Neb. 1883).

301. *See* City of Atlanta v. Green, 67 Ga. 386, 388 (1881) (noting that decisions holding municipalities not liable "have rested upon the common-law doctrine that . . . private injury or inconvenience that may arise te adjacent lot-holders, as a consequence of such raising or lowering the grade of the street must be berne by the proprieter without componsation"); Swift & Co. v. City of Newport News, 52 S.E. 821, 823 (Va. 1906) ("At common law, as has been repeatedly held by this court, municipal corporations were not liable for consequential damages, arising from the change of grade of a street . . . ."); Johnson v. City of Parkersburg, 16 W. Va. 402, 415 (1880) ("[T]he sweeping current of beth English and American decisions . . . is, that at common law a municipal corporation is not liable for consequential damages arising from a change in the grade of a street . . . .").

authority that shielded the entities from common law liability.[302] American courts accepted this statutory justification framework, but added the qualification that statutes in violation of just compensation clauses could not justify otherwise tortious action.[303] Thus, expansion of a just compensation clause to expose a municipality to greater liability for street grading might restrict legislative power to alter the common law without reaching beyond the common law itself.

The characterization of the no-liability-for-street-grading rule as a common law rule, however, is not merely a mistake, but a more complex and interesting phenomenon. Legal analysis of some of the injury caused by street grading could draw on private law cases—cases involving the rights and duties of two private parties. Raising the grade of a street, for example, would often cause flooding on abutting property;[304] thus there was a developed body of law about a private owner's liability for diverting surface water towards his neighbor.[305] Lowering the grade of a street often caused lateral support problems;[306] thus there was also developed law about private lateral support.[307] Often, however, property owners were concerned about neither flooding nor loss of lateral support, but loss or increased difficulty of access to the street. Owners found it more difficult to reach their property from the street, and the property lost value as a result. Courts deciding the scope (if any) of a right of access to public streets were hard-pressed to find a suitable body of private law from which to draw. No customary relationship between private neighbors seemed sufficiently analogous to the relationship between private owner and municipality regarding public streets. Thus, when courts were deciding issues of access to public streets—when, for example, they decided that abutting owners had easements of access[308]—they

302. *See supra* text accompanying notes 127-35.

303. *See supra* text accompanying notes 146-47.

304. *See, e.g.*, Nevins v. City of Peoria, 41 Ill. 502, 507-08 (1866).

305. *See, e.g.*, Proprietors of Locks and Canals v. Nashua & Lowell R.R. Corp., 64 Mass. (10 Cush.) 385, 388 (1852).

306. *See, e.g.*, Callender v. Marsh, 18 Mass. (1 Pick.) 418, 418 (1823) (involving dwelling house placed in danger of collapse when grade of adjacent street was lowered); O'Connor v. Pittsburgh, 18 Pa. 187, 187-88 (1851) (involving cathedral that had to be moved when grade of adjacent street was lowered by seventeen feet).

307. *See, e.g.*, Thurston v. Hancock, 12 Mass. (11 Tyng) 220, 224-25 (1815).

308. *See generally* Transylvania Univ. v. City of Lexington, 42 Ky. (3 B. Mon.) 25 (1842); Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. (8 Dana) 289 (1838); Fletcher v. Auburn & Syracuse R.R. Co., 25 Wend. 462 (N.Y. Sup. Ct. 1841); *In re* Lewis Street, 2 Wend. 472 (N.Y. Sup. Ct. 1829); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1250-53 (discussing *Parker*, *Transylvania University*, and *Fletcher*); *cf.* McCombs v. Town Council, 15 Ohio 474, 481-82 (1846) (Birchard, J., dissenting) (arguing that the majority was wrong to recognize a municipal corporation's liability for a

were developing an irreducibly public body of common law.[309] Unsurprisingly, the development of this public common law was intertwined with the development of the constitutional law of just compensation.[310] Once one thought of an owner as having a reified right of access to a public street, the effect of street grade changes on access te abutting land seemed less like "consequential damage," and more like a taking.[311] And if, in deciding that injury to neighbors was merely "consequential damage," a court was always implicitly rejecting the claim that the neighbors had a more reified common law right that was being "taken," then it was not a simple mistake to characterize the earlier street-grade cases as common law cases, but involved a subtler recasting of those cases. Once those cases were so recast, the common law equivalence interpretation was rejected, not just because making municipalities liable for consequential damages

---

change in street grade even though the landowner suffered no loss of lateral support, because a private owner would not face liability in that situation). For a review of the development of the constitutional law of access rights, see generally WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 21-71 (1977); William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

309. The rejection of the private-law analogy may be clearest in *Crawford v. Village of Delaware*, 7 Ohio St. 459, 469-70 (1857). The *Crawford* court concedes that "if the owner of a lot abutting on a street, stands in the same relation to the street, which adjacent proprietors of lots stand in te each other, no right of a lot owner is invaded by cutting down or blocking up a street...." *Id.* at 468-69. It then, however, "inquire[s] whether there is any analogy between the rights of a lot owner in the adjacent lot of another person, and the rights of a lot owner in an adjacent street," *id.* at 469, and decides that there is no such analogy. *See id.*

Public nuisance law is perhaps another (older) area of arguably irreducibly public common law. In enforcing public nuisance law the state is not just acting for those members of the public who own or pessess land, but for the entire public; a public nuisance is not an aggregation of private nuisances. Nor is it in any simple sense the aggregation of individual rights untied te land ownership; it is doubtful, for example, that the state could permanently divest itself of its authority te enforce nuisance law by distributing it to individuals in pro rata pertions.

310. This point is particularly true in state courts, which had full control over both state common law and state constitutional law. This statement itself, however, reflects in part modern attitudes not shared by ninetoenth-century judges who thought in terms of general common law. *See, e.g.*, Yatos v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870):

> The law which governs the case is the common law, on which this court has never acknowledged the right of the State courts to contrel our decisions, except, perhaps, in a class of cases where the State courts have established, by repeated decisions, a rule of proporty in regard to land titles peculiar to the State.

Id. at 506 (Miller, J.) (holding that the city of Milwaukee's regulation banning docks from reaching past a particular line in a river teok a riparian owner's common law rights without just compensation)

311. *Cf.* Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544, 568-71 (1905) (holding that construction of elevated railroad over a street deprived abutting landowner of easement of light and air over that street); New Mexican R.R. Co. v. Hendricks, 30 P. 901, 901 (N.M. 1892) (upholding an action te recover loss in land value caused by construction of railroad in street) ("[T]he most the state can do is to surrender its own right to the public street or highway... it cannot impair or surrender the property represented by the easement of private owners of abutting property in the right of way to and from their homes.").

from street grading went beyond the common law, but because the common law equivalence model assumed that common law was essentially private law, and that all public law could be reduced to private law. Treatise writor Philip Nichols came closest to articulating such a view in his rejection of common law equivalence:

> [T]o lay down the rule that damage in the [sense used in "taking or damage" clauses] is such injury and such injury only as would be actionable if done by a private individual neither clarifies the situation nor gives the clause a broad enough meaning to include the specific form of injustice which it was chiefly intended to remedy. Few public improvements which injuriously affect adjoining land are of such a character that similar structures have been erected without legislative authority frequently enough to have settled the question whether they would coustitute an actionable injury at common law, so that the proposed test is in most cases useless, and furthermore many of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law. Thus the right of a private owner te pile up a mound of earth on his own land close to his neighbor's line, or te excavate on his own and so long as he did not deprive his neighbor's soil of support, was unquestioned at common law; and yet the right of a city or town te do this same thing in the course of grading a street without liability to the adjoining owner was the chief cause of dissatisfaction with the doctrine that unless there was a taking there was no right to compensation.[312]

Finally, even though the case that became the leading American case on "damage clause" intorpretation, *Rigney v. City of Chicago*,[313] wraps its holding in the mantle of common law equivalence, doubt that the rule in *Rigney* was really coextensive with the common law both preceded and followed the case. *Rigney* held that:

> [T]o warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.[314]

---

312. *See* 2 NICHOLS, *supra* note 34, § 312, at 849-50.

313. Rigney v. City of Chicago, 102 Ill. 64 (1882).

314. *Id.* at 80-81; *see also* Metropolitan Bd. of Works v. McCarthy, 7 L.R.-E.&I. App. 243, 265 (H.L. 1874). In *McCarthy*, the plaintiff was the lessee of a huilding near a public dock on the Thames River who successfully argued that the construction of the Thames Embankment, which involved demolition of the dock and an end to easy unloading of ships at that location, rendered his leasehold interest less valuable and was therefore an "injurious affection." The *McCarthy* rule, crafted by McCarthy's lawyer Thesiger to allow McCarthy to recover while assuring the court that "injurious affection" liability was not unlimited, is a truly outstanding example of lawyering. *See id.* at 249 (summarizing Thesiger's argument); *id.* at 256 (Lord Chelmsford) (adopting Thesiger's proposed rule); *id.* at 264 (Lord O'Hagan) (adopting Thesiger's proposed rule).

In the very next sentence, the *Rigney* court asserted that its rule was merely a restatement of the common law:

> In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.[315]

The *Rigney* rule, however, was copied almost verbatim from *Metropolitan Board of Works v. McCarthy*,[316] an English case interpreting the "injurious affection" requirement of the Lands Clauses Consolidation Act. Although *McCarthy* formally followed the already established English rule that actionability at common law was a prerequisite for recovery,[317] two members of the *McCarthy* court openly expressed doubt about the validity of that rule,[318] as did members of English courts in cases before and after *McCarthy*.[319] American courts such as the Colorado Supreme Court in *City of Denver v. Bayer* were skeptical that the English and Illinois courts actually applied common law limitations on recovery:

> The English courts . . . have usually (not always) held that the words "injuriously affected" only allow compensation where a right of action would have existed at common law; yet, in their application of this construction, they

---

315. *Rigney*, 102 Ill. at 81.

316. *McCarthy*, 7 L.R.-E.&I. App. at 243.

317. *Id.* at 261 (Lord Penzance); *see supra* text accompanying notes 262, 279 (discussing the English rule). There was some dissent from the common law equivalence model even among English judges.

318. *See McCarthy*, 7 L.R.-E.&I. App. at 252 (Lord Cairns) ("I do not pause to inquire whether or not, if the question was now te be decided for the first time, [the test of actionability at common law] is not a test somewhat narrow."); *id.* at 264 (Lord O'Hagan):

> I confess, my Lords, that if the case were entirely new . . . I should have doubted whether it was within the view of the framers of this Act of Parliament to make the possibility of bringing an action, if the Act of Parliament had not existed, a condition of compensation under the statute.

319. *See* Caledonian Ry. v. Walker's Trustees, 1881-85 All Eng. L.R. 592, 597 (H.L. 1882) (Lord Selborne) (discussing common law actionability):

> [A]n interpretation which it is too late te criticize now, though, if the point were open, I should myself think it questionable if there were not a fallacy in such a test deponding upon the hypothesis of the same work being executed without authority, which, having regard te the nature and operation of Acts for that class of public works, can hardly bo supposed to have been within the contemplation of Parliament.

See also Ricket v. Metropolitan Ry., 2 L.R. 175, 202 (H.L. 1867) (Lord Westbury, dissenting) ("There is nothing in the statutes te warrant the position that there shall be no compensation where at common law there would he no right of action.").

> have been extremely liberal, sometimes declaring that actionable at common law which we generally do not so consider.[320]

Although the *Bayer* court noted that other courts had taken conflicting positions on the issue of whether common law actionability was required, it concluded that it need not decide the issue, because the injury in the case before it (obstruction of access by construction of a railroad in a public street) *was* actionable at common law.[321] In a later concurrence, however, the author of the *Bayer* opinion, Judge Helm, revealed his own support for an interpretation that did not require common law actionability, and argued that his position "seem[ed] to be the construction given, though without discussion, by the supreme courts of several states in the Union."[322] Under this interpretation, the addition of the words "or damaged" to the state constitution's just compensation provision indicated "the recognition of a *new right of action*."[323] In sum, whether because of the relatively simple reasoning that private-law liability could not be accommodated in the justification-stripping model, or because of the more complicated reasoning that any expansion of just compensation law changed a portion of common law that was irreducibly public, the courts' attempts to interpret and apply the "taking or damage" amendments were major factors in the transition to a remedial duty understanding of just compensation provisions.

C. Permanent Damages and Injunctive Relief

Recall that the broad project of the Article is to describe the transition from a justification-stripping/legislative disability model of just compensation provisions to a remedial duty model, and to explore the connections between that transition and changes in the operative rules defining the just compensation rights of owners. Although the changes set in motion by the "taking or damage" amendments are probably the most important, another potentially fruitful set of rules is that governing the ability of owners to obtain permanent damages

---

320. City of Denver v. Bayer, 2 P. 6, 11 (Colo. 1883).

321. *Id.* at 12.

322. Denver Circle R.R. Co. v. Nestor, 15 P. 714, 725 (Colo. 1887). The Colorado Supreme Court later embraced Justice Helm's position in *Board of County Commissioners v. Adler*, 194 P. 621, 623 (Colo. 1920), noting that "damag[e]" in the "taken or damaged" clause meant:

> [S]uch as would result from the making of an improvement in which the right of eminent domain might be called into use .... The provision being thus limitod, it may be held ... that the right of recovery under such a constitutional provision is not limitod to actions maintainable at common law.

323. *Nestor*, 15 P. at 725 (emphasis in original).

or injunctive relief. As detailed above, under the classic justification-stripping model, owners who successfully invoked a just compensation provision to strip a defendant's justification could recover only retrospective damages, following the normal rule for trespass actions.[324] In the 1850s and 1860s, one can find a few isolated cases allowing owners to waive their right to an injunction or ejectment and sue for the value of property appropriated, which the court would then award as permanent damages.[325] After 1870, however, more and more courts allowed suits for permanent damages. This shift was aided by the growing sense that an owner's action under a just compensation provision was distinct from a common law trespass action. The most explicit recognition of this distinction and its effect on available damages appears in *City of Denver v. Bayer*,[326] the first Colorado Supreme Court case to interpret the 1876 Colorado Constitution's "taking or damage" amendment. The *Bayer* court proclaimed that "[u]nlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit; in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent."[327]

At the same time that courts began to allow actions for permanent damages under "taking or damage" provisions, they also became more reluctant to provide injunctive relief. In *Stetson v. Chicago & Evanston Railroad Co.*,[328] for example, the plaintiff, Stotson, owned land abutting a street in which the defendant railroad, by permission of the city of Chicago, had laid tracks. Stetson alleged that the operation of the railroad would "damage" his land within the meaning of the 1870 Illinois Constitution's just compensation clause, and filed a bill praying for an injunction against such operation until the railroad paid him just compensation. The Illinois Constitution did not contain a provision that required payment of just compensation before an appropriation,[329] and the mere failure to pay compensation before commencing operation would not be grounds for an injunction. On the other hand, even absent such a timing provision, courts would traditionally grant an injunction if a taking was about to occur and no statute provided an adequato post-deprivation procedure for an aggrieved property owner to obtain the constitutionally guaranteed just

324. *See supra* text accompanying notes 184-85.
325. *See, e.g.*, Mayor and Council of Rome v. Perkins, 30 Ga. 154, 155-56 (1860).
326. City of Denver v. Bayer, 2 P. 6 (Colo. 1883).
327. *Id.* at 15.
328. Stetson v. Chicago & Evanston R.R. Co., 75 Ill. 74 (1874).
329. For an example of such a provision, see *supra* note 22.

compensation; in such a case, the legislature would have purported to authorize a taking without providing just compensation, an act outside of its competence. Yet the *Stetson* court denied Stetson's request for an injunction without mentioning the existence of any statutory post-deprivation procedure, and apparently there was none. Instead, it relied on the existence of an ordinary action at law, in which, it intimated, Stetson could recover permanent damages.[330] The availability of a non-statutory action for permanent damages was becoming a substitute for a statutory post-deprivation procedure; if the constitution itself provided an adequate post-deprivation remedy, the lack of a statutory remedy would not be grounds for enjoining an act amounting to a "taking or damaging" until compensation was paid.

The *Stetson* court, followed by the Georgia Supreme Court in *Moore v. City of Atlanta*,[331] concluded that this regime was appropriate when property was not taken, but merely damaged. First, it reasoned, the amount of damage could only be known after the improvement was constructed and in operation: "How can it be known before the completion of the railroad what damages, if any, the complainant will sustain, and how could the same be measured?"[332] Second, and more importantly, the *Stetson* court reasoned that construction of public improvements would be greatly impeded if compensation, not only for land actually taken, but for damage to all neighboring land, had to be paid before the improvement was constructed and operated.[333] The *Moore* court was even more emphatic on this point; after ruling that an abutting landowner damaged by a change in street grade conld "recover damages for such injury te his freehold . . . measured by the decrease in the actual value of his property[,]"[334] it denied his request for an injunction, and intoned:

> Has [the abutting landowner] or any other citizen the right absolutely to stop the entire system of grades of a whole street, or of two streets, because his property will be damaged if the contomplated improvement, in the judgment of the authorities, be carried into effect? Is it not better that one man's property be incidentally damaged than that the city authorities be absolutely prohibited

330. Stetson complained that the construction of the track "had depreciated and decreased the value and price of lots fronting on the avenue," *Stetson*, 75 Ill. at 75, and that the railroad's operation "would further diminish the price and value of lots . . . ." *Id.* The court concluded that "[w]hat injury, if any, [Stetson] has sustained, may be compensated by damages recoverable in an action at law." *Id.* at 78.

331. Moore v. City of Atlanta, 70 Ga. 611 (1883).

332. *Stetson*, 75 Ill. at 78.

333. *Id.* ("[If the] company [were] bound te stop and litigate the question of damages with every one who may claim te he injured . . . it would be found te be utterly impracticable to construct any railroad or other public improvement within any reasonable time.").

334. *Moore*, 70 Ga. at 614.

> from grading the streets? Is it not more in harmony with all law and reason that this be so, especially when whatever damage the one man sustains the municipality will be made to pay? It might damage the one man one thousand dollars to make the contemplated grade; it might damage the march of improvement in a great and growing city millions of money not to make it.[335]

Thus, here as well, one might trace a change in operative rule, as well as the change toward understanding just compensation provisions as imposing remedial duties, to the courts' response to the "taking or damage" amendments. When those amendments expanded just compensation protection to cover the effects of public improvements on many neighboring landowners, courts concluded that allowing injunctive relief absent a statutory post-deprivation procedure would unduly impede "the march of improvement"; thus, they invented an adequate non-statutory post-deprivation procedure for recovering just compensation. With that procedure in place, they denied injunctive relief.[336] The invention of that non-statutory post-deprivation procedure, with a different measure of damages than traditionally allowed in trespass or case actions, further supported the perception that the Constitution itself imposed a remedial duty.

D. Immunities

A final group of operative rules to consider are those concerning sovereign, governmental, and official immunities. These rules determine, in part, the parties against whom an owner has a just compensation remedy. In advance of specific historical research, one might hypothesize that the change from a justification-stripping model to a constitutional tort model was precipitated by, or immediately followed by, changes in immunity doctrine. For example, one

---

335. *Id.* at 614-15.

336. Philip Nichols, writing in 1917, explained this development along similar lines, without tying it specifically to the "taking or damage" amendments:

> When . . . an expensive public improvement has been erected by authority of the legislature upon private land, or so near it as to "take" it in the constitutional sense, [but] there have been no valid condemnation proceedings . . . it will be a matter of convenience to both parties, and to the public as well, if the owner can have his damages assessed once and for all, and the corporation which erected the structure can be at the same time confirmed in its right of occupancy without further interference.
>
> The convenience of an action which will produce such a result, or rather the inconvenience of there being none, has led to the creation of the necessary remedy by one means or another in almost every jurisdiction, the courts, as in so many other matters, being unconsciously influenced by sociological considerations when the statutory authority was lacking and having thus been led to adapt the law to the conceptions of policy and justice prevailing in the community of which they form a part.

2 NICHOLS, *supra* note 34, § 478, at 1278-79.

might think that the expansion of immunity for individual public officials had made it more difficult to recover against individual officers under justification-stripping, and therefore had led property-rights-conscious courts to reshape just compensation clauses as encompassing a right to recover directly from the state. In fact, however, as detailed above,[337] the developing law of official immunity never affected actions for violations of property rights: courts either made an explicit exception for such actions or simply failed to recognize any immunity that would affect those actions. Nor did courts that adopted a constitutional tort model of just compensation actions immediately begin to entertain actions that previously would have been barred by sovereign or governmental immunity.

To the contrary, the Illinois Constitution of 1870 contains dramatic evidence that there was not generally thought to be a connection between the conception of the just compensation clause as providing a private damages action and the abrogation of sovereign immunity. In debate, delegates to the 1869-1870 constitutional convention stated that the proposed "taking or damage" amendment was inspired by the English Parliament's Lands Clauses Consolidation Act; because the Lands Clauses Act did explicitly grant a right of action for damages, it is reasonable to think that convention delegates likely thought, though perhaps not in a conscious, articulated manner, that the "taking or damage" amendment did so as well. Yet the same delegates adopted a provision that constitutionalized the principle of sovereign immunity in the most extreme form, providing that "[t]he State of Illinois shall never be made defendant in any court of law or equity,"[338] thereby wresting from the legislature the power it had had under the Illinois Constitution of 1848 to control actions against the state.[339] Nor did the debate in the constitutional convention leave any doubt that the sovereign immunity provision was supposed to trump whatever rights owners might have had under the 1870 Constitution's "taking or damage" provision. That latter provision generally required that a jury ascertain just compensation, but made an exception when just compensation was to be provided by the state.[340] The state's exemption from the jury requirement was contro-

337. *See supra* text accompanying notes 86-107.

338. ILL. CONST. of 1870, art. IV, § 26.

339. ILL. CONST. of 1848, art. III, § 34 (revised 1870) ("The general assembly shall direct by law in what manner suits may be brought against the state.").

340. ILL. CONST. of 1870, art. II, § 13 ("Private property shall not be taken or damaged for public use without just compensation. Such compensation, *when not made by the State*, shall be ascertained by a jury, as shall be prescribed by law.") (emphasis added).

versial, but was explained and defended on the ground that, because the state had absolute sovereign immunity, it alone should be the judge of the sufficiency of the compensation it provided:

> I conceive it to be very essential that, when compensation is made by the State, the people of the State should not be restricted and regulated as to the ascertainment of the compensation. The question of compensation, in such case, should be left to the Legislature, instead of twelve men.
>
> . . .
>
> We have provided in the legislative article, upon full discussion, that the State, in no event shall be made defendant in a suit at law. We reserve the rights of the whole people when we provide that the State, the political embodiment of the people, shall not be sued—shall not be the subject of jury trials, or any trials whatever.
>
> The effect of the clause is merely this: that when compensation is made by the State directly, the State shall be the proper judge of the compensation, upon the same principle that we provided that the State should never be sued.[341]

Thus, adoption of a constitutional tort model was not initially thought to have any counection to the abrogation of sovereign immunity.

That is not the end of the story, however. The United States Supreme Court, while adopting the view that the Just Compensation Clause is " 'self-executing . . . with respect to compensation[,]' "[342] has

---

341. 2 DEBATES AND PROCEEDINGS, *supra* note 254, at 1580 (statement of Mr. Benjamin).

342. United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting Nichols). In the federal courts, the transition from a justification-stripping model to a constitutional tort model has been tightly linked to the history of the federal statutes creating jurisdiction over claims against the United States and waiving federal sovereign immunity. In 1855, Congress passed the Court of Claims Act, creating the Court of Claims and conferring on it jurisdiction over actions founded "upon any contract, express or implied, with the government of the Unitod States . . . ." Court of Claims Act of 1855, ch. 122, 10 Stat. 612, 612 (1855) (codified at 28 U.S.C. §§ 2501-2525 (1994)). The Court of Claims and the Supreme Court construed this statute to grant jurisdiction over certain claims of owners for just compensation under the Takings Clause, by allowing owners to bring a common law action of *indebitatus assumpsit*, alleging that the United States had impliedly promised to pay for property it had taken, so long as the United States did not dispute that the plaintiff owner's title. *See* United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884):

> The law will imply a promise to make the required compensation, where property, te which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication [is] consistent with the constitutional duty of the government, as well as with common justice . . . .

Id. at 656-57. Jurisdiction under the "implied promise" fiction, however, did not reach all takings within the scopo of the Just Compensation Clause; if the government did not acknowledge the plaintiff's title to the property alleged to have been taken, then, the Court held, no promise to pay the owner just compensation could be implied. *See* Langford v. United States, 101 U.S. 341 (1879) (holding that the Court of Claims did not have jurisdiction over an owner's claim for just compensation when the United States disputed title). The *Langford* court noted that "[w]e are not prepared to deny that when the government of the United States . . . takes for

never held that the Clause abrogates either federal or state sovereign immunity,[343] and the reference to sovereign immunity in *First English* that some have taken to be an oblique hint about abrogation may be explicable on other grounds.[344] But beginning in the 1920s and 1930s, many state courts began to hold that state just compensation provi-

---

public use . . . land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value." *Id.* at 343.

In 1887, Congress passed the Tucker Act, which enlarged the Court of Claims's jurisdiction to include "[a]ll claims founded upon the Constitution of the United States . . . ." Tucker Act, ch. 359, 24 Stat. 505, 505 (1887). Several decades later, the Court decided that property owners' actions claiming just compensation were not based on an implied promise, but were simply "founded upon the Constitution" within the meaning of the Tucker Act. *See* Jacobs v. United States, 290 U.S. 13, 16 (1933). *Jacobs* represents the Court's acceptance of the modern "constitutional tort" model of just compensation provisions, as is demonstrated by the citations to *Jacobs* in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

343. The classic cases holding that the Just Compensation Clause does not abrogate sovereign immunity, now somewhat dated, are *Lynch v. United States*, 292 U.S. 571, 579, 580-82 (1934) and *Schillinger v. United States*, 155 U.S. 163, 168 (1894). More recently, the Court seems to have indirectly affirmed that the Just Compensation Clause does not of its own force abrogate federal sovereign immunity. In *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983), the Court held that the Tucker Act merely granted jurisdiction and waived sovereign immunity, but did not itself create any substantive rights. Rather, the Court concluded, "[a] substantive right must be found in some other source of law, such as 'the Constitution . . . .'" *Id.* at 216. Moreover, "[n]ot every claim invoking the Constitution . . . is cognizable under the Tucker Act." *Id.* The claimant must be seeking money damages against the United States and must "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-17 (quoting United States v. Testan, 424 U.S. 392, 400 (1976)). This analysis seems clearly to contemplate that constitutional provisions "mandating compensation" create substantive rights to damages that plaintiffs can seek to vindicate once Congress waives sovereign immunity, but do not themselves waive sovereign immunity. *Cf.* Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.").

344. The reference is in a footnote that rejects the Solicitor General's argument "that the prohibitory nature of the Fifth Amendment, . . . *combined with prineiples of sovereign immunity*, establishes that the Amendment . . . is . . . not a remedial provision." *First English*, 482 U.S. at 316 n.9 (emphasis added); *see also supra* note 12 (discussing this footnote). The Court concludes that "the cases cited in the text . . . refute the argument of the United States," *id.*; none of those cases addresses the issue of sovereign immunity, and one of them, *Jacobs v. United States*, 290 U.S. 13 (1933), was decided a year before the Court most recently decided that the Just Compensation Clause did *not* abrogate federal sovereign immunity. The nature of the governmental defendant in *First English*—a county—suggests at least two paths of development other than the abrogation of sovereign immunity. First, the Court might decide that the Fourteenth Amendment abrogated state sovereign immunity with respect to the incorporated Fifth Amendment, even though the Fifth Amendment did not abrogate federal sovereign immunity. Second, the Court might decide that the Just Compensation Clause did not have any effect on sovereign immunity, but did provide a damages action against public entities that do not have sovereign immunity under federal law. Counties such as Los Angeles County cannot claim sovereign immunity (that is, Eleventh Amendment immunity) against a federal law claim. *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529 (1890).

sions did abrogate state sovereign immunity, and when they did, they relied heavily on the "constitutional tort" conception of just compensation provisions as imposing remedial duties. The first case to hold that a governmental entity otherwise immune from tort liability was liable for just compensation if it "took or damaged property" was *Board of Commissioners of Logan County v. Adler*, a 1920 Colorado case.[345] The nub of its reasoning relies on the notion that the just compensation clause itself mandates a damages remedy:

> It being a prerogative of the state to be exempt from coercion by suit, a provision of the fundamental law for compensation in case of damage, which is applicable to injuries caused by instrumentalities of the state, or by its agents, and to no other injuries, must be held to except such cases from the exemption. If this be not so, the plain intent of the inhibition is limited, and made, to a considerable extent, ineffective.[346]

Similar reasoning appears in a landmark 1931 South Carolina case holding that not just a county, but the state itself, cannot assert sovereign immunity as a defense to a property owner's suit for just compensation:

> [T]he state . . . can[not] itself or by any statute or through any agency take property without paying compensation. "Immunity from suit" cannot avail in this instance, and, if no statute exists, liability still exists, because as to this provision the Constitutio[n] [is] self-executing.
>
> To hold otherwise would be te say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.[347]

What conclusion should one draw from this history? One possibility is that courts deciding that just compensation provisions abrogated sovereign immunity did so for reasons quite unrelated to the acceptance of a constitutional tort model of such provisions; perhaps they were influenced by contemporary scholarship arguing that sovereign immunity was obsolete.[348] Even if the courts' discussion of the "self-

---

345. Board of Comm'rs v. Adler, 194 P. 621 (Colo. 1920).

346. *Id.* at 622.

347. Chick Springs Water Co. v. State Highway Dep't, 157 S.E. 842, 850 (S.C. 1931).

348. See, for example, Edwin Borchard's influental article that appeared in installments in the *Yale Law Journal* between 1924 and 1927. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); 34 YALE L.J. 129 (1924); 34 YALE L.J. 229 (1925); *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926); 36 YALE L.J. 757 (1927); 36 YALE L.J. 1039 (1927). In the 1950s and 1960s, a number of state courts began to discard the notion of common law governmental and sovereign immunity altogether. *See supra* noto 343 (citing cases rejecting a common law governmental immunity defense). Moreover, in recent years, many state courts

executing" nature of just compensation provisions is *post hoc* rationalization, however, the fact that the rationalization has some appeal, some plausibility, suggests an affinity between the constitutional tort model and the idea that the provision should provide a basis for recovery against the state.

IV. CONCLUSION

The history of the transition from the traditional conception of just compensation provisions as limitations on legislative competence to the modern conception of those provisions as direct bases for damage actions is a history of surprise and complexity. It is not the history of how property owners gained a damages remedy protected by the constitution; the traditional conception always assumed a preexisting common law damages remedy which the legislature was not competent to foreclose if such a foreclosure would leave an owner whose property had been taken without just compensation. On the other hand, neither is it a history of a purely theoretical shift in understanding with no links to changes in the operative rules that define property owners' rights. The shift has some relationship to changes in rules regarding the injuries cognizable under just compensation provisions, the damages recoverable for cognizable injuries, the circumstances under which injunctive relief is available, and the availability of governmental and sovereign immunity defenses to states and state subdivisions. Yet those relationships seem to consist of something less than logical necessity. The ultimato lesson is, perhaps, a cautionary one, suggesting that the evolution of legal doctrine is subtle and complex, and that to describe the influence of change in

---

have recognized private damages actions, not only under just compensation provisions, but under other individual rights provisions, and not just against state officials (as *Bivens* was against federal officials), but against the state itself. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 602 (Cal. 1979); Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092-93 (La. 1990); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 929-30 (Md. 1984); Brown v. State, 674 N.E.2d 1129, 1132-33 (N.Y. 1996); Corum v. University of N.C., 413 S.E.2d 276, 289-90, 292 (N.C. 1992); Hunter v. Port Auth., 419 A.2d 631, 635 (Pa. Super. Ct. 1980). Other state courts have declined to create such an action. *See, e.g.*, Figueroa v. State, 604 P.2d 1198, 1205-06 (Haw. 1979); Hunter v. City of Eugene, 787 P.2d 881, 884 (Or. 1990). For commentary on the state law development of constitutional private damages actions, see John M. Baker, *The Minnesota Constitution as Sword: The Evolving Private Right of Action*, 20 WM. MITCHELL L. REV. 313 (1994); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1298 (1985); Jefferson, *supra* note 5; Paul R. Owen, *Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173 (1995); Eric J. Stockel, Brown v. State of New York: *Judge Simons Says New York State Can Be Held Liable for Money Damages*, 13 TOURO L. REV. 653 (1997).

one area on another, we must conceive of a logic that admits to degree and of conceptual links that can be of varying strength.