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I. INTRODUCTION

When police officers destroy the property of innocent people in the course of authorized law enforcement activities, intuitive notions of fairness suggest that the property owners should be made whole by the government. Yet the Iowa Supreme Court's decision in *Kelley v. Story County Sheriff*[1] solidified a trend against such compensation. In fact, the *Kelley* court became the third state supreme court to deny recovery under the state constitutional just compensation clause for police destruction of innocent people's property. The previous two courts to so hold were the Oklahoma Supreme Court in *Sullivant v. City of Oklahoma City*[2] and the California Supreme Court in *Customer Co. v. City of Sacramento*.[3] Two other state supreme courts held that plaintiffs might recover under takings theories. The Texas Supreme Court, in *Steele v. City of Houston*,[4] held that police destruction *could* amount to a taking under the Texas Constitution, but it remanded with instructions that a showing of "great public necessity" would be a defense.[5] Only the Minnesota Supreme Court, in *Wegner v. Milwaukee Mutual Insurance Co.*,[6] allowed recovery under a takings theory, notwithstanding the possibility that there may have been a public necessity underlying the police actions at issue.

In each of these cases, innocent property owners claimed to have suffered intentional destruction of their property by government agents, and each owner relied, at least in part, on his state's just compensation clause. Yet despite the fact that the constitutional provisions at issue were nearly identical in wording,[7] these

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* B.A., 1987, Harvard University; J.D., 1999, University of California, Hastings College of the Law. The author wishes to thank Colin Crawford, David I. Levine and Leo Martinez for their support and encouragement.

1. 611 N.W.2d 475 (Iowa 2000).
2. 940 P.2d 220 (Okla. 1997).
3. 895 P.2d 900 (Cal. 1995).
4. 603 S.W.2d 786 (Tex. 1980).
5. *Id.*
6. 479 N.W.2d 38 (Minn. 1991).
7. *See Wegner*, 479 N.W.2d at 41 (noting that the taking provision of the Texas Constitution "is virtually identical to the Minnesota taking provision"); *Customer Co.*, 895 P.2d at 912 (describing the just compensation provisions of the Minnesota and Texas Constitutions as "similar to our section 19"); *Sullivant*, 940 P.2d at 226 (noting that "New Jersey, Minnesota and Texas all have constitutional provisions which are

courts essentially split into two camps: one flatly refusing recovery on the ground that the police actions were not exercises of eminent domain, and the other allowing recovery by holding that destructive police actions could be takings under certain circumstances.

If, as one scholar has declared, "[t]hroughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize,"[8] no collection of cases better demonstrates the point. Of the five courts deciding the cases discussed in this article, only the Iowa Supreme Court was able to articulate a coherent explanation for its holding. Although all of the courts purported to rely on precedent and the policies underlying the Takings Clause, none of the courts was able to explain convincingly why one policy should be favored over another. To be fair, this is no surprise. The United States Supreme Court has itself acknowledged that its approach to takings cases has been "essentially ad hoc."[9]

I believe that the courts which denied recovery in these cases reached the better result, but not for the reasons emphasized by those courts.[10] The most important principles underlying the requirement of just compensation—the protection of a property-owning minority from majoritarian redistributivism, the guarding of stability within the economic and political system, and the deterrence of arbitrary government—are not implicated under the facts of these cases. Instead, the principles underlying the line of Supreme Court takings cases dealing with emergencies, including *National Board of Young Men's Christian Associations (YMCA) v. United States*[11] and *United States v. Caltex, Inc.*[12] seem more applicable. Because the decisions to take the plaintiffs' property were not the result of collective deliberation, because the government gained no resources as a result of the police officers' acts, and because the police officers' actions were at least partly intended to benefit the plaintiffs, the policy considerations weigh against compensation.

In Part II of this article, I discuss the decisions in the five police destruction cases. In Part III, I briefly sketch the relevant principles and policies of takings law. In Part IV, I critique the five state supreme court decisions in light of the principles and policies discussed in Part III.

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similar to Art. 2, § 24"). The California constitutional provision at issue in *Customer Co.* was "almost identical in meaning to Art. 2, § 24." *Id.* at 41 n.3.

8. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993). Another observed that it has become cliché to portray takings law "as a hopelessly confused welter of conflicting precedents." Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL'Y 149, 149 (2000).

9. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

10. Two other authors who have examined these cases have reached alternate conclusions. *See* C. Wayne Owen, Jr., Note, *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of Police Activities?*, 9 WM. & MARY BILL RTS. J. 277 (2000); Lior J. Strahilevitz, Case Note, *When the Taking Itself is Just Compensation*, 107 YALE L.J. 1975 (1998).

11. 395 U.S. 85 (1969).

12. 344 U.S. 149 (1952).

II. THE POLICE DESTRUCTION CASES: COMPETING THEORIES

A. Steele v. City of Houston: *The Possibility of a Taking*

In *Steele,* Houston police officers were accused of intentionally burning down the plaintiffs' house in order to capture escaped prisoners hiding inside.[13] The plaintiffs sued the city under tort and takings theories. The latter theory was premised on the Fifth and Fourteenth Amendments to the United States Constitution,[14] and article I, section 17 of the Texas Constitution which provides in relevant part that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use, without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money."[15] Although two lower courts denied recovery under the takings theory, the Texas Supreme Court reversed, holding that the plaintiffs had stated a cause of action under article I, section 17 of the Texas Constitution for destruction of their property.[16] Nonetheless, the court indicated that a showing of "great public necessity" on remand would bar the plaintiffs' recovery.

Although the court did not set forth its reasoning with great precision, it appears that the Texas justices were moved by several factors. First, the court was obviously influenced by the often-quoted language from the United States Supreme Court's decision in *Armstrong v. United States,*[17] observing that the Takings Clause was meant "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18] The Texas court referred to the *Armstrong* principle as "[t]he underlying basis" for the just compensation requirement.[19] Second, the court noted that its recent decisions had refused to differentiate between exercises of police power and eminent domain and that it had "moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of police powers."[20] Third, the court concluded that the plaintiffs' claim was not based on tort theory, which, under the court's precedent, would preclude recovery under the just compensation clause.[21] Fourth, the court stated that the requisite public use could be established by proof that the Houston officers had ordered destruction of the house "because of real or

13. 603 S.W.2d at 788. The officers were accused of both intentionally starting the fire and preventing the fire department from putting it out.

14. *Id.*

15. TEX. CONST. art. I, § 17.

16. *Steele,* 603 S.W.2d at 788.

17. 364 U.S. 40 (1960).

18. *Id.* at 49.

19. *Steele,* 603 S.W.2d at 789 (quoting *Armstrong,* 364 U.S. at 49).

20. *Id.*

21. *Id.* at 791-92.

supposed public emergency [in order] to apprehend armed and dangerous men [inside]."[22] Then, the court stated that on remand the city could defend itself on the grounds of "great public necessity."[23] However, the court stressed, "[m]ere convenience will not suffice."[24] The court then set forth passages from Professors Prosser and Nichols discussing the policies underlying the "public necessity" defense to a takings claim.[25]

B. Wegner v. Milwaukee Mutual Insurance Co.: *A Taking on Equitable Grounds*

In *Wegner*, Minneapolis police surrounded the plaintiff's house after fleeing felons previously unknown to the plaintiff broke in and hid inside.[26] When attempts to communicate with the barricaded suspects failed, the police launched twenty-five rounds of tear gas and three concussion grenades into the house.[27] The assault broke virtually every window in the house, damaged interior walls, and left a pink film on the walls and furniture.[28] The plaintiff sued the city, alleging trespass and a compensable taking under article I, section 13 of the Minnesota Constitution.[29] Section 13 provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation."[30] Both the trial court and the court of appeals rejected the takings claim, but the Minnesota Supreme Court reversed.[31]

First, the court mentioned the *Armstrong* principle and quoted its famous language.[32] Next, the court stated that "simply labeling the actions of the police as an exercise of the police power 'cannot justify the disregard of the constitutional inhibitions.'"[33] The court indicated that it was influenced by the *Steele* decision, particularly on the issues of police power, governmental immunity, and public use.[34] The opinion rejected any suggestion that a taking

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22. *Id.* at 792.
23. *Id.* According to Professor Prosser:

> [w]here the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. . . . It would seem that the moral obligation upon the group affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.

Id. (quoting PROSSER, THE LAW OF TORTS § 24 (4th ed. 1971)).
24. *Id.*
25. *Id.* at 792 & n.2.
26. 479 N.W.2d at 39.
27. *Id.*
28. *Id.*
29. *Id.*
30. MINN. CONST. art I, § 13.
31. *Wegner*, 479 N.W.2d at 39.
32. *Id.* at 40.
33. *Id.* (quoting *In re* Dreosch, 47 N.W.2d 106, 111 (1951)).
34. *Id.* at 40-41.

must occur in connection with a public improvement project in order to be compensable under the state's just compensation clause.[35] Finally, the court stated it was "not inclined to allow the city to defend [itself on the basis] of public necessity" because compensating the plaintiff was required by "basic notions of fairness and justice."[36]

C. Customer Co. v. City of Sacramento: *A Categorical Limitation to Exercises of Eminent Domain*

In *Customer Co.*, Sacramento police officers surrounded a convenience store in order to capture a fugitive who was inside.[37] After the suspect ignored orders to come out, a prolonged standoff culminated in the firing of canisters of tear gas through the store's plate glass windows.[38] By the time the officers made their arrest, they had caused $275,000 in damage to the store, a sum that included $90,000 for hazardous waste handling of inventory contaminated by the gas.[39] Rather than bring an action for negligence under the state's Tort Claims Act, the store's owner asserted an inverse condemnation theory[40] under article I, section 19 of the California Constitution, which provides in relevant part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."[41] The plaintiff contended that its property had been "damaged for public use."[42]

The California Supreme Court rejected the inverse condemnation theory. The court's majority concluded that article I, section 19 "never was intended, and never has been interpreted, to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property."[43] Instead, the majority asserted, the clause was "concerned, most directly, with the state's exercise of its traditional eminent domain power."[44] The court stated that while the just compensation requirement had "been extended, in limited circumstances—beyond its traditional context involving the taking or damaging of private property in connection with public

35. *Id.* at 41.

36. *Id.* at 42.

37. 895 P.2d at 902.

38. *Id.* at 903-04.

39. *Id.* at 904.

40. As the court noted, "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principals which affect the parties' right in an inverse condemnation suit are the same as those in an eminent domain action." *Id.* at 905 n.4 (citations omitted).

41. CAL. CONST. art I, § 19. The plaintiff did not assert a claim under the Fifth Amendment to the federal Constitution. *Customer Co.*, 895 P.2d at 905 n.2.

42. *Customer Co.*, 895 P.2d at 906.

43. *Id.*

44. *Id.* at 905.

improvement projects—to encompass government regulations that constitute the functional equivalent of an exercise of eminent domain, section 19" had never been invoked to require the compensation of a property owner for damage done by police officers trying to enforce the law.[45] "On the contrary," the majority explained, "such property damage, like any personal injury caused by the same type of public employee activity, has—throughout the entire history of section 19—been recoverable, if at all, under general tort principles, principles that always have been understood to be subject to control and regulation of the Legislature."[46]

The court cited its 1929 decision *Miller v. City of Palo Alto*[47] in holding that there could be no recovery because the "public use" requirement had not been met. In *Miller*, the plaintiff's property was destroyed by a fire allegedly caused by the city's negligence.[48] The plaintiff sought recovery based, in part, on an inverse condemnation theory, arguing that his "property had been 'damaged' by an activity of the public entity conducted for the public benefit."[49] The *Miller* court rejected this theory because the "public use" requirement had not been met.[50] The court recited the following definition of public use:

> A public use is "a use which concerns the whole community as distinguished from a particular individual or a particular number of individuals; public usefulness, utility or advantage; or what is productive of general benefit; a use by or for the government, the general public or some portion of it."[51]

Finally, the court sought to dispel "[a]ny doubt" that its rejection of the inverse condemnation claim was correct by citing cases applying the "emergency exception" to the requirement of compensation for takings.[52] The court described this exception as "a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often. . . . works not only damage to property but destruction of property."[53] More specifically, the court explained the doctrine by quoting from an earlier decision which stated that:

> In such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to

45. *Id.* at 905-06.
46. *Id.* at 906.
47. 280 P. 108 (Cal. 1929).
48. *Customer Co.*, 895 P.2d at 908 (citing *Miller*, 280 P. at 108).
49. *Id.*
50. *Id.*
51. *Id.* (citation omitted).
52. *Id.* at 909.
53. *Id.*

> the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.[54]

The court also cited in passing two United States Supreme Court decisions exemplifying the emergency exception, *Caltex, Inc.* and *United States v. Pacific Railroad*,[55] and concluded that the need for police officers to respond to emergency situations "unhampered by the specter of constitutionally mandated liability for resulting damage to private property" required that recovery under an inverse condemnation theory be denied.[56]

The court noted that allowing the plaintiff to proceed under a constitutional takings theory would allow it to avoid the procedural requirements of the state's Tort Claims Act and, if successful, would allow recovery of attorneys' fees, which the Tort Claims Act did not allow. The court observed that in the absence of a showing of negligence, the plaintiff might be eligible for compensation from the state's victim's compensation statutes, "which specifically authorize cities and counties to establish reimbursement programs for damage to the property of 'innocent residents' caused by peace officers engaged in detecting crime or apprehending suspects."[57]

Justice Kennard filed a concurring opinion criticizing the majority's methodology.[58] She proposed the simple solution of basing the denial of compensation on the "public use" requirement of section 19.[59] She explained that "[h]ere, the police did not, in any meaningful sense of the word, use the store windows that they broke or the food and beverages that they contaminated with tear gas."[60]

Justice Baxter dissented. He rejected the majority's conclusion that section 19 was limited to damages arising from public improvements, stating that the section, by its plain language, was not so limited.[61] The fact that the California cases involving section 19 only spoke in terms of public improvements did not mean that section 19 could only apply to public improvements. Since these cases dealt with public improvements, it made sense that their holdings would be given in that context.[62] He argued that the policies and purposes behind the just compensation clause, and not arbitrary categories, should govern, and then put forth an equitable argument, quoting *Armstrong*, about the unfairness of requiring the property owner alone to bear the cost of the police actions.[63] Finally, he

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54. *Customer Co.*, 895 P.2d at 910 (citation omitted).
55. 120 U.S. 227 (1887).
56. *Customer Co.*, 895 P.2d at 911.
57. *Id.* at 916 (citing sections 29631, 29632, and 29636 of the California Government Code).
58. *Id.* at 917 (Kennard, J., concurring).
59. *Id.*
60. *Id.*
61. *Id.* at 925 (Baxter, J., dissenting).
62. *Customer Co.*, 895 P.2d at 926.
63. *Id.* at 927 (Baxter, J., dissenting).

rejected the argument that the emergency exception should excuse compensation on the ground that this doctrine "was limited to certain kinds of true emergency,"[64] and that the police destruction of the plaintiff's property was not a "true emergency" because the government actors here had "helped precipitate the crisis."[65] The dissent rejected the concurrence's contention that no "public use" had been established, arguing that a public use occurred because the damage had been inflicted on behalf of the community by public employees for the public welfare.[66]

D. Sullivant v. City of Oklahoma City: *Another Categorical Approach*

In *Sullivant*, police officers, exercising a valid search warrant, damaged the doors of an apartment unit owned by the plaintiff landlord.[67] The landlord sought recovery under both tort and state constitutional taking theories.[68] The constitutional theory was based on article 2, section 24 of the Oklahoma Constitution, which provides in relevant part that "[p]rivate property shall not be taken or damaged for public use without just compensation."[69] The court denied recovery under article 2, section 24 for three reasons. First, the court held that article 2, section 24 applied only to "condemnation proceedings, where real property is actually taken and used for a public project."[70] Second, the court held that section 24 does not permit recovery for torts committed by government employees.[71] Third, the court concluded that the actions in question constituted proper exercise of the police power, specifically the power to damage or destroy property to protect public health and safety, and therefore did not require compensation under the court's prior cases.[72] The court noted the decisions in *Wallace v. Atlantic City*,[73] *Wegner*, and *Steele*, but stated that it found the decisions in *Customer Co.* and other cases denying recovery "more in accord with our construction of [a]rt. 2, [section] 24 and the relevant decisional authority."[74] The court noted that it found two arguments from *Customer Co.* particularly persuasive: (1) permitting recovery might deter police from doing their job, and (2) the damage was not a "use" of the property.[75]

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64. *Id.* at 929.
65. *Id.* at 924, 935.
66. *Id.* at 930.
67. 940 P.2d at 222.
68. *Id.*
69. *Id.* at 224 (quoting article 2, section 24 of the Oklahoma Constitution). Plaintiff also relied on an Oklahoma statute, 27 O.S. 1991 § 16, but the court dismissed this assertion out of hand, noting that the "statute is limited to the acquisition of real property for public use in a project or program using state, federal or local funds," and was thus "expressly inapplicable." *Id.* at 224 n.2 (citing 27 O.S. § 9).
70. *Id.* at 224.
71. *Id.*
72. *Id.* at 224-25.
73. 608 A.2d 480 (N.J. Super. Law Div. 1992).
74. *Sullivant*, 940 P.2d at 226.
75. *Id.* at 226-27.

E. Kelley v. Story County Sheriff: *A Nuanced Approach*

In *Kelley*, Story County Sheriff's officers damaged two doors while executing an arrest warrant at a rented home.[76] The landlord plaintiff filed a small claims action against the county and the sheriff.[77] After the small claims court found the officers immune under chapter 670 of the Iowa Code, Municipal Tort Claims Act, Kelley appealed to the district court.[78] The district court denied recovery on a takings theory premised on article I, section 18 of the Iowa Constitution,[79] concluding that the acts Kelley complained of were tortious rather than an exercise of eminent domain.[80] The Iowa Supreme Court affirmed.[81]

The court noted that the facts before it did not fit neatly into other categories of takings cases, such as invasion, occupation, or regulation.[82] The court then noted that it had distinguished between eminent domain actions (requiring compensation) and police power actions (not requiring compensation).[83] It noted that its own 1913 decision in *Waud v. Crawford*[84] explained that the destruction of property in an emergency to protect the public was within the police power.[85] However, the court went on to explain that exercises of police power could sometimes work a taking if the interference with an owner's property rights was great enough.[86] This determination is made on a case-by-case basis by employing a balancing test that "asks whether the collective benefits of the regulatory action outweigh the restraint imposed upon the property owner."[87] The court concluded that the destruction at issue was an exercise of the police power because it fell within section 804.15 of the Iowa Code, which authorizes a police officer to use "reasonably necessary" force to make an arrest.[88] The court then concluded that the county's interest in protecting its citizens outweighed any impact on the

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76. 611 N.W.2d at 477.

77. *Id.*

78. *Id.*

79. IOWA CONST. art I, § 18 provides in relevant part:

> Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

80. *Kelley*, 611 N.W.2d. at 477-78. It is unclear whether Kelley raised his constitutional theory before the small claims court.

81. *Id.* at 477.

82. *Id.* at 479.

83. *Id.*

84. 141 N.W. 1041 (Iowa 1913).

85. *Kelley*, 611 N.W.2d at 479 (quoting *Waud*, 141 N.W. at 1041).

86. *Id.* at 480.

87. *Id.* (citations omitted).

88. *Id.* at 481.

plaintiff's property and that the plaintiff was required to bear some cost for the good of the public.[89]

III. THE BACKGROUND ON TAKINGS

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use without just compensation."[90] Courts and scholars have been famously unsuccessful in developing a coherent framework for application of this brief passage from the Bill of Rights.[91]

Although the historical record of the Framers' intent regarding the Takings Clause is exceedingly limited,[92] a few themes have emerged. William Treanor argued that the Takings Clause was designed to protect possession of real property against the political majority's redistributive impulses.[93] His research concluded that in colonial America the political process alone determined when compensation was due for government acts that affected property rights.[94] As late as the time of the drafting of the Fifth Amendment, even outright physical seizures of property did not by constitutional edict automatically entitle property owners to compensation. In those few colonial charters that explicitly protected property, the protection was in the form of a "requirement of procedural regularity,"[95] which was obtained before a jury or the legislature, each being, in Treanor's words, a "majoritarian decisionmaking body" and thus subject to the iniquities of the political process.[96] Typically, however, colonial governments took real or personal property without compensation.[97] Where statutes required compensation, they typically did so only for improved or enclosed land.[98] New York limited compensation to takings of improved or enclosed land or else it required the private beneficiaries of the taking to provide compensation.[99]

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89. *Id.*

90. U.S. CONST. amend. V. Most state constitutions contain "just compensation" provisions similar to the Fifth Amendment Takings Clause, while about half the state constitutions provide additionally for compensation when property is "damaged," as opposed to simply "taken," for public use. *See* PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN § 6.02[1], ¶ 6-30 (3d ed. 1998).

91. *See generally* William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1151 (1997) [hereinafter Treanor II] (describing the incoherence of takings jurisprudence).

92. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790-91 (1995) [hereinafter Treanor I]; Rubenfeld, *supra* note 8, at 1081; Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 539-40 (1995).

93. Treanor I, *supra* note 92, at 786.

94. *Id.* at 785.

95. *Id.* at 786.

96. *Id.* at 787.

97. *Id.* at 787-88.

98. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 582 (1972).

99. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 63 (1977).

Moreover, none of the state constitutions adopted in 1776 required just compensation for seizures of property.[100] The only revolutionary era documents containing just compensation clauses—the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787—applied by their plain terms only to physical appropriation of property.[101]

Treanor argued that the Takings Clause was a product of Republican ideology, which "accorded the institution of private property a high degree of respect and protection because it provided the autonomy necessary for citizenship."[102] James Madison, the primary advocate for the Takings Clause among the Framers of the Constitution, focused on protecting possession rather than value—not because of a limited conception of property.[103] Instead, according to Treanor, the Framers' generation generally believed that majoritarian bodies such as legislatures would protect property rights, except for "a small class of cases in which property concerns would not be fairly considered, and that a compensation rule was necessary for that class."[104] The narrow class included cases of military impressments of personal property during wartime.[105] Madison "believed that physical property needed greater protection than other forms of property because its owners were peculiarly vulnerable to majoritarian decisionmaking."[106] Thus, according to Treanor, the original understanding of the Takings Clause was that it applied only when the government physically took property, and not to other government acts that diminished or destroyed the value of property.[107]

Joseph Sax's examination of the seventeenth and eighteenth century legal scholars, whose views were the "direct antecedents" of the federal Just Compensation Clause, concluded that the primary concern underlying the compensation principle was "not the fact of loss but the imposition of loss by unjust means,"[108] specifically, through "arbitrary or tyrannical treatment."[109] The early writers often cited the example of impressments of property in wartime by the army without compensation. According to Sax, "[i]t was only for the losses sustained in such circumstances that compensation was thought to be required."[110] The underlying concern was appropriation by the state "to finance its own enterprise[,]"[111] "the

100. *See* Treanor I, *supra* note 92, at 786-87.
101. *Id.* at 790-91.
102. *Id.* at 825.
103. *Id.* at 818.
104. *Id.* at 832, 836.
105. *Id.* at 835-36.
106. *Id.* at 847.
107. *Id.* at 798.
108. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 57 (1964).
109. *Id.*
110. *Id.*
111. *Id.* at 59.

threat of the state's becoming the direct economic beneficiary of its own legislative acts."[112]

Even the limited property protections intended by the Fifth Amendment far exceeded those available on the state level. As late as 1820, the majority of states had no just compensation provisions in their constitutions, although all except South Carolina had enacted statutes providing for compensation.[113] One commentator attributes the lack of constitutional just compensation provisions at the turn of the nineteenth century to "a perhaps dominant body of opinion maintaining that individuals held their property at the sufferance of the state."[114] This view eventually shifted. In the first half of the nineteenth century, states increasingly added just compensation provisions to their constitutions.[115] By mid-century, the prevailing view favored mandatory compensation, largely out of fear that the eminent domain power might be used for wholesale redistribution of wealth.[116]

Subsequently, however, courts began adopting rules of law that dramatically limited the compensation for damages arising from public works projects.[117] This was accomplished by distinguishing between "immediate" and "consequential" injuries, with the ultimate result that compensation was required only for injures caused by direct trespass or appropriation for public use.[118] In the absence of a physical invasion or taking, damages resulting from a nearby public improvement were considered *damnum absque injuria.* According to Morton J. Horwitz, these limitations were the work of instrumentalist judges seeking to force property owners to subsidize the cost of public improvements.[119] When the industrial revolution brought an explosion of economic activity and increased population density, the frequency with which public improvements resulted in indirect damage to private property increased.[120] Beginning in Illinois in 1870, states began amending their just compensation clauses to require compensation for damage as well as for takings, thus abandoning the direct physical injury requirement.[121] Today about half of the states' constitutions contain such a provision.[122]

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112. *Id.* at 59-60.

113. *See* HORWITZ, *supra* note 99, at 64.

114. *Id.*

115. *Id.* at 66.

116. *Id. See also* Stoebuck, *supra* note 98, at 555 (stating that the enactment of constitutional eminent domain clauses reflected "an existing ethos shared by judges along with constitution makers.").

117. *See* HORWITZ, *supra* note 99, at 72.

118. *Id.*

119. *Id.* at 70-71.

120. *See* NICHOLS, *supra* note 90, at § 6.02[2].

121. *Id.* § 6.02[1].

122. *Id.* § 6.02[1] n.15; *see* H. Dixon Montague & Billy Coe Dyer, *Compensability of Nonphysical Impacts of Public Works: A Game of Chance*, 34 URB. LAW. 171, 172 n.10 (2002).

Countermajoritarianism remains an animating principle in takings jurisprudence and scholarship.[123] But even accepting the Madisonian view that property ownership is an essential attribute of our democratic society—and therefore deserving constitutional protection from majoritarian redistributivism—government's very nature is to "adjust[] the benefits and burdens of economic life,"[124] which must include regulation of property.[125] How, then, is one to determine which governmental limitations or exactions go too far? Or, as one commentator has questioned, "[w]hich resources should be treated as crucial to personal well-being and thus either exempt from any collective redistribution or at least shielded against uncompensated loss?"[126]

Today, the most straightforward and uncontroversial application of the right to just compensation occurs when the government physically takes real property through the exercise of its eminent domain power.[127] The government acts under its eminent domain power when it appropriates privately-owned property by ousting the owner and transferring legal title to itself in order to use the property for some public purpose.[128] There appears never to have been any serious question that the Takings Clause required compensation in the eminent domain arena.[129] In fact, prior to its famous 1922 decision in *Pennsylvania Coal Co. v. Mahon*,[130] the United States Supreme Court confronted only a handful of cases in which owners claimed to have suffered takings in the absence of actual appropriation of their property by the government.[131] The Court's decisions during this time generally held that governmental acts did not require compensation absent outright appropriation; this was so even if the acts diminished property values or otherwise imposed costs on landowners.[132] The most significant early variant on

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123. Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 24 (1996).

124. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017-18 (1992) (quoting *Penn Central Trans. Co.*, 438 U.S. at 124).

125. Blais, *supra* note 123, at 25.

126. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1396 (1991).

127. Rubenfeld, *supra* note 8, at 1081.

128. *Id.*; ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 515 (1904). Like so much else in takings law, the apparently neat distinction between government acts which "appropriate" property and those which do not is in fact susceptible to significant confusion, and this confusion renders rules that purport to turn on the distinction arguably meaningless. Professor Stoebuck has noted that while eminent domain typically involves the acquisition by the government of a "property right" and police power activity does not, it is often difficult to distinguish between acts which appear superficially to be within the police power but which might constitute the acquisition of some kind of "property right": "[A]n ordinance forbidding landowners to enter an abutting street would, presumably, be both a regulatory traffic measure and an extinguishment (forced release) of the owners' easements of access upon the city's street." Stoebuck, *supra* note 98, at 570-71.

129. Treanor I, *supra* note 92, at 847.

130. 260 U.S. 393 (1922).

131. Rubenfeld, *supra* note 8, at 1081.

132. *See* Treanor I, *supra* note 92, at 794-96 (citing Smith v. Corp. of Washington, 61 U.S. 135 (1858), Transportation Co. v. Chicago, 99 U.S. 635 (1879), and Gibson v. United States, 166 U.S. 269 (1897)).

this theme came from *Pumpelly v. Green Bay Co.*[133] In *Pumpelly*, the Supreme Court held that the complete flooding of the plaintiff's land due to the construction of a government-authorized dam constituted a taking despite the fact that there had been no outright appropriation. Later, however, the Court limited the reach of *Pumpelly* to cases involving actual invasion of property, rather than any acts resulting in diminution in value.[134]

Another principle that emerged early in takings jurisprudence was that when the government regulated or took property to abate a nuisance, there was no compensable taking regardless of the effect on the value of the property.[135] As Justice Harlan explained in *Mugler v. Kansas,*[136] which held that a statute outlawing the manufacture of liquor had not worked a taking of the plaintiff's brewery despite a dramatic decline in the value of the property,

> [t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way . . . is very different from taking property for public use. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[137]

Mugler and its progeny[138] are often said to embody the "nuisance exception" or the "harm rule." For many years under this doctrine, the Court would inquire whether the challenged regulation sought to prevent harms caused by the proscribed property use, in which case no taking occurred, or whether the regulation sought to obtain a benefit for the general public at the expense of the property owner, in which case a taking occurred.[139] Harm-preventing regulations were thought to be within the sovereign's police power and therefore not subject to a compensation requirement.[140] The harm-benefit methodology came under attack for reasons that now appear obvious. Determining whether a regulation prevents a harm or extracts a benefit is a metaphysical undertaking.[141] The United

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133. 80 U.S. (13 Wall.) 166 (1871).

134. *See* Treanor I, *supra* note 92, at 795 n.74 (citing Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)).

135. Mugler v. Kansas, 123 U.S. 623 (1887); *see also* Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 365-66 (1997) [hereinafter Laitos I].

136. 123 U.S. 623 (1887).

137. *Id.* at 669.

138. *See, e.g.,* Reinman v. Little Rock, 237 U.S. 171 (1915) (holding that a law prohibiting operation of livery stables within city limits was not a taking); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that prohibition of a brickyard in a residential area was not a taking).

139. *See* Laitos I, *supra* note 135, at 364.

140. Paul, *supra* note 126, at 1435-36. For a summary of the evolution of the police power concept in takings jurisprudence, see Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9, 21-27 (1993) [hereinafter Laitos II].

141. *See* Laitos I, *supra* note 135, at 366; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-97 (1967).

States Supreme Court ultimately rejected this approach,[142] first in *Penn Central Transportation Co. v. New York City*[143] and later in *Lucas v. South Carolina Coastal Council*,[144] in which Justice Scalia explained that the difference between "benefit-conferring" and "harm-preventing" was "in the eye of the beholder."[145]

Pennsylvania Coal contained the first explicit declaration from the United States Supreme Court that the Takings Clause was intended to protect the value of real property, rather than just possession.[146] Most significantly, it introduced the concept that a government regulation affecting the use of property—but not actually ousting the owner or transferring title to the government—could go "too far,"[147] thereby amounting to a constitutional taking. In the ensuing eighty years, the determination of when a regulation has gone "too far" has proved so daunting that even the Supreme Court has acknowledged that it has approached each takings question as an essentially "ad hoc, factual inquir[y]."[148]

Nonetheless, there are recurring themes. One common theme is that the Takings Clause of the Fifth Amendment should protect settled expectations.[149] Such protection is said to be desirable because unstable distribution of wealth would (1) undermine the democratic system by, among other things, raising the stakes underlying political factionalism;[150] and (2) discourage productive investment.[151] In a similar vein, the Takings Clause is sometimes said to reduce insecurity among property owners by serving as a form of insurance and imposing fiscal discipline upon the government.[152] While much economic uncertainty is beyond the ability of government to control,[153] "there must be at work a tacit assumption that losses which seem the proximate results of deliberate collective

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142. *See* Laitos II, *supra* note 140, at 13.

143. 438 U.S. 104 (1978).

144. 505 U.S. 1003 (1992).

145. *Id.* at 1024.

146. *See id.* at 1014 (Justice Scalia explaining that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession'") (citations omitted); *see also* Sarah E. Waldeck, *Why the Judiciary Can't Referee the Takings Game*, 1996 WIS. L. REV. 859, 878 (1996). *But see* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 701 (1996) (arguing that *Pennsylvania Coal* was neither the first regulatory takings case, nor the first to extend constitutional protection to "nonphysical property or property as value").

147. *Pennsylvania Coal*, 260 U.S. at 415-16.

148. *Penn Cent.*, 438 U.S. at 124.

149. *Id.* at 124-25; Blais, *supra* note 123, at 25-27; Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 914-15 (1993).

150. Sunstein, *supra* note 149, at 914-15.

151. Blais, *supra* note 123, at 26; Sunstein, *supra* note 149, at 914-15.

152. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 5 (1995).

153. Blais, *supra* note 123, at 26-27.

decision have a special counterproductive potency beyond any which may be contained in other kinds of losses."[154]

Another recurring theme concerns the theory of "reciprocity of advantage."[155] It is simply unfair to require property owners to bear a disproportionate share of the cost of governmental acts which broadly benefit the public. If reciprocity of advantage underlies property regulation, such unfairness is alleviated.[156] The theory, simply stated, is that if an individual suffers as a result of a policy designed to benefit the public, the policy is fair if it provides "reciprocity of advantage," that is, if the individual benefits in some way from the policy.[157] In a particularly trenchant synopsis of the theory, Professor Frank Michelman explained that the just compensation requirement should not apply "as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."[158]

Another more modern theme arose in one of the Court's most recent takings cases. In *Lucas*, passage of South Carolina's Beachfront Management Act prevented the property owner from erecting any structures on two beachfront parcels.[159] A state trial court found that the regulation rendered the parcels, which had been purchased for a large sum before enactment of the legislation, "valueless."[160] The Court set forth two discrete types of government regulation which the Court had previously declared "compensable without case-specific inquiry into the public interest advanced in support of the restraint."[161] These included cases of government-imposed physical invasion, as in *Loretto v. Teleprompter Manhattan CATV Corp.*,[162] though here the Court suggested the rule might only apply to permanent invasions. The Court did acknowledge that its categorical rule applied "at least with regard to permanent invasions,"[163] suggesting such a rule might not apply to a temporary invasion. The second category applied "where regulation denies all economically beneficial or productive use of land."[164] But the Court did not go so far as to say that all regulations depriving owners of all economically beneficial use were necessarily compensable takings. Instead, the Court held that if a government regulation prohibiting all economically beneficial

154. Michelman, *supra* note 141, at 1216.

155. *Pennsylvania Coal*, 260 U.S. at 414-16; *Penn Cent.*, 438 U.S. at 134-35; Andrus v. Allard, 444 U.S. 51, 67 (1979).

156. *See* Blais, *supra* note 123, at 27-28.

157. *Armstrong*, 364 U.S. at 40; Laitos I, *supra* note 135, at 364-65.

158. Michelman, *supra* note 141, at 1223.

159. 505 U.S. at 1007.

160. *Id.*

161. *Id.* at 1015.

162. 458 U.S. 419 (1982).

163. *Lucas*, 505 U.S. at 1015.

164. *Id.*

use of land is to be found noncompensable, the restriction "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[165]

Another theme can be found in the Court's cases involving emergencies. It is generally accepted that public authorities owe no compensation when they destroy property to protect the general welfare in times of emergency.[166] As the United States Supreme Court explained in an early property destruction case:

> At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: "For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied. "The rights of necessity are a part of the law."[167]

This is true as a matter of tort as well as constitutional law.[168] However, some cases held that owners were entitled to trials to determine whether the destruction was, in fact, necessary under the circumstances.[169] Interestingly, when a private person takes or damages another's property in an emergency, he might be

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165. *Id.* at 1029.

166. George C. Christie, *The Defense of Necessity Considered From the Legal and Moral Points of View*, 48 DUKE L.J. 975, 995-96 nn.122-23 (1999); Bowditch v. Boston, 101 U.S. 16 (1879); Surocco v. Geary, 3 Cal. 69 (1853); Dunbar v. San Francisco, 1 Cal. 355 (1850). Despite a near consensus among courts and commentators regarding the historical existence of an "emergency exception," one prominent scholar advanced a different position. Joseph Sax, in his classic *Takings and the Police Power*, argued that the main purpose behind historical restrictions against takings without compensation was not so much to protect the economic interests of landowners as to protect them against arbitrary or discriminatory takings. Sax, *supra* note 108, at 53-54. He contended, rather than describing an exception for "emergencies," early writers on takings indicated that compensation was required only when the government seized property in emergency situations. *Id.* at 56-57. According to Sax, "[t]he examples [the early writers] give suggest a principal fear of ill-considered, hasty, or even discriminatory impositions created by the pressing necessity of the state to get a job done." *Id.* at 57. He continues: "The more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government." *Id.* at 60.

167. *Bowditch*, 101 U.S. at 18-19 (quoting Respublica v. Sparhawk, 1 Dall. 357, 362 (1788)); *accord Lucas*, 505 U.S. at 1029 n.16 (quoting *Bowditch*, 101 U.S. at 18-19); Glenn P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. LAW. 939, 956-57 (1999).

168. Christie, *supra* note 166, at 995.

169. Conwell v. Emrie, 2 Ind. 35 (1850).

absolved of the tort of conversion or trespass but is still required to compensate the owner.[170]

In *United States v. Pacific Railroad*,[171] Union Army officers ordered the destruction of railroad bridges to prevent the advance of confederate forces.[172] The Court held that the government was not responsible for the cost of repairing the bridges because the damage was the result of military operations.[173] The Court explained:

> For all injuries and destruction which followed necessarily from [the military operations] no compensation could be claimed from the government. By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences.... The safety of the state in such cases overrides all considerations of private loss.[174]

The Court distinguished its earlier decisions in which property had been requisitioned by the army for use in war.[175] In such cases, the government was required to pay the property owners under "the general principle of justice that compensation should be made where private property is taken for public use."[176]

In *Miller v. Schoene*,[177] the Supreme Court made additional pronouncements about property destruction. The Court held that a Virginia law, allowing officials to order the destruction of ornamental cedar trees that were infected with cedar rust in order to preserve nearby apple orchards, did not effect a "taking" of the cedar tree owners' property.[178] When a state is forced to make a choice between the preservation of one kind of property or another, the Court held that the state does not act unconstitutionally in doing so.[179] Moreover, the Court noted, preferring the public interest "over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[180] Significantly, the Court explained that where the government must destroy one kind of property in order

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170. Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON. 367, 375 n.15 (1997).

171. 120 U.S. 227 (1887).

172. *Id.* at 229.

173. *Id.* at 234.

174. *Id.*

175. *Id.* at 239.

176. *Id.*

177. 276 U.S. 272 (1928).

178. *Id.* at 279.

179. *Id.*

180. *Id.* at 280.

to preserve another, it is not necessary to classify the destroyed property as a "nuisance" in order to avoid constitutional prohibitions.[181]

In *Caltex, Inc.*, the United States military destroyed privately-owned oil terminal facilities in the Philippines during World War II in advance of an imminent invasion by the Japanese army.[182] The terminal owners claimed the destruction amounted to a compensable taking under the Fifth Amendment.[183] The Supreme Court rejected the takings claim.[184] Chief Justice Vinson, writing for the Court, explained that the destruction of the terminals was attributable not to the government, but to the "fortunes of war."[185] He noted that the terminal owners would not have Fifth Amendment claims if the facilities had fallen into the hands of the enemy instead of being destroyed.[186] The Court rejected the claimants' argument that they were entitled to compensation because Army officials had deliberated before destroying the facilities.[187] Without explicitly resolving whether the Army's hurried decision did or did not amount to "deliberation," the Court stated that applying the term deliberation would not resolve the case.[188] It stated: "The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use."[189]

Justice Douglas dissented, joined by Justice Black. They argued that destruction of property to aid the war effort amounted to appropriation for the common good.[190] Therefore, they concluded, "the public purse, rather than the individual, should bear the loss."[191]

The most recent Supreme Court case involving property destruction was *YMCA v. United States* decided in 1969. There, United States troops stationed in the Panama Canal Zone were dispatched to the Atlantic segment of the Zone to quell rioting.[192] Prior to the troops' arrival, rioters entered and began looting and burning the claimants' buildings.[193] Upon arrival in the Atlantic Zone, the troops ejected the rioters from the buildings, then moved outside.[194] Outside, the troops were subjected to projectiles and sniper fire. Eventually they went back inside the buildings for protection. Rioters continued their assault, and ultimately the troops retreated from

181. *Id.*
182. 344 U.S. at 150-51.
183. *Id.* at 151.
184. *Id.* at 156.
185. *Id.* at 155-56.
186. *Id.* at 155.
187. *Id.* at 154-55.
188. *Caltex, Inc.*, 344 U.S. at 154-55.
189. *Id.* at 155.
190. *Id.* at 156 (Douglas, J., dissenting).
191. *Id.*
192. *YMCA*, 395 U.S. at 87.
193. *Id.*
194. *Id.*

the buildings. After the troops retreated, the rioters continued to damage the buildings.[195] The property owners sought recovery from the United States only for the damage inflicted on the buildings after the troops had entered.[196]

The Supreme Court denied recovery. Although the Court rejected the claimants' contention that the damage occurred because of the troops' presence in the buildings, it explicitly did not rest its holding on such finding.[197] It stated that there would be no Fifth Amendment claim even if the damage had occurred because of the troops' presence.[198] This was because the troops had not entered the buildings under advance plans to use them as fortresses; rather, they had entered the buildings in order to protect them.[199] Thus, the requirement of "public use" was not met. The Court explained:

> Of course, any protection of private property also serves a broader public purpose. But where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.[200]

The Court noted that while government occupation of property ordinarily deprives an owner of his use of the property, such deprivation of use does not always result.[201] For example, entry by a firefighter into a burning building "cannot be said to deprive the private owners of any use of the premises."[202] Here, the Court concluded that "the physical occupation by the troops did not deprive petitioners of any use of their buildings."[203]

Destruction cases implicate the controversy surrounding the "use requirement" set forth in the Takings Clause. Professor Jed Rubenfeld has criticized recent Supreme Court case law as rendering the "public-use requirement" as "duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses."[204] According to Professor

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195. *Id.* at 87-88
196. *Id.* at 88.
197. *Id.* at 89.
198. *YMCA*, 395 U.S. at 89.
199. *Id.* at 90.
200. *Id.* at 92 (citations omitted).
201. *Id.* at 92-93.
202. *Id.* at 93.
203. *Id.*
204. Rubenfeld, *supra* note 8, at 1079 (citing Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 242-43 (1984)).

Rubenfeld, the words "for public-use" have come to be seen as language of limitation, as setting forth a threshold requirement that any taking must meet in order to be constitutional—regardless of whether compensation is paid.[205] Instead, he argues, the words should be read as specifying "which governmental takings, although otherwise constitutional, nonetheless require compensation."[206] Under Professor Rubenfeld's conception of the public-use requirement, state-ordered destruction of diseased trees, as in *Miller*, would not require compensation simply because the state did not "use" the trees, and for no other reason.[207] The result of adopting such a view would be that many takings would require no compensation, indeed, that compensation would be required only when the state uses the property it has taken.[208] Joseph Sax proposed a takings test that turned on whether the government "used" the property taken, with the key question being whether the government was acting in its "enterprise" capacity.[209] Under his rule, if the loss in value is by government action "which enhances the economic value of some governmental enterprise," then a taking has occurred.[210]

Roger Clegg has pointed out that the word "taken" "connotes property leaving one person's hands and becoming the property of another," whereas "[d]eprivation has no such connotation."[211] Moreover, he argues, the words "for public use" bolster the argument that extinguishment or destruction of a right does not fall within the Takings Clause because "[h]ow can the public 'use' something that no longer exists?"[212]

The Supreme Court's most recent word on the subject, rendered in *Hawaii Housing Authority v. Midkiff*,[213] declared that "public purpose" is to be broadly construed as being "coterminous with the scope of a sovereign's police powers."[214] In *Midkiff*, Hawaii adopted a policy that transferred property rights from one group of private citizens to another.[215] The Court held that a "public purpose" existed even though a small group, and not the general public, directly benefited.[216] Whether *Midkiff* is applicable in a destruction case where the property has not been used by *anyone* is debatable. *Omnia Commercial Co. v. United States*,[217] a case predating *Midkiff* by some sixty years, speaks more directly to the issue of "destruction." There, the claimant owned a contract entitling it to purchase a

205. *Id.*
206. *Id.* at 1080.
207. *Id.*
208. *Id.*
209. Sax, *supra* note 108, at 67.
210. *Id.*
211. Clegg, *supra* note 92, at 535-36.
212. *Id.* at 536.
213. 467 U.S. 229 (1984).
214. *Id.* at 240.
215. *Id.* at 233.
216. *Id.* at 243-44.
217. 261 U.S. 502 (1923).

large amount of steel plate at below market prices.[218] The government requisitioned the steel company's entire output for the year 1918, rendering compliance with the claimant's contract impossible.[219] The claimant argued that its property right in the contract had been taken for public use.[220] The Court, however, said that the contract had been destroyed, not taken.[221] It noted that a "taking" of the contract would demand compensation, but that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."[222] It noted cases of property destruction to prevent spreading of a fire, destruction of diseased cattle, and destruction of diseased trees as examples.[223] The Court concluded that if property is "injured or destroyed by lawful action, without a taking, the Government is not liable."[224]

IV. ANALYSIS

As a preliminary matter, it is important to examine the strange interplay between state and federal takings jurisprudence displayed in these cases. Each of the five state supreme court cases applies United States Supreme Court takings precedents—or at least cites them—even though each of the courts purports to be applying only the state provision at issue. Certainly, no effort is made to analyze explicitly whether the relevant state provision might have different application than the federal Takings Clause. It is as if the courts assume the state and federal clauses are identical in their scope.

But the courts then proceed to disregard important United States Supreme Court jurisprudence that impedes their desired result. The most flagrant examples of this occur in *Customer Co.* and *Sullivant*, both of which hold that their respective state just compensation clauses apply only in connection with public improvements. This is a narrow and anachronistic view, representing a pre-*Pennsylvania Coal* conception of the reach of the just compensation requirement. This omission is made all the more strange by the fact that the *Customer Co.* majority alludes in passing to the regulatory takings doctrine, which long ago repudiated any notion that takings were necessarily related to public improvements, and relies on Supreme Court precedent in discussing the "emergency exception." Moreover, the *Customer Co.* and *Sullivant* courts offer the flimsiest of justifications for their public improvement limitation—simply noting that the relevant provision had never been applied outside the realm of

218. *Id.* at 507.

219. *Id.*

220. *Id.* at 508.

221. *See id.* at 510. The court rejected the claimant's argument that by taking all of the factory's output, the government had essentially "taken" the contract. The court said such an argument "is to confound the contract with its subject-matter." *Id.*

222. *Id.* at 508.

223. *Omnia Commercial Co.*, 261 U.S. at 508-09.

224. *Id.* at 510.

eminent domain. But as Justice Baxter's dissent points out in *Customer Co.*, this does not necessarily mean that the provision in question can have no other application.[225]

The courts in *Steele, Wegner*, and *Kelley* are willing to apply their respective state's just compensation clauses more flexibly. But the *Steele* and *Wegner* courts demonstrate little more of a grasp of constitutional nuance than the *Customer Co.* and *Sullivant* courts. They essentially rest their conclusion on the argument that it would be "unfair" for the individual plaintiffs to bear the cost of destruction related to law enforcement. But like their colleagues in California and Oklahoma, they make no effort to analyze any takings cases or related scholarship that might support or undermine their position. Numerous decisions citing *Armstrong* have required property owners to bear disproportionate burdens. How disproportionate must the burden be? The *Steele* and *Wegner* courts do not say. *Kelley*, by contrast, specifically applies Iowa regulatory takings precedent which calls for balancing interests, and concludes that the state's interest in enforcing the law outweighs the relatively limited damage suffered by Kelley. This is the most modern and sophisticated approach taken by any of the courts.

On policy, the *Customer Co.* court makes the most commendable effort, pointing out the negative consequences that would occur if police departments were required to pay for all damage caused by their officers absent a showing of negligence. The *Steele* and *Wegner* courts do not appear to consider this factor. Yet strong policy reasons for limiting the reach of the Just Compensation Clause have been a key part of the takings analysis at least since Justice Holmes's statement in *Pennsylvania Coal* that the "government could hardly go on. . . ."[226] What about the societal costs that are imposed under *Steele* and *Wegner*? The courts do not address these costs.

Despite their superficial analyses, I believe that the courts in *Customer Co., Sullivant*, and *Kelley* reach the correct result. To the extent that *Steele* would absolve the Houston police on the grounds of a great public necessity or emergency exception, it also reached the correct result. Destruction by public authorities in a time of emergency does not work a taking. The emergency exception makes sense because few of the policy concerns underlying just compensation clauses are implicated when public officials make hasty decisions in times of crisis.

The process failure concerns underlying the federal Takings Clause are not triggered by emergency destruction. Because such destruction arises from random occurrences—because the aggrieved property owners are not chosen by the political process at all—there is little concern that a small group of politically powerless individuals are being oppressed by a political majority. Thus, Treanor's concern that contemporary process failure is most likely to occur when individuals

225. *Customer Co.*, 895 P.2d at 408-09 (Baxter, J., dissenting).

226. *Pennsylvania Coal*, 260 U.S. at 413.

are singled out[227] is of little concern. Admittedly, police policies governing the use of force are indirect products of the political process (in the sense that law enforcement policymakers are answerable to elected officials, or are themselves elected officials), but because no one can predict at the time these policies are made who exactly will be harmed by them, the singling out concern is dramatically diminished. While it can be argued that these policies victimize property owners as a class, property owners as a group are numerous and wealthy enough to protect their own interests in the political process, such that singling out is not a concern.

The concern regarding settled expectations is implicated by failure to compensate in the police cases. This is so simply because the possibility of suffering a dramatic, uncompensated loss at any time is inherently de-stabilizing.[228] However, the settled expectations concern hinges not just on the possibility of loss, but also on the possibility of loss arising from collective deliberation.[229] Here, there is no collective deliberation—the loss is tantamount to an accident.

The reciprocity of advantage concept also tends to support the denial of recovery. This is not simply because the property owners benefit from aggressive law enforcement. Such an attenuated benefit would presumably apply in any takings case because every citizen arguably benefits at least indirectly from anything that generally enhances public welfare. Here, though, the randomness of the loss combined with the extreme unlikelihood that any of these property owners will be similarly injured again, suggests that, under Michelman's theory, reciprocity of advantage is present. Here, a "disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."[230]

Moreover, denying recovery on the ground that the property has not been "used" has great appeal and firm support in the Supreme Court's *Omnia Commercial* decision. Because the property has not been put to any productive use by the government, the concerns that the government is acting to enrich itself at the expense of the property owner are not implicated, and thus one of the major policy reasons for the just compensation requirement does not come into play.

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227. *See* Treanor II, *supra* note 91, at 1171.

228. Coverage for destruction by governmental authorities engaging in authorized acts is excluded from most property insurance policies. *See* LEO R. RUSS & THOMAS F. SEGALLA, 10 COUCH ON INSURANCE 3D §§ 152.25-.28 (1998). For one explanation of why such events are excluded, see William A. Fischel, *Why Expectations and Insurance Do Not Trump Just Compensation*, SE18 ALI-ABA 218 (arguing that unpredictability makes underwriters unwilling to insure against such losses).

229. Michelman, *supra* note 141, at 1216.

230. *Id.* at 1223.

V. CONCLUSION

The plaintiffs in these five state supreme court cases should not have been permitted to recover under takings theories. Because of the emergency conditions under which the destruction occurred, the policy concerns underlying the Takings Clause have little force. While this seems intuitively unfair, the Constitution does not prohibit all unfairness. Rather, it ensures that particular, limited potential abuses, which were identified for historical reasons at the time of the framing, will no longer take place. As the United States Supreme Court said more than a century ago: "[I]t is not every hardship that is unjust, much less that is unconstitutional."[231]

231. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 552 (1870).

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