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As Much upon Tradition as upon Principle: A Critique of the Privilege of Necessity Destruction under the Fifth Amendment

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NOTE

"AS MUCH UPON TRADITION AS UPON PRINCIPLE": A CRITIQUE OF THE PRIVILEGE OF NECESSITY DESTRUCTION UNDER THE FIFTH AMENDMENT

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INTRODUCTION

Marcus C. Strickland Jr. was a timber farmer in Ormond Beach, Florida. He owned 5000 acres of cypress trees on property that he inherited from his father, who had been shot and killed during a land dispute in the late 1940s. The trees represented an inheritance Mr. Strickland intended to pass on to his three young children—trees as big around as his outstretched arms, and some over 300 years old. For a timber farmer, those trees represented $2 million worth of harvest.[1]

In the summer of 1998, a small lightning fire eventually grew out of control and threatened tens of thousands of acres of land in Flagler and Volusia Counties in Florida. Firefighters unsuccessfully attempted to create fire lines through ditches or controlled burns. Eventually, government officials and firefighters entered Mr. Strickland's land.[2]

On June 27, 1998, government workers used a bulldozer to remove Mr. Strickland's fence. In an attempt to create a fire line, they bulldozed over two miles of his property, cutting trees and destroying a dike. On July 1, firefighters set two independent fires on Mr. Strickland's property in another attempt to control the spread of the larger fire. Ultimately, they failed. Mr. Strickland's entire 5000 acres of timber lay ravaged, and the income-producing timber now was nothing more than a charred parcel of land.[3]

Mr. Strickland brought a suit under the Takings Clause of both the Florida Constitution and the United States Constitution.[4] Timberland is not covered by federal crop insurance, so compensation from the government could be his only remedy.[5] He asserted that public officials had entered his land and destroyed his property, by bulldozer and by deliberately-set control fires, causing millions of dollars worth of damage. Therefore, Mr. Strickland argued, his property had been

1 Maya Bell, *Family Stands Tough*, ORLANDO SENTINEL, July 6, 1998, at A11; Stacey Singer, *Clinton Calls for Tourism Boost as Fire Losses Are Tallied*, SUN-SENTINEL, July 10, 1998, at 6B.

2 Initial Brief at 1–2, Strickland v. Dep't of Agric. & Consumer Servs., 922 So. 2d 1022 (Fla. Dist. Ct. App. 2006) (No. 5D05-2635).

3 Complaint at 2–5, Strickland v. Dep't of Agric. & Consumer Servs., No. 02-156-CA (Fla. Flagler County Ct. Feb. 5, 2002).

4 *Strickland*, 922 So. 2d at 1023.

5 Singer, *supra* note 1.

taken, and compensation was due.[6] But the court granted summary judgment for the Department of Agriculture, and Mr. Strickland appealed.

The District Court of Appeals of Florida found no sympathy for Mr. Strickland's plight. The court cited United States Supreme Court cases from the nineteenth century,[7] and the Department of Agriculture cited English common law from the seventeenth century at oral argument.[8] The court noted that the privilege of necessity exempted the government from liability, and no compensation was required. It summarily dismissed his state and federal claims.[9]

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."[10] Despite some complex balancing tests in the contemporary era, clear rules still do exist for takings law, and it should be relatively simple to determine that the government takes property by destroying it. If private property has been destroyed for the greater good of the public, such as a perfectly good house destroyed to stop the spread of a fire, a compensable taking has occurred and the government owes just compensation. The Supreme Court, however, has held otherwise: it has preserved an exception for the destruction of property during cases of necessity, and it has left landowners, including Mr. Strickland, without compensation.[11] The Court long ago stopped trying to justify its rationale, instead choosing to rest simply upon Justice Holmes's statement that this exception to the Fifth Amendment is based "as much upon tradition as upon principle."[12] This Note will argue that neither principle nor tradition can sustain the injustice that landowners like Mr. Strickland have experienced. The Fifth Amendment requires compensation for landowners when their property is destroyed for the public good.

This Note first explores the history of the privilege of necessity destruction, a common law defense that allows an individual to destroy property for the public good. It analyzes the history of the exception, defining the doctrine and comparing it to the traditional eminent domain power of the state. In Part I, this Note examines the

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6 Complaint, *supra* note 3, at 9–11.

7 Oral Argument, *Strickland*, 922 So. 2d 1022 (No. 5D05-2635), *video available at mms://199.242.67.132/5dca06jan11oa*, at 1:37:15, 1:38:55.

8 *Id.* at 1:58:50.

9 *Strickland*, 922 So. 2d at 1023–24.

10 U.S. CONST. amend. V.

11 *See, e.g.*, Bowditch v. Boston, 101 U.S. 16 (1879) (rejecting the plaintiff's argument that the city should be liable for destroying his home to create a fire break).

12 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

three types of necessity destruction: general public necessity, military necessity, and law enforcement necessity. The general public necessity privilege has the deepest tradition, and it is the source of the original necessity destruction doctrine.[13] The Note relates its English legal ancestry, its application to the Great Fire of London of 1666, and its American adoption. In the area of military destruction, this Note explores the common law and historical background for the privilege. For law enforcement destruction, the most recent adoption of the necessity destruction justification, the Note describes the theory and the American legal history.

In Part II, this Note applies the Fifth Amendment to the privilege of necessity destruction and finds destruction to be compensable within the scope of the Takings Clause. The Takings Clause had not yet been adopted when the legal theories were created, the Clause did not originally apply to state action, and the Clause was not understood to encompass any necessity destruction exception. The Note then examines the conflict between the Constitution and the common law exception, and it rejects the attempt to reconcile the two areas. Courts have attempted to describe necessity destruction as some other analogous exception to the Takings Clause, such as a nuisance theory, a definition that excludes it as a taking, or an aspect of the police power. These comparisons improperly shoehorn the necessity destruction privilege into some other category, because the privilege cannot stand on its own.

In Part III, this Note concludes with an examination of the lingering policy reasons behind the exception to determine if *any* justification for the exception exists in light of contemporary policy concerns. The maritime law of general average, which requires compensation for property owners at sea whose property is destroyed in a time of necessity, suggests that land-based property owners should receive similar compensation.[14] Despite alternative policy concerns, "in all fairness and justice," property owners should be compensated for property destroyed to benefit the public.[15] The text and policy of the Takings Clause should supersede this privilege, and injured property owners should receive compensation.

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13 *See infra* Part I.A.2 (discussing the seventeenth century English roots of the exception).

14 *See infra* notes 260–62 and accompanying text.

15 Armstrong v. United States, 364 U.S. 40, 49 (1960).

I. HISTORY OF THE EXCEPTION

The Supreme Court has held that both the permanent physical occupation of property[16] and denial of all economically beneficial use of property[17] are compensable takings. The Takings Clause exists "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] These claims about the Takings Clause, however, have not been applied to the privilege of necessity.

The common law defense of public necessity allows the destruction of private property for the public good. The person destroying the property need not be a government official or the actual property owner. The law gives the property owner no recourse and requires no compensation. It makes the common public good the supreme law, and it trumps the rights of the individual property owner.[19]

Three primary types of necessity destruction exist. First, an individual may destroy property to prevent the spread of a natural disaster, usually a fire, flood, or epidemic.[20] For instance, an individual may tear down an untouched house to create a firebreak. Second, the government may destroy property in times of necessity during war.[21] Under this privilege, the army can destroy privately owned kegs of flour to prevent the approaching enemy from using them. Third, the government may destroy property in times of necessity during law enforcement, such as burning down a home to capture a barricaded criminal.[22]

In the latter two examples, the government has the exclusive authority to exercise necessity destruction; in the former, either public or private individuals may destroy the property. The English common law allowed this privilege for a variety of policy reasons, predominantly because the sovereign could take property without compensating the injured property owner anyway.[23] Additionally, the privilege extended because of the idea that necessity should be treated differently from other situations. The privilege has thrived under the Latin maxim *salus populi suprema lex*, the health of the people is the supreme

16 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

17 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

18 *Armstrong*, 364 U.S. at 49.

19 *See infra* Part I.A.4.

20 *See infra* Part I.A.

21 *See infra* Part I.B.

22 *See infra* Part I.C.

23 *See infra* notes 114–15 and accompanying text.

law.[24] In the realm of destruction of property for a public use, maxims and history have trumped the text of Takings Clause.

Indeed, courts have readily applied the Takings Clause in a variety of other circumstances where the government takes or uses property. The government's exercise of eminent domain is a taking under the Fifth Amendment. Eminent domain is "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking."[25] When the government takes property without eminent domain, the property owner can bring an inverse condemnation proceeding against the government.[26] Formal proceedings are not a prerequisite for a taking. Though "eminent domain" does not appear in the Constitution, the Supreme Court has determined that it is "'an incident of federal sovereignty and an offspring of political necessity.'"[27] Additionally, physical invasions of land are takings that require compensation.[28]

Despite the Court's own use of the term "necessity" to describe eminent domain, public necessity is a distinct area of the law in the conversion of property. Public necessity is "[a] necessity that involves the public interest and thus completely excuses the defendant's liability."[29] The use of the term has been applied inconsistently to three areas of law where converted property need not be compensated: destruction for public necessity, necessity destruction during war, and necessity destruction during law enforcement.

A. Public Necessity

1. Generally

The common law allowed any citizen to destroy property for the public use in a time of urgent necessity.[30] Commentators have gone so far as to state explicitly, "The destruction of private property to prevent the spread of conflagration is not a 'taking of private property

24 *See, e.g.*, Mayor of N.Y. v. Lord, 17 Wend. 285, 292 (N.Y. Sup. Ct. 1837); 4 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1632, at 2846 (5th ed. 1911); JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 87–88 (Prometheus Books 1986) (1690).

25 BLACK'S LAW DICTIONARY 562 (8th ed. 2004).

26 *See, e.g.*, United States v. Clarke, 445 U.S. 253, 257 (1980).

27 BLACK'S LAW DICTIONARY, *supra* note 25, at 562 (quoting JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 424–25 (4th ed. 1991) (internal quotation marks omitted)).

28 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

29 BLACK'S LAW DICTIONARY, *supra* note 25, at 1059.

30 DILLON, *supra* note 24, § 1632, at 2846.

for public use,' entitling the owner to compensation from the city."[31] The privilege has long existed at common law, usually for the prevention of disaster. It is most frequently applied to fire but has also extended to other disasters, including flooding and epidemic.[32]

The Restatement (Second) of Torts states, "One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."[33] Conversion is also permitted: "One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster."[34] In tort law, the privilege benefits the public in times of emergency, embodying the maxim *salus populi suprema lex.*

Necessity exists for both the good of the public and the good of the private individual. If an individual converts or destroys property for the good of a single person, either for herself or for a third party, then she is liable for the damage caused.[35] The compensation requirement for private benefits makes sense: an individual should not be able to swap property arbitrarily, regardless of the relative value. The conversion looks like theft; however, the law concedes that in cases of extreme necessity, the individual is privileged to act where she reasonably believes she needs to act to protect herself or a third party.

The Restatement, though, offers little solace for the private property owner whose property is converted and destroyed for the *public* good. *Armstrong v. United States*[36] undisputedly explains the rationale for the Takings Clause, stating that it was "designed 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."[37] The Restatement admits that although the "moral obligation" to compensate "is obviously very great," municipal actors have generally been immune from suits of trespass.[38] Furthermore, the Restatement does

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31 *Id.* at n.1 (emphasis omitted).

32 1 NICHOLS ON EMINENT DOMAIN § 1.43(1), at 841 (Julius L. Sackman et al. eds., 3d rev. ed. 2006).

33 RESTATEMENT (SECOND) OF TORTS § 196 (1965). Whether a disaster is "imminent" is a question to which the courts have generally afforded great deference to the actor. So long as the individual acts reasonably, even if the disaster was not imminent, the court would privilege the actor unless he had been negligent.

34 *Id.* § 262.

35 *Id.* § 197(2). The individual, however, will not be liable if the conversion is caused by the possessor's tortious conduct or contributory negligence.

36 364 U.S. 40 (1960).

37 *Id.* at 49.

38 RESTATEMENT (SECOND) OF TORTS § 196 cmt. h (1965).

not address whether municipalities ought to be held liable for the destruction of property.[39]

The history of necessity destruction privilege began in the English common law,[40] with the preeminent example of the Great Fire of London of 1666 as a primary justification for the policy behind it. American case law has largely followed the English history, even though the Fifth Amendment severely deviated from common law takings jurisprudence.[41]

2. English History

Two English cases in the early seventeenth century are hallmarks for the privilege of public necessity. First, *The Case of the King's Prerogative in Saltpetre*[42] in 1606 involved a citizen bringing suit against the Crown for saltpeter taken from his land. The king took the saltpeter for the benefit of the entire kingdom, but did not claim exclusive possession of the remaining saltpeter or any interest beyond the saltpeter necessary for the defense of the kingdom.[43]

The court did not rest upon the war as justification for the necessity, though the king sought the saltpeter to make gunpowder. The court emphasized that "every man may come upon my land for the defence of the realm."[44] Therefore, the privilege was not limited to the sovereign but was extended to anyone who acted for the public good. Furthermore, the court noted that "every one hath benefit by it," and that "for the commonwealth, a man shall suffer damage."[45] The court analogized the situation of destruction to prevent the spread of a fire, or for war strategy.[46] The court here conflated the right of the sovereign to enter land and take property with the private individual's privilege of public necessity. The discussion, however, may have taken place because parliament could grant a right of compensation, and the king instead tried to argue that liability could not exist for a privilege that any man may exercise.[47] Under the necessity privilege, the court permitted the king to take saltpeter from private

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39 *Id.* § 262 cmt. d.

40 *See infra* Part I.A.2.

41 *See infra* notes 150–62 and accompanying text.

42 (1606) 77 Eng. Rep. 1294 (K.B.) (decided in December of the fourth regnal year of James I, which some sources identify as 1607).

43 *Id.* at 1295.

44 *Id.*

45 *Id.*

46 *Id.*

47 *See* MONSIEUR DE VATTEL, THE LAW OF NATIONS 402 n.181 (photo. reprint 2005) (Joseph Chitty ed., 1854).

property, because the production of gunpowder benefited the defense of the entire nation.[48] The court found that the privilege applied and was not exclusive to the sovereign. Therefore, no compensation was due.

The second case was *Mouse's Case*,[49] decided two years later. Mouse, a barge passenger, lost cargo when it was jettisoned during a violent storm on the way to London.[50] Various passengers jettisoned the cargo, and the court refused to hold any of them liable because their actions were necessary to save the forty-seven passengers on the barge.[51] While the court considered the possibility of compensation from maritime law,[52] it refused to hold any individual passenger or the owner of the ship liable. The court reasoned that because "the danger accrued only by the act of God . . . everyone ought to bear his loss for the safeguard and life of a man."[53] The comparison to the "plucking down of a house, in time of fire" again lent to the application of the necessity exception.[54]

The rationale in these two cases was generally adopted in the United States.[55] Interestingly, though neither case concerns destruction to prevent a fire, both cases refer to fire, and American courts have used the privilege almost exclusively for that situation. The history behind the Great Fire of London of 1666 also influenced American jurisprudence, because that tale allegedly offered a historic justification to preserve this privilege.

3. The Great Fire

In the 1788 case of *Respublica v. Sparhawk*,[56] the Pennsylvania Supreme Court defended the doctrine of necessity privilege through the history of the London Fire from the preeminent narrative of the Earl of Clarendon. The court described "a memorable instance of folly," because the mayor of London refused to tear down houses for fear of being financially liable to the property owners, who were attorneys.[57] The court reasoned that the law of necessity would eliminate the hesi-

48 *Saltpetre*, 77 Eng. Rep. at 1295.

49 (1608) 77 Eng. Rep. 1341 (K.B.) (decided in the Michaelmas term of the sixth regnal year of James I, which some sources identify as 1609).

50 *Id.* at 1341.

51 *Id.* at 1341–42.

52 *See infra* Part III.A.

53 *Mouse's Case*, 77 Eng. Rep. at 1342.

54 *Id.*

55 *See infra* Part I.A.4.

56 1 U.S. (1 Dall.) 357 (Pa. 1788).

57 *Id.* at 363.

tation that paralyzed the mayor of London during that fire, because a government official would not need to worry about the compensation due the aggrieved property owner. The history, though, has been badly muddled and selectively reported.

The court's retelling conflicts with Clarendon's actual account. Clarendon notes that citizens pressed the mayor to tear down houses and create a firebreak, and adds parenthetically that "the doing whereof at that Time *might* probably have prevented much of the Mischief that succeeded,"[58] without the Pennsylvania Supreme Court's embellished statement that "half that great city was burnt"[59] because of the delay.[60] The narrative in *Sparhawk* does not rely on the factual history of Clarendon, but instead presents an inflated picture of events that justified the court's conclusion.

Diarist Samuel Pepys agreed with Clarendon, writing that men were initially paralyzed and did not attempt to stop the fire.[61] Pepys received word just hours after the fire began September 2, and immediately went to the king, who "commanded me to go to my Lord Mayor from him, and command him to spare no houses, but to pull down before the fire every way."[62] The very same day, however, Pepys recalls that the mayor had been tearing down houses all day: "To the King's message [the mayor] cried, like a fainting woman, 'Lord! what can I do? I am spent: people will not obey me. *I have been pulling down houses; but the fire overtakes us faster than we can do it.*'"[63] The futility of tearing down houses also appears certain in Pepys's account, because

58 3 EDWARD EARL OF CLARENDON, THE CONTINUATION OF THE LIFE OF EDWARD EARL OF CLARENDON 674 (Oxford, Clarendon Printing House, 1759) (emphasis added).

59 *Sparhawk*, 1 U.S. (1 Dall.) at 363.

60 This embellishment is among the most egregious of the *Sparhawk* court. The now-forgotten history of Clarendon then indicates that the mayor refused to tear down houses because "that He durst not do it without the Consent of the Owners." CLARENDON, *supra* note 58, at 674 (internal quotation marks omitted) (spelling modernized). The text does not claim that it was because the lawyers' property was in peril, but instead that the lawyers agreed with the legal analysis of the mayor. *Id.* The very next day after the fire began, however, Clarendon writes that "the Fire was too ravenous to be extinguished with such Quantities of Water as those Instruments could apply to it, and fastened still upon new Materials before it had destroyed the old. And though it raged furiously all that Day, to that Degree that all Men stood amazed, as Spectators only . . . ." *Id.* at 660–61. The simplistic assertion that the mayor may have stopped the fire through speedy action is dubious, because the morning after the mayor's alleged inaction, the fire had become insatiable.

61 5 THE DIARY OF SAMUEL PEPYS 393 (Henry B. Wheatley ed., G. Bell & Sons 1946) (1665).

62 *Id.* at 393–94.

63 *Id.* at 394 (emphasis added).

he describes houses at least six away from each other catching on fire, which would require a tremendous fire break well in advance of the progressing flame.[64] Pepys notes that even though the mayor was not at fault for the fire, "[p]eople do all the world over cry out of the simplicity of my Lord Mayor in general; and more particularly in this business of the fire, laying it all upon him."[65] The London Gazette's own report of the episode closely imitates Pepys, emphasizing repeatedly that homes were torn down, describing that the fire was unstoppable, and blaming only the weather for the bad fortune.[66]

The Great Fire of London of 1666 is an episode quickly cited in support of the necessity privilege exception,[67] but one with disputable history at best and false conclusions at worst. History shows that public officials did the best they could to prevent the spread of the fire, even though they were not given the additional incentive of the necessity privilege. The mythic conception created by the *Sparhawk* court that the mayor could have stopped the fire with a necessity privilege doctrine is too much conclusion and too little fact. American courts, however, have continued to use this conclusion and its English legal predecessors to defend the privilege.

4. American History

The first prominent American case to address the privilege of private necessity was the Pennsylvania Supreme Court in *Sparhawk*, which took place in 1788 well before the idea of compensation for destruction had swept many constitutions.[68] *Sparhawk* brought the privilege of public necessity into the American legal corpus. The facts did not ostensibly implicate the privilege of public necessity: 227 barrels of flour had been moved by the government to a depot in anticipation of the invasion of British troops, who eventually took the depot and the flour.[69] The court then examined the common law history, emphasizing that "[t]he transaction, it must be remembered, happened *flagrante bello*; and many things are lawful in that season, which would not be permitted in a time of peace."[70] Again, despite the fact that

64 *Id.* at 396.

65 *Id.* at 405.

66 THE LONDON GAZETTE, Sept. 3–10, 1666, *available at* http://www.opsi.gov.uk/images/london-gazette-fire-of-london.gif.

67 *See, e.g.*, United States v. Caltex, Inc., 344 U.S. 149, 155 n.7 (1952) (quoting *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (Pa. 1788), and its account of the Great Fire).

68 *See infra* Part II.B.

69 *Sparhawk*, 1 U.S. (1 Dall.) at 358.

70 *Id.* at 362.

the case was related to war and not to a natural disaster like a fire, the court placed its emphasis upon the unique circumstances that would permit the privilege of necessity.

The court carefully distinguished the seizure of property that would be a trespass from the "rule . . . that it is better to suffer a private mischief, than a public inconvenience; and *the rights of necessity*, form a part of our law."[71] The opinion then specifies several cases of necessity for the public safety: trespass to land if the road is damaged, trespass to land if an individual is assaulted, bulwarks built on land during war, and the situation in the present case.[72] The first example is taken directly from Blackstone,[73] and the rest from various English common law sources.[74] The court then enumerated several other exceptions: use of the banks of navigable waterways for towing; pursuit of noxious foxes across private property; disruption of consensual fighting, even when the fight takes place in a private home; and destruction of houses to prevent the spread of fire.[75] Again, the court refers to a series of English common law treatises, referring in the final instance to the Great Fire of London of 1666.[76]

After tracing the numerous instances where necessity justifies action "for the public good," the court concluded:

> Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And, having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss.[77]

The privilege became "well settled common law," even before the passage of any constitutions, when taking place "in cases of actual necessity,—as that of preventing the spread of fire,—the ravages of a pestilence, or any other great calamity . . . ."[78] Even though the case took place before the Takings Clause had even been proposed, public necessity would be used in the future to shield the government from liability.

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71 *Id.*

72 *Id.* at 363.

73 WILLIAM BLACKSTONE, 2 COMMENTARIES *36.

74 *Sparhawk*, 1 U.S. (1 Dall.) at 363.

75 *Id.*

76 *See supra* Part I.A.3.

77 *Sparhawk*, 1 U.S. (1 Dall.) at 363.

78 FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 444 (Platt Potter ed., Albany, William Gould & Son 1885).

Sparhawk, however, may have overextended itself in lumping necessity *destruction* with these other general categories of necessity. For instance, some of the situations mentioned are not as urgent cases of necessity as the court suggests: the *need* to use the banks of navigable waterways or to hunt foxes seems rather small. Instead, the court relies upon the "public good" rather than any urgent need. Additionally, many exceptions conflate distinct areas of law. Laws about fighting, the title of beach fronts, and animal control may not necessarily find their strongest defenders in the law of public necessity.[79]

Finally, the loss created by most of these cases is *de minimis*, particularly when compared to the loss or the complete destruction of private property. Most of the exceptions allow trespass to land, which would result in little more than nominal compensation. Good policy would presumably forbid punitive damages for trespass in cases of necessity, because the trespass would not implicate the policy concerns that usually trouble courts.[80]

Despite these policy arguments, states followed *Sparhawk* and adopted the English common law. The first significant decisions reflecting the policy of necessity came in a series of New Jersey cases about property destroyed in an 1835 fire in New York.[81] State actors destroyed a print shop and all the goods within it to prevent a fire from spreading.[82] The parties hotly disputed whether a statute enabled the state officials to tear down buildings in a time of fire, but the court emphasized that necessity, not a statute, authorized the destruction.[83] The court distinguished between the taking of property that was an "attribute of sovereignty" and within the scope of the constitution, and the taking of property that was the right of any individual who acted in a time of necessity.[84]

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79 Moreover, today's view of foxes has presumably improved since cases like *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

80 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 164–65 (Wis. 1997).

81 Am. Print Works v. Lawrence, 21 N.J.L. 248 (N.J. 1847), *rev'd sub nom.* Hale v. Lawrence, 21 N.J.L. 714 (N.J. 1848). The case was reversed on the ground that the statute was not a regulation of necessity, but actually a grant of eminent domain that required compensation. *Hale*, 21 N.J.L. at 733–36. Ultimately, as explained later by Nichols, if a state tries to add to the privilege of necessity, such as by expanding the right to destroy property in times of "emergency" rather than just "necessity," then the right becomes one of eminent domain and requires compensation. A public official, however, acting within the normal scope of the privilege, is not liable to a landowner. NICHOLS ON EMINENT DOMAIN, *supra* note 32, § 1.43(2), at 845.

82 *Am. Print Works*, 21 N.J.L. at 255–56.

83 *Id.* at 258–59. It further admitted that the destruction was even a taking under the state constitution, but not compensable. *Id.* at 256.

84 *Id.* at 257.

After determining that necessity applied in the case, the court tried to distinguish taking for public necessity from a taking for public good:

> They are both spoken of as grounded on necessity, and they doubtless are so. But the one is a *state*, the other an *individual* necessity, though ofttimes resulting in a public or general good. The one is a civil, the other a natural right. The one is founded on property and is an exercise of sovereignty. The other has no connexion [sic] with, or dependence upon, the one or the other.[85]

The court added that necessity is not for the benefit of the State or the public, but for "the benefit of one, of a few, or of many."[86] The reasoning distinguished the destruction from the kind authorized by the statute in order to vindicate state liability. The definition of necessity emphasized the natural right, independent of the state, to destruction in such circumstances. The court overstated its case, because the act of necessity may be divided into public or private, and the scope of the action alters the requirement for compensation.[87]

Most importantly, the court refused to consider whether the statute overrode the existing common law and held the state liable where it would naturally bear no liability. After all, it found the destruction a taking under the constitution but refused compensation. Nevertheless, the New Jersey courts adhered to this position in subsequent cases from the same episode and held that necessity "is essentially a private and not a public or official right."[88]

In the years approaching the Supreme Court's 1879 decision *Bowditch v. Boston*,[89] cases in Iowa[90] and Texas[91] presented prominent examples of state courts adopting the line of reasoning from *Mouse's Case* or *Sparhawk* when justifying the necessity privilege to prevent the spread of a fire. State courts often invoked commentator John Dillon's explanation: from the popular maxim *salus populi suprema lex*, he justified an exemption from liability in "the *public necessity*, the public good; and, therefore, if the public good did not require the act to be done,—if the act was not apparently and reasonably necessary,—the actors cannot justify, and would be responsible."[92] Without much de-

85 *Id.* at 258 (spelling modernized).

86 *Id.*

87 *See supra* notes 33–39 and accompanying text.

88 Hale v. Lawrence, 21 N.J.L. 714, 729 (N.J. 1848) (reversing *American Print Works*, 21 N.J.L. 248).

89 101 U.S. 16 (1879).

90 Field v. City of Des Moines, 39 Iowa 575, 577 (1874).

91 Keller v. City of Corpus Christi, 50 Tex. 614, 615 (Tex. 1879).

92 DILLON, *supra* note 24, § 1632, at 2846.

bate, virtually every state that confronted the issue had adopted the common law exception despite the takings clause of each state's constitution.[93]

The last and most significant case to question necessity destruction takings was *Bowditch*, in which the Supreme Court upheld the privilege.[94] The Court's jurisdiction in *Bowditch*, however, arose only incidentally from the relationship of the parties in a bankruptcy dispute, so the only questions presented turned on an interpretation of state law; the Court did not examine the Fifth Amendment at all.[95]

Bowditch lost his building when firemen successfully exploded it to prevent the approaching fire from spreading, and he sought recovery only for the destroyed goods that he could have removed from the building before the fire reached it.[96] The Court cited the usual litany of cases justifying the privilege and denying compensation to Bowditch: *Saltpetre*, *Mouse's Case*, *Sparhawk*.[97] The case is largely unremarkable in its defense of necessity, except that it was the first time the United States Supreme Court had clearly enunciated the doctrine. The Court reasoned, "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."[98] Even though the Court was interpreting state law and not the federal Constitution, the Court's articulation of this doctrine would implicate future necessity jurisprudence that did relate to the Fifth Amendment.[99] The Court denied Bowditch compensation for a destruction that had benefited the community, and the Fifth Amendment would be forever interpreted through this holding.

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93 The only state case to hold otherwise was *Bishop & Parsons v. Mayor of Macon*, 7 Ga. 200, 202 (1849).

94 *Bowditch*, 101 U.S. at 18–19.

95 *Id.* at 19.

96 *Id.* at 16.

97 *Id.* at 18–19.

98 *Id.* at 18.

99 *Bowditch* took place in 1879, eighteen years before the Takings Clause would be incorporated against the states. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). *Bowditch*, however, became the ideal justification of the necessity defense, twice cited in the watershed compensation case *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992); *id.* at 1048 n.8 (Blackmun, J., dissenting).

B. Military Necessity Destruction

The second type of necessity privilege is necessity destruction during war. The necessity privilege for destruction during times of war was often used interchangeably with the general principle of public necessity.[100] The two principles are not identical; they share only the central traits of the privilege: property may be destroyed in a time of necessity for the benefit of the public good.

Regarding damage caused by the military during war, natural law scholar Emer de Vattel wrote, "Such damages are to be made good to the individual, who should bear only his quota of the loss."[101] The English editor's reply to Vattel's comment, however, insisted, "It is legal to take possession of these for the benefit of the community, and no action lies for compensation, nor is any recoverable, unless given by act of parliament."[102] Vattel did distinguish between military acts "done deliberately and by way of precaution," and military acts that were "merely accidents,—they are misfortunes which chance deals out to the proprietors on whom they happen to fall."[103] He emphasized that the latter would exhaust the public finances, require an "impracticable" contribution from the citizens, create "a thousand abuses" to the system, and find "no end of the particulars."[104] The problems that would be created, he argued, outweighed the benefits of compensating those injured by necessity destruction.

Applied to contemporary takings jurisprudence, Vattel's analysis remains accurate. The misfortunes of war generally fall upon the citizens affected, and compensation for those misfortunes has never been "intended by those who united to form a society."[105] Furthermore, the incidental loss of private property when the army tries to protect or regain that property has been regarded as beneficial. Without the protection of the army, the private property would be entirely lost.

Vattel, however, did argue that the sovereign ought to be "equitable" and "just" to "those unhappy sufferers who have been ruined by the ravages of war."[106] He compared the debt of the state to injured property owners as equal to that of families whose head had been killed in duty.[107] He surmised, "There are many debts which are con-

100 *See supra* notes 42–48 and accompanying text.
101 VATTEL, *supra* note 47, at 402.
102 *Id.* at 402 n.181.
103 *Id.* at 402.
104 *Id.* at 402–03.
105 *Id.* at 403.
106 *Id.*
107 *Id.*

sidered as sacred by the man who knows his duty, although they do not afford any ground of action against him."[108] Vattel determined that the injustice suffered by property owners triggered an obligation from the state to compensate. The United States federal government often has not felt so obliged.

The federal government's own analyses of the military necessity exception during World War II held that enemy property taken or destroyed was not compensable.[109] Invoking the principles of *Bowditch* and other natural disaster cases, the Department of Justice defended the no compensation principle and argued that "justification may be found for the practice of destroying property within the zone of actual military operations to prevent its falling into the hands of the enemy or for other military purposes without payment of compensation to the owner."[110] Admitting that the distinction between destruction and taking was not entirely clear,[111] the Department nevertheless clung to the public necessity language. A report from the Department cited Justice Holmes in a Massachusetts decision:

> When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use, as truly as if it were seized to drag an artillery wagon. The public equally appropriate it, whatever they do with it afterwards.[112]

The Department summed up its position by distinguishing eminent domain, which did require compensation, from other government activities that did not use eminent domain.[113] The necessity exception privileged the government for destruction in war just as it had for individuals destroying property for the public good to prevent a natural disaster.

C. Law Enforcement Necessity Destruction

The third type of necessity privilege is necessity destruction during law enforcement. At English common law, the government as sov-

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108 *Id.*

109 LANDS DIV., U.S. DEP'T OF JUSTICE, ACQUISITION OF PROPERTY FOR WAR PURPOSES 78 (1944) [hereinafter U.S. DEP'T OF JUSTICE, ACQUISITION OF PROPERTY]; LANDS DIV., U.S. DEP'T OF JUSTICE, EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE 72 (1941) [hereinafter U.S. DEP'T OF JUSTICE, EXPROPRIATION OF PROPERTY]. The government, however, failed to make an explicit parallel holding regarding allied property destroyed during the war.

110 U.S. DEP'T OF JUSTICE, EXPROPRIATION OF PROPERTY, *supra* note 109, at 90.

111 *Id.* at 91 n.340.

112 Miller v. Horton, 26 N.E. 100, 102 (Mass. 1891).

113 U.S. DEP'T OF JUSTICE, ACQUISITION OF PROPERTY, *supra* note 109, at 86.

ereign owed no compensation for any taking, destruction or otherwise, unless parliament granted it.[114] Blackstone thought that compensation should be due, but the English courts emphasized that, as wise as the policy may be, it was not required.[115] Destruction caused by the sovereign in the exercise of law enforcement would not be compensated, and it was not protected under the "necessity" defense until the late twentieth century.[116]

The necessity justification for law enforcement destruction cobbled together a variety of theories to prevent the expansion of liability to the state. A 1995 California case, *Customer Co. v. City of Sacramento*,[117] exemplifies the theory promulgated. Police used tear gas to capture a criminal who had hidden in the plaintiff's store.[118]

The California Supreme Court first emphasized:

> Neither the "taken" nor the "or damaged" language ever has been extended to apply outside the realm of eminent domain or public works to impose a constitutionally-based liability, *unamenable to legislative regulation*, for property damage incidentally caused by the actions of public employees in the pursuit of their public duties.[119]

Even though the California Constitution contained the words "or damaged" as a circumstance beyond a "taking" that required compensation, the Supreme Court of California refused to recognize recovery in this case. It examined the history and found that the language only applied to the traditional bounds of eminent domain.[120] It then used the "emergency exception" doctrine as an alternative ground to explain the refusal to compensate:

> The emergency exception has had a long and consistent history in both state and federal courts. It is a specific application of the general rule that damage to, or even destruction of, property pursuant

114 William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 572–88 (1972).

115 Governor & Co. of the British Cast Plate Mfrs. v. Meredith, (1792) 100 Eng. Rep. 1306, 1307–08 (K.B.); *see infra* note 137 and accompanying text.

116 *See infra* note 124 and accompanying text.

117 895 P.2d 900 (Cal. 1995).

118 *Id.* at 902–04. The plaintiff failed to submit a proper federal question, and certiorari was denied by the Supreme Court presumably for this reason. Customer Co. v. City of Sacramento, 516 U.S. 1116, 1116 (1996). According to the California Supreme Court, the plaintiff only brought an inverse condemnation claim instead of a tort claim, and he did not make a federal takings claim. *Customer Co.*, 895 P.2d at 904–05, 905 n.2. The city also insisted that no federal claim was properly submitted. Brief in Opposition to Petition for Writ of Certiorari at 5–9, *Customer Co.*, 516 U.S. 1116 (1996) (No. 95-980), 1996 WL 33467250.

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

120 *Id.* at 906–07.

> to a valid exercise of the police power often requires no compensation under the just compensation clause.[121]

The court's light treatment of the emergency exception assumed that the exercise of law enforcement alone was a sufficient prerequisite for application of the necessity doctrine, a trait heretofore unknown to the doctrine of necessity. Historically, necessity destruction had been grounded in policy objectives distinct from the exercise of the police power, but California unified the two doctrines.

The court also asserted the same traditional policy concerns behind the doctrine. Officers must be able to act without concern of later liability and professional discipline.[122] The court echoed Vattel's concern that increased liability "would constitute a significant, unprecedented, and unwarranted expansion of the scope of the just compensation requirement."[123]

Various state courts invoked similar reasoning relating to the privilege of destruction during the exercise of law enforcement.[124] Others insisted that the privilege fell under the text of the takings clause of state constitutions.[125] Whether explicit or implicit, all the opinions struggle with the consequences of law enforcement for the public good during a time of necessity. State courts have limited the text of state constitutions in numerous ways: limiting takings to eminent domain, distinguishing takings from the police power, or restricting the scope of the term "public use." The federal issue of takings

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121 *Id.* at 909.

122 *Id.* at 910–11.

123 *Id.* at 911.

124 *See, e.g.*, McCoy v. Sanders, 148 S.E.2d 902, 904 (Ga. Ct. App. 1966) (emphasizing that the police power is derived from necessity and "is not to be confused with the power of eminent domain"); Ind. State Police v. May, 469 N.E.2d 1183, 1184 (Ind. Ct. App. 1984) (finding that the destruction did not amount to eminent domain but was "the nature of tort"); Kelley v. Story County Sheriff, 611 N.W.2d 475, 482 (Iowa 2000) (finding that the destruction in question looked more like an exercise of the police power rather than of eminent domain); Blackman v. City of Cincinnati, 42 N.E.2d 158, 160 (Ohio 1942) (finding "moral" but "no legal basis" for compensation for the destruction of property); Sullivant v. City of Okla. City, 940 P.2d 220, 226–27 (Okla. 1997) (invoking the standards from *Customer Co.*, 895 P.2d 900, to exclude a compensation requirement for the destruction of property during the exercise of the police power).

125 *See, e.g.*, Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 41–42 (Minn. 1991) (construing the takings clause of the state constitution to require compensation for destruction); Wallace v. City of Atlantic City, 608 A.2d 480, 483 (N.J. Super. Ct. Law Div. 1992) (holding that damage committed for the public good requires compensation by the public); Steele v. City of Houston, 603 S.W.2d 786, 789 (Tex. 1980) (invoking the *Armstrong* principle of "fairness and justice" to require compensation for destroyed property).

has been lightly skirted or flatly ignored, and the nagging question of the Fifth Amendment remains unaddressed in these cases where necessity has been invoked.

II. THE HISTORY AND APPLICATION OF THE FIFTH AMENDMENT

The Fifth Amendment has not been extended to protect any of these three categories of necessity destruction. The Takings Clause and the Compensation Clause, however, each offer reasons in their text alone and in their historical underpinnings to apply the Fifth Amendment to landowners whose property has been destroyed during times of necessity. The compensation requirement in the Constitution is therefore in conflict with the common law of necessity, and courts have used the common law exception to trump the Compensation Clause. The nuisance exception, the definitional scope of a taking, and the police power have all been avenues by which courts have rejected a compensation requirement for property owners. In light of the plain meaning of the Fifth Amendment, however, none of these efforts is convincing.

A. The Takings Clause

According to the common law history, only a sovereign can take property, and destruction in times of necessity is not a taking. The Takings Clause of the Fifth Amendment supersedes this traditional understanding. Common law exceptions do not trump the rights guaranteed under the text of the Constitution, and the text effectively supersedes the common law.[126]

Furthermore, the Takings Clause is not limited to government actors. In the passive voice, the Clause requires that no "private property *be taken* for public use."[127] The requirement "for public use" suggests that this clause should apply exclusively against the sovereign, because governments alone may exercise eminent domain. On its face, however, the Clause is not limited to "eminent domain" or the actions of the sovereign. It allows any taking "for public use" and requires "just compensation." The plain text suggests that a private citizen may take the private property of another and use it to the benefit

126 For example, sovereign immunity protected states from lawsuits, but the Supreme Court held in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the states no longer had that traditional privilege in certain circumstances after they ratified the Constitution. *Id.* at 420. In response, the states ratified the Eleventh Amendment, which restored their sovereign immunity in those circumstances.

127 U.S. CONST. amend. V (emphasis added).

of the public.[128] After all, under the privilege of public necessity, completely apart from the Fifth Amendment, a private citizen could convert property for the public benefit in extreme circumstances. The text of the Clause only requires that the taking be for public use, regardless of who takes the property, and the common law doctrine of public necessity provides a private actor with the ability to "take" property for the public use.

An argument from the text alone may look like a charlatan's trick to expand the interpretation of the Takings Clause. But similar takings clauses of the era support this interpretation. While little history exists regarding the passage of the original Takings Clause, some indicates that it was not limited to eminent domain. The federal government did not enact a federal eminent domain statute until 1888.[129] Previously, the federal government used state law to take land, but the Supreme Court in 1896 held that the power of eminent domain inhered in the federal sovereign irrespective of any other affirmative grant.[130] If the federal government takes land without the procedural safeguards of eminent domain, the injured property owner may file an inverse condemnation claim against the government.[131] The government must pay for the property taken if the inverse condemnation claim is successful, despite the fact that the government did not formally exercise its power of eminent domain.[132] Whether the federal government took property through its own eminent domain power, through state mechanisms, or without any formalities, the Takings Clause required compensation for the injured property owner.

American colonies had no consistent takings principles before the Revolution. In 1641, Massachusetts deviated from the previous default English position of denying compensation when it provided compensation for property if "goods should perish,"[133] a phrase that includes both useful and destroyed property. Vermont required com-

128 Other laws also hold that private citizens may violate public rights. For instance, suits may be filed against private parties acting under color of state law for statutory violations enforced under the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 1983 (2000).

129 Act of Aug. 1, 1888, ch. 728, 25 Stat. 357 (repealed 2002).

130 Chappell v. United States, 160 U.S. 499, 510 (1896).

131 United States v. Clarke, 445 U.S. 253, 257 (1980).

132 United States v. Lynah, 188 U.S. 445, 464–65 (1903).

133 William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995) (quoting MASS. BODY OF LIBERTIES § 8 (1641), *reprinted in* SOURCES OF OUR LIBERTIES 148, 149 (Richard L. Perry & John C. Cooper eds., 1952)).

pensation whenever land was taken "for use of the public."[134] The Massachusetts Constitution followed in 1780 with a compensation requirement for takings during "public exigencies,"[135] a phrase that encompasses property taken in a time of necessity. The Northwest Ordinance of 1787 also required compensation "[s]hould the public exigencies make it necessary, for the common preservation."[136] These documents contradict the common law assumptions about the privilege of necessity destruction, because terms embodying both destruction and necessity were codified in contemporary legislation. Courts have also acknowledged that takings embody destruction. During the New York fire cases, for instance, the New Jersey Supreme Court held, "Nor is it denied that the *destruction* of private property for public use is a *taking* of it within the meaning of the constitution."[137]

Legal scholars have agreed with this definition, and even the Department of Justice has admitted that the definition is at the very least open to debate.[138] Richard Epstein aligns conversion and destruction because they perform the same deprivation of property rights.[139] He writes, "Surely no one would argue that the state does not take private property when it blows up a building, or that thereafter it can condemn the land without paying for the building it has destroyed."[140] Therefore, he concludes, "The eminent domain clause must apply whether the government takes or destroys private property."[141] Bruce

134 *Id.* at 790 (quoting VT. CONST. ch. 1, art. II, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3737, 3740 (Francis N. Thorpe ed., 1909)).

135 *Id.* (quoting MASS. CONST. of 1780, part I, art. X, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1891 (Francis N. Thorpe ed., 1909)).

136 *Id.* at 791 (quoting Northwest Ordinance of 1787, art. II, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 133, at 392, 395). Interestingly, although the Northwest Ordinance delegated local control in the territory over issues like education, other areas, including the requirements for takings and compensation, found no such deference to local decision-making bodies. *See generally* LARRY P. ARNN, LIBERTY AND LEARNING 4–5 (2004) (discussing the delegation of authority in the Northwest Ordinance, particularly in education).

137 Am. Print Works v. Lawrence, 21 N.J.L. 248, 256 (N.J. 1847), *rev'd sub nom.* Hale v. Lawrence, 21 N.J.L. 714 (N.J. 1848) (finding that the New York statute created a right of eminent domain instead of codifying necessity destruction).

138 U.S. DEP'T OF JUSTICE, EXPROPRIATION OF PROPERTY, *supra* note 109, at 91 n.340.

139 RICHARD A. EPSTEIN, TAKINGS 38 (1985).

140 *Id.*

141 *Id.*

Ackerman agrees that the plain meaning of "taking" embodies "destruction."[142] Property can be taken without it being given to anyone in particular, for "if a Layman can properly use language in this way, it follows that an Ordinary Observer will recognize a prima facie taking not only when Layman's thing has been *transferred* to a third party but when it has been utterly *destroyed* by the state as well."[143] The plain meaning of the text and contemporary documents give a strong preference to include destruction within the scope of the word "taking."

If this definition of a taking is accepted, then even private individuals who act on behalf of the public good fall within the scope of the Takings Clause, and property owners should receive just compensation for their loss. Courts have carefully distinguished the privilege of necessity from other conversions that are exclusively granted to the sovereign.[144] The Supreme Court, however, has articulated the oft-invoked and highly abstract principle that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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."[145] The principle focuses upon the harm caused to property owners rather than the action of the government. As a dissenting justice noted in the New York fire cases, "I cannot but think that [the destruction] . . . may well be said to be a taking for a public use. The whole city may in turn be exposed to the same danger, and the whole city may in turn be obliged to appeal to the same means of protection."[146] This policy of compensating property owners who bore public burdens continued through *Armstrong* and exists in the present day.[147]

The other popular competing principle about the purpose of the Takings Clause is that compensation for takings prevents the arbitrary

142 *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 129–36 (1977).

143 *Id.* at 130.

144 *See, e.g.*, 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 7, at 16–17 (3d ed. 1909) ("[The privilege of private necessity] is plainly distinguishable from the right of eminent domain. It is a right which exists in the individual, and not in the State; by nature, and not as the result of political organization.").

145 Armstrong v. United States, 364 U.S. 40, 49 (1960).

146 Hale v. Lawrence, 21 N.J.L. 714, 748 (N.J. 1848) (Carpenter, J., dissenting).

147 *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (citing *Armstrong*'s "fairness and justice" principle).

deprivation of property by the government.[148] This philosophy behind the takings doctrine was promulgated by St. George Tucker in his edition of Blackstone's *Commentaries*.[149] If arbitrariness were the sole concern of the Takings Clause, then necessity privilege would not conflict with that goal, because property would be destroyed under times of *actual* necessity and therefore not for an arbitrary or capricious purpose.

But if the *Armstrong* principle of "fairness and justice" is truly the impetus behind the Takings Clause, then compensation should be due *regardless of the actor*, so long as the actor does destroy the property "for public use." If the arbitrariness principle is the impetus, then compensation should be limited to occasions where arbitrariness is a concern. The tension between the *Armstrong* principle and the arbitrariness principle is best reflected in the debate about the meaning and application of the Compensation Clause.

B. The Compensation Clause

William Michael Treanor traces the history of the Compensation Clause, emphasizing that the original understanding was clear on two points: the government compensated physical takings, and the government did not compensate land regulation.[150] American colonies had no consistent compensation principles before the Revolution.[151] The colonies often adopted the standard English position of voluntary compensation, which allowed the sovereign to take property and required no compensation, although sometimes the sovereign chose to compensate.[152] Later statutes and constitutions began to adopt a compensation requirement.[153] For instance, although improving un-

148 *See, e.g.*, Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners' Property in the Course of Law Enforcement: The View from Five State Supreme Courts*, 34 MCGEORGE L. REV. 1, 17 n.166 (2002).

149 St. George Tucker, *Of the Constitution of the United States, in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 305 (photo. reprint 1969) (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (stating that the Compensation Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining suppliers for the army"). Tucker wrote before 1795, so his comments are arguably most authoritative on the interpretation of the Constitution. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 11–12 (2002).

150 Treanor, *supra* note 133, at 782.

151 *See* Stoebuck, *supra* note 114, at 579–88 (discussing the compensation requirements of the various colonies and their underlying principles).

152 *See id.* at 575–88.

153 *See supra* notes 133–36 and accompanying text.

improved lands traditionally did not require compensation, Vermont altered that tradition with its constitution of 1777 by requiring compensation even for improvement of unimproved property.[154] This history cuts against the arbitrariness principle, because the government's *improvement* of land does not indicate the arbitrary taking of property.

These statutes that first adopted a compensation requirement followed a long line of legal theorists, including Samuel Pufendorf and William Blackstone, who defended the need for compensation.[155] Pufendorf insisted that if property were taken for public purposes, the share that the property owner did not deserve to bear "ought to be refunded to that citizen from the public treasury, or by contribution of the other citizens, so far as possible."[156] Pufendorf distinguished between the regulation and the taking of property.[157] He conceded, however, that an exception may exist in times of necessity and for damage that was "inevitable," though he did not advocate the exception.[158] He limited the principle to cases where the property owners "tacitly confirmed" government destruction of property in advance.[159] How to determine tacit confirmation was never discussed.

Blackstone insisted that when the government took private property from a citizen, it should "giv[e] him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange."[160] He argued that the legislature needed a check, because the possession of this exclusive power was one that would unjustly harm the property owner, who would be stripped arbitrarily of his property.[161] Though Blackstone's native England did not look so kindly upon his commentary,[162] the Founders relied upon Blackstone and adopted a compensation clause in the Bill of Rights.

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154 William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695, 702–03 (1985).

155 James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 16–17 (1992).

156 SAMUEL PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 136 (James Brown Scott ed., 1995).

157 *Id.*

158 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (C.H. Oldfather & W.A. Oldfather trans., Oxford Univ. Press 1934) (1688), *reprinted in* THE CLASSICS OF INTERNATIONAL LAW, *supra* note 156, at 1286.

159 *Id.*

160 1 BLACKSTONE, *supra* note 73, at *139.

161 *Id.*

162 *See supra* notes 114–15 and accompanying text.

The Founders' theory behind the Compensation Clause remains elusive. In theory, any process-based concerns in the government's conversion of property should be alleviated in the "public use" restriction and the enumerated powers of the federal government in Article I.[163] If arbitrariness alone were the concern, the "public use" requirement and the limited enumerated powers would have been sufficient to protect property owners.[164] The Compensation Clause instead suggests that when the government singles out a property owner, the loss is borne by a single individual who cannot easily seek a remedy through the political process, and the property owner should expect compensation.[165] Singling out, though, is not necessarily a prerequisite for physical invasions.[166] A destruction of property not only meets the singling out requirement, but it also meets the physical invasion requirement.

Instead, the compensation principle boils down to a fairness issue, and "we must say that compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government."[167] If government conversions were limited to tort challenges, as many necessity destruction claims have been limited, then the claims are subject to strict statutory limits, the inevitable problem of sovereign immunity, and the reluctance of the government to open itself to suits.[168] Unfortunately, the problems inevitable in limited statutory liability often leave property

163 *See* Kelo v. City of New London, 125 S. Ct. 2655, 2679–80 (2005) (Thomas, J., dissenting) (explaining that the "public use" requirement "allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever" and that "the Government may take property only when necessary and proper to the exercise of an expressly enumerated power").

164 Jed Rubenfeld wrote an influential article in the *Yale Law Journal* incorporating a sort of substantive due process analysis inherent to the Takings Clause and eviscerating this historical understanding of the public use requirement. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119–24 (1993). Because substantive due process did not reach the Court's jurisprudence until the late nineteenth century, A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1046 (2006), it is unlikely that the Takings Clause necessarily involves this anachronistic history.

165 *See* Saul Levmore, *Takings, Torts, and Special Interests*, 38 VA. L. REV. 1333, 1344–48 (1991).

166 *Id.* at 1352–53 (explaining that where a physical invasion has occurred, a compensable taking exists regardless of whether the property owner was singled out).

167 Stoebuck, *supra* note 114, at 588.

168 Levmore, *supra* note 165, at 1349–50.

owners with the cost of the government's destruction of property.[169] Kent concedes these limitations, writing, "The remedy under the act does not extend to allow a recovery in damages for merchandise in the building when destroyed, and being the property of a third person."[170] An Iowa statute limited the scope of necessity destruction liability so that if the government acted *ultra vires*, it was no longer liable under the common law exception.[171] Case after case reflects the inadequacy of compensating property owners under statutory tort liability.

C. *The Text of the Constitution and the Tradition of the Common Law*

1. The Conflict

Once state constitutions adopted takings clauses that required government compensation, states had to determine what to do with the common law privilege of necessity. Theoretically, the new constitutional text trumped the old common law exception, and the destruction required compensation. Instead, the courts recognized that a common law exception for necessity was built into the constitutional text and did not require compensation. The states, and later the federal government, resisted altering the old common law, apparently, because it was simply old.

For instance, New York enacted a constitution that included a takings clause.[172] Fortunatus Dwarris's definitive interpretation of the new constitution, however, relied heavily on old case law that had preserved this exception, or cases that had reached the conclusion that the new constitution did not supersede the old common law.[173] Commentator Platt Potter would later rely on *Saltpetre* and *Mouse's Case*,[174] following Dwarris's emphasis that "our highest courts have held, that this police power, or the law of overruling necessity, is not controlled by this constitutional limitation."[175] Dwarris admitted that "all such parts of the common law, &c., as are repugnant to this constitution were abrogated," but concluded that "it is not clearly repugnant to the

169 For example, one New York statute was construed to permit compensation to property owners for structures destroyed by the government during a New York fire, but not for the loss of the goods inside the buildings. Hale v. Lawrence, 21 N.J.L. 714, 733–34 (1848). Another statute was construed to limit significantly the liability of public officials, again to exclude liability for the goods inside buildings. Russell v. Mayor of New York, 2 Denio 461, 467–68 (N.Y. Sup. Ct. 1845).

170 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW *339 n.b.

171 Field v. Des Moines, 39 Iowa 575, 587 (1874).

172 N.Y. CONST. art. I, § 7.

173 DWARRIS, *supra* note 78, at 445–48.

174 *See supra* notes 42–54 and accompanying text.

175 DWARRIS, *supra* note 78, at 445.

constitution; but being adopted by it, is in effect a part of it."[176] He conceded, however, that the lack of compensation was "injustice" and should be corrected "by proper legislation."[177]

A similar tactic, though not as explicit, occurred in the application of the Federal Takings Clause. The Takings Clause was incorporated against the states in 1896, with the Court's determination that compensation and eminent domain were "inseparably connected with the other."[178] Therefore, a taking of private property for the state, or "under its direction for public use," requires compensation for the injured property owner.[179] The Court held that even though the government did not retain title to the property, it nevertheless owed compensation for the taking. The Court embodied a principle broader than the state's actual taking of the title, and included takings under the state's direction. This holding is not dicta: the railroad had desired property, and the city of Chicago accordingly condemned it.[180] Actions that take place under the direction of the state, which include its authorized common law directives, fall within the scope of the Fifth Amendment.

The landmark case *Pennsylvania Coal Co. v. Mahon*[181] was the first case to reconcile the privilege of public necessity with the Takings Clause. Justice Holmes uneasily made an "odd comment" in *Pennsylvania Coal* about *Bowditch*.[182] *Pennsylvania Coal* included a broad statement about the nature of takings jurisprudence, which included dicta that specified destruction and appropriation as identical constitutional takings.[183] Holmes, however, included a huge exception to takings:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle.[184]

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176 *Id.* at 446.

177 *Id.* at 449.

178 Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238 (1897).

179 *Id.* at 241 (holding that a state taking of private property for public use without compensation violates due process of law).

180 *Id.* at 230.

181 260 U.S. 393 (1922).

182 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, 656 (1996).

183 *Mahon*, 260 U.S. at 415.

184 *Id.* at 415–16.

Holmes admits that the force behind *Bowditch* is as much tradition as principle, a bothersome concession for anyone reading the text of the Constitution. If the Constitution can be ignored in light of preexisting traditions, the rule of law is called into question.

The statement reflects more about Holmes's own judicial philosophy and less about the actual text of the Constitution. Holmes stated explicitly in *Pennsylvania Coal* that "[i]n general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."[185] The text of the Takings Clause applies to property owners injured to the benefit of the public, and property owners are so injured in emergency destruction. Robert Brauneis notes, "Private necessity does not exempt a person from liability; Holmes thought it was an anomaly that public necessity did."[186] Holmes's judicial philosophy, however, accepted exceptions like the privilege of public necessity under the doctrine of survivals.

Survivals are "rules that continue to exist by inertia even though the law in general has discarded their original justifications."[187] Even though Holmes did not necessarily agree with either the principle or the application of the doctrine, he nevertheless continued to apply it because of its long-standing history. Brauneis concludes, "Although the public necessity doctrine persisted, other legal doctrines pointed to the acceptance of a principle at odds with allowing 'public necessity' to justify uncompensated destruction of property."[188] Though the privilege did not comport with the text or the philosophy behind the Takings Clause, it remained as a vestige of the old common law.

Seventy years after *Pennsylvania Coal*, the Court in *Lucas v. South Carolina Coastal Council*[189] adopted Holmes's reasoning without any analysis. The Court held that states cannot take away property rights that never existed, and it looked to "background principles"[190] such as nuisance law to determine whether those rights existed.[191] Justice Scalia included the necessity privilege among these built-in limitations on property rights: "The principle 'otherwise' . . . [is] destruction of 'real and personal property, in cases of actual necessity, to prevent the

185 *Id.* at 416.

186 Brauneis, *supra* note 182, at 657.

187 *Id.* at 656.

188 *Id.*

189 505 U.S. 1003 (1992).

190 *See* Glenn P. Sugameli, *Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define if There Is a Protected Property Interest, in* TAKING SIDES ON TAKINGS ISSUES § 7.1 (Thomas E. Roberts ed., 2002) (quoting *Lucas*, 505 U.S. at 1029).

191 *Id.* § 7.1(a).

spreading of a fire' or to forestall other grave threats to the lives and property of others."[192] He then cited *Bowditch*, a pre-incorporation case, to dismiss the application of the Takings Clause to analogous destruction situations.[193] One commentary notes that California's *Customer Co.* case[194] adopted the necessity privilege as a result of the logic in *Lucas*, which effectively allowed states to carve out historic exceptions to the text of takings statutes.[195] These exceptions to the plain text of the Takings Clause have persisted, often, as the "background principles" that *Lucas* suggests are under a nuisance theory.

2. The Nuisance Exception

Just nineteen years before incorporation of the Takings Clause, the Court had allowed a nuisance exception to the Takings Clause in *Mugler v. Kansas*.[196] States may prohibit use of property that "will be prejudicial to the health, the morals, or the safety of the public."[197] The state does not need to compensate for losses, because property owners are inherently prohibited from harming society with a "noxious use of their property."[198] In its broadest terms, "[i]ndividuals in the enjoyment of their own rights must be careful not to injure the rights of others."[199] The state owes no compensation for regulations, including regulation of nuisances: "In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."[200] Regardless of the validity of having a nuisance exception to the Takings Clause in the first place, an attempt to carve out the necessity exception by means of the nuisance exception is, at best, tenuous.

Courts and scholars have tried to join nuisance and necessity into a single exception, arguing that "[a]lthough an inert building is ordinarily not a nuisance, when approached by a raging fire it can be said to take on the characteristics of a tinder box, and thus poses a nuisance-like threat to other buildings."[201] Similarly, goods that an approaching enemy may take or property surrounding a blockaded

192 *Lucas*, 505 U.S. at 1029 n.16 (quoting Bowditch v. Boston, 101 U.S. 16, 18–19 (1879)).

193 *Id.*

194 *See supra* notes 117–23 and accompanying text.

195 Sugameli, *supra* note 190, § 7.1(a).

196 123 U.S. 623 (1887).

197 *Id.* at 669.

198 *Id.*

199 The License Cases, 46 U.S. (5. How.) 504, 589 (1847) (McLean, J., dissenting).

200 *Mugler*, 123 U.S. at 669.

201 DANA & MERRILL, *supra* note 149, at 119–20.

criminal may be extended by analogy to be considered a nuisance. This analogy, however, proves too much. If a home in an increasingly-crowded neighborhood would better serve the health of the community as a park, that home becomes "a nuisance-like threat" to the community, because although the home is not actually injurious, the community would be better off if it did not exist at all. The home itself is not actually deleterious to the health of the community, but the destruction of the home would benefit the community more. If "nuisance" is so broadly defined for purposes of public necessity and narrowly defined elsewhere, it loses credibility and becomes a doctrine that stretches and shrinks with convenience to evade the compensation requirement of the Takings Clause.[202]

Furthermore, an actual nuisance must exist before the state can control it; the potential for a nuisance is not enough. As one federal court has held, "[T]he actual existence of a public nuisance is an absolute condition precedent to the exercise of the power."[203] A house that has not yet caught fire, a flour barrel not yet captured by the enemy, or a warehouse commandeered by a criminal are not "actual nuisances," but potential nuisances or not nuisances at all.

The primary case cited in defense of the necessity-nuisance analogy is the Supreme Court case *Miller v. Schoene*.[204] Virginia ordered Miller to cut down cedar trees that might spread a disease to nearby apple trees,[205] though the disease did not diminish the value of the cedars at all.[206] The state defined the nuisance as keeping plants that host communicable diseases within the radius of apple orchards potentially harmed by that disease.[207] The Court agreed and quoted the recent *Euclid v. Ambler Realty Co.*[208] opinion, which stated, "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."[209] In *Schoene*, the Court found that the disease was simply in the wrong place, so the state could destroy the property without compensation. It refused to consider the

202 *See* Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 50–51 (1971) ("Where the advantage obtained from a mandatory expenditure is enjoyed primarily, if not exclusively, by persons other than the one required to make it . . . the basic unfairness of the imposition seems obvious.").

203 Miles v. Dist. of Columbia, 354 F. Supp. 577, 579–80 (D.D.C. 1973).

204 276 U.S. 272 (1928).

205 *Id.* at 277.

206 *Id.* at 278.

207 *Id.* at 279.

208 272 U.S. 365 (1926).

209 *Id.* at 388.

"nicet[ies]" of common law nuisance or statutory regulation.[210] Instead, the Court invoked a necessity-like exception to defend this definition of a nuisance, and *Schoene* was often invoked in later case law with an acceptance of this logic.[211]

The facts of *Schoene* do not match its broad construction or alleged sweeping terms. The Court noted that Miller could use the felled trees.[212] The primary concern, instead, was the loss of scenic value: "The evidence tends to show that the land is more valuable without them; but, when properly trimmed and kept in order, they possess, or are supposed to possess, a scenic value."[213] Unlike public necessity destruction cases, the property in *Schoene* retained value and had not been completely destroyed.

The analogies to nuisance and to *Schoene* inadequately explain how the public necessity exception falls outside the scope of the Takings Clause. Nuisance, however, is not the only evasive jurisprudence that tries to justify the public necessity exception in the face of the text of the Constitution. A host of other conclusory statements continue to defend the public necessity privilege.

3. The Scope of the Takings Clause Exception

Courts have adopted several other arguments to distinguish takings from public necessity. First, some have limited the scope of the Takings Clause to exercises of eminent domain.[214] Eminent domain, however, is not the sole procedure available for the government to take property. Actions for inverse condemnation are allowed even without the process of eminent domain, and these takings require compensation.[215] According to *Pumpelly v. Green Bay Co.*,[216] a physical invasion of land is a compensable taking, regardless of the govern-

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210 *Schoene*, 276 U.S. at 280.

211 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022 (1992); *id.* at 1048 (Blackmun, J., dissenting); *id.* at 1064 (Stevens, J., dissenting); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125–26 (1978); *id.* at 145 n.8 (Rehnquist, J., dissenting).

212 *Schoene*, 276 U.S. at 277. The Virginia Supreme Court had implied that the owner was allowed to keep the lumber, which could be chopped for fence posts and firewood. Miller v. State Entomologist, 135 S.E. 813, 818–19 (Va. 1926), *aff'd sub nom.* Miller v. Schoene, 276 U.S. 272 (1928).

213 *Miller*, 135 S.E. at 814.

214 *See, e.g.*, MARK TUSHNET, A COURT DIVIDED 284 (2005) ("The takings clause was originally about the power of eminent domain, a state's power to take property for a fair market price and use it for public purposes.").

215 *See supra* notes 125–26 and accompanying text.

216 80 U.S. (13 Wall.) 166 (1871).

ment's desire to take title.[217] Additionally, this philosophy undercuts the premise of cases like *Pennsylvania Coal* and *Lucas*, where a compensable taking exists where the regulation "goes too far."[218] Other scholars agree: "Payment of compensation was the practice not only when the government appropriated formal title to property, but also when 'land was taken, used by the government, or damaged pursuant to government authorization.'"[219] Accordingly, many courts have not restricted the scope of the Takings Clause to merely taking title.

Rather than *restricting* the Takings Clause, some courts have asserted that instances of necessity destruction are simply not *within the scope* of the Fifth Amendment. These arguments read the public necessity privilege right out of the text of the Clause for various reasons, none of which relate to the actual words of the Takings Clause. For instance, Kent's oft-cited commentaries distinguish public necessity from eminent domain, but he discusses the legal concepts together because they so closely resemble each other.[220] Dwarris's interpretation of the New York Constitution awkwardly tries to unify common law with constitutional text.[221] Even though the constitutional text is clear enough and broad enough to require compensation for destruction, commentators try to escape the plain meaning of the text. The Supreme Court's distinctions, particularly in the military necessity context, have been just as awkward.

In *Mitchell v. Harmony*,[222] the Mexican trader and United States citizen Harmony had his "horses, mules, wagons, goods, chattels, and merchandise" seized, and the army under Mitchell impressed his workers.[223] The Court held that "private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy," but emphasized, "[u]nquestionably, in such cases, the government is bound to make full compensation to the owner."[224] The Court continued to hold this position in *United*

217 *See id.* at 176–78 (interpreting the Wisconsin Constitution's Takings Clause, which the Court equates with that of the Federal Constitution); Rubenfeld, *supra* note 164, at 1083–85 (summarizing the physical-invasion aspect of takings).

218 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

219 DANA & MERRILL, *supra* note 149, at 17 (quoting John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1284 (1996)).

220 *See* KENT, *supra* note 170, at *338–40.

221 *See* DWARRIS, *supra* note 78, at 445; *supra* note 175 and accompanying text.

222 54 U.S. (13 How.) 115 (1851).

223 *Id.* at 116.

224 *Id.* at 134.

States v. Russell,[225] where a steamer was seized and impressed for use, but not appropriated, and later returned.[226] The Court continued its inclusive definition of takings with decorative language regarding the nature of necessity, and it held that property "impressed, appropriated, or destroyed" by the government[227] required "full compensation to the owner."[228] "[F]ull restitution" must be made if the situation is so "imperative and immediate."[229] While one writer has described the dicta of *Mitchell* and *Russell* to be a "guarantee,"[230] the Court did not confront the actual situation of military destruction in a case of necessity.

When the Court finally did face that situation, it hastily retreated from its dicta. In *United States v. Pacific Railroad*,[231] the military sought to prevent the Confederate advance into St. Louis during the Civil War, and "some of the bridges were destroyed by [General Rosencrans's] orders, as a military necessity, to prevent the advance of the enemy."[232] Invoking a host of outside sources, including Vattel, the maxim *salus populi suprema lex*, and *Sparhawk*,[233] the Court determined that the discussion of "destruction" in *Mitchell* and *Russell* applied only to compensation for property destroyed when the government made use of the land.[234] It described military necessity as outside the scope of the Takings Clause, despite the fact that the military takings in *Mitchell* and *Russell* explicitly required compensation *because* they were takings for public use, seemingly within the scope of the Clause.[235]

The Supreme Court continued to apply this logic in the second half of the twentieth century. In *United States v. Caltex*,[236] the Army destroyed Filipino petroleum products to prevent the advancing Japanese from using the facilities.[237] Consistent with *Pacific Railroad*, the Court noted that the "language in [*Mitchell* and *Russell*] is far broader

225 80 U.S. (13 Wall.) 623 (1871).
226 *Id.* at 631–32.
227 *Id.* at 628.
228 *Id.* at 629.
229 *Id.*
230 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, 277, 290 (2000).
231 120 U.S. 227 (1887).
232 *Id.* at 229.
233 *Id.* at 234–35.
234 *Id.* at 239–40.
235 United States v. Russell, 80 U.S. (13 Wall.) 623, 628–29 (1871); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851).
236 344 U.S. 149 (1952).
237 *Id.* at 150–51.

than the holdings."[238] The Court explained that it had not been appropriate for public use, but that the property "was destroyed that the United States might better and sooner destroy the enemy."[239] The Court nevertheless refused to compensate Caltex for its loss. It also unhelpfully stated, "No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts."[240] A complete destruction of property, then, had no categorical protection under the Takings Clause.

In *YMCA v. United States*,[241] the Court continued to apply this standard, again to the chagrin of Justices Black and Douglas. Riots took protestors to the YMCA Building and the Masonic Temple in Panama, where army troops barricaded themselves inside the YMCA.[242] The alleged goal of the mission was to remove the rioters from the Canal Zone, not to protect the businesses.[243] From the facts, however, the Court found that the troops were actually protecting the buildings, and not the Zone.[244] Stipulated facts stated the army's command, which included "instructions to protect the property."[245] The Court emphasized that because "the private party [was] the particular intended beneficiary of the governmental activity, 'fairness and justice' [did] 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."[246] The justification of *Caltex* again applied here, though the YMCA stood to benefit directly from government intervention.

The result in *YMCA*, however, should not be overstated because of the proximity of the benefit. In fact, Justice Stewart concurred to emphasize that "[i]f United States military forces should use a building for their own purposes—as a defense bastion or command post, for example—it seems to me this would be a Fifth Amendment taking, even though the owner himself were not actually deprived of any per-

238 *Id.* at 153.

239 *Id.* at 155. Justice Douglas seized upon this language in his dissent, which was joined by Justice Black, and described the destruction as "necessary to help win the war." *Id.* at 156 (Douglas, J., dissenting). The destruction, he notes, "deprived the enemy of a valuable logistic weapon." *Id.*

240 *Id.* at 156 (majority opinion).

241 395 U.S. 85 (1969).

242 *Id.* at 87–88.

243 *Id.* at 87, 90.

244 *Id.* at 90.

245 *Id.* at 91 (emphasis omitted) (quoting a fact sheet from the General Counsel of the U.S. Department of the Army, to which the parties stipulated).

246 *Id.* at 92 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

sonal use of the building."[247] Justice Harlan went further and concurred in the result only, reflecting that if the military destroyed the building to stop the rioters,

> it would be difficult indeed to call the building's owner the 'particular intended beneficiary' of the Government's action. Nevertheless, if the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied for the same reasons it is properly denied in the case before us.[248]

The holding of *Caltex* continued to control the Court's analysis, and the government's use of the property seemed more important than its seizure of the property.[249]

The Court readily accepted a distinction between a compensable destruction and a noncompensable destruction exclusively on the basis of a historical exception. It continued to stack precedent against a compensation requirement and distinguished destruction from use of the property. Without regard to the text of the Clause or the principle of "fairness and justice," the Court flatly determined that this kind of destruction did not require compensation. This history doomed compensation for military destruction, and it collided with the Takings Clause, resulting in the generic exclusion of the police power.

4. The Police Power Exception

Last among interpretive techniques that seek to justify excluding necessity from compensable takings, courts have articulated the position that the exercise of the police power is not a taking. The argument is similar to the nuisance analogy, but it more generally encompasses the state's police power role. Defining the police power, however, has been a confusing body of law that unsuccessfully attempts to compartmentalize the necessity privilege.

Ernst Freund's treatise on the police power and the Constitution tries to distinguish eminent domain from the police power. He writes, "If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against."[250] Freund distinguishes property that the public uses to create a positive value, which would fall under eminent domain, and property that the public

247 *Id.* at 94 (Stewart, J., concurring).

248 *Id.* at 97 (Harlan, J., concurring in the result).

249 Justice Black dissented with Justice Douglas and echoed Douglas's concerns set forth in his *Caltex* dissent. *Id.* at 97 (Black, J., dissenting).

250 ERNST FREUND, THE POLICE POWER 546 (1904).

does not use but prevents from generating a negative value, which would fall under the police power.[251] He concludes that the community should be liable in cases of necessity,[252] but the common law did "not afford an adequate remedy in cases of sudden and extraordinary emergency."[253] The common law did not provide justice to injured property owners who could not recover compensation. He concedes that war could create "constitutional anomalies."[254] This discussion, however, does not address the actual text of the Constitution, and Freund fails to explain adequately the distinction between a taking and a complete destruction of property for public use merely classified under the police power.

The Texas Supreme Court has indicated that the police power covers actions during "impending peril."[255] It analyzed eminent domain and the police power, then held, "[t]he one can await the forms and tardiness of the law; the other is governed by a necessity which knows no law. Delay in the latter case may be certain destruction."[256] The rationale here suggests that if something is important or urgent enough, the state acts with the police power and compensation is not required. Again, this analysis runs afoul of the Supreme Court's own analysis in cases like *Pumpelly* or the military seizure cases, where an inadvertent physical invasion of property needed for war still requires compensation.

Furthermore, the *Lucas* Court emphasized that compensation no longer hinged upon this harm-benefit balancing test. Justice Scalia wrote, "[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[257] He remarked that many regulations could be classified both ways, so the distinction is unhelpful.[258] Instead, categorical rules for takings are preferred, particularly when the classification can be drawn either way. In the necessity cases, the destructions can easily be classified as *both* harm-preventing *and* benefit-conferring. The destruction of a home in the path of a fire prevents the further harm of an advancing fire, but creates the benefit of a fire break that did not naturally exist; the destruction of property that the approaching enemy may use prevents the future harm of a sustained enemy attack, but creates the

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251 *Id.* at 546–47.
252 *Id.* at 564–65.
253 *Id.* at 564.
254 *Id.* at 565–66.
255 Keller v. Corpus Christi, 50 Tex. 614, 627–28 (Tex. 1879).
256 *Id.*
257 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024 (1992).
258 *Id.* at 1024–25.

benefit of strategic military action against the enemy; the destruction of property surrounding a criminal prevents the harm that the criminal on the loose may cause, but it benefits society in contributing to the capture of the criminal. In each situation the "eye of the beholder" creates an unworkable framework for the police power definition.

The consensus among contemporary legal scholars has been to accept this privilege without much question and to move on without much explanation. David Dana and Thomas Merrill, for example, refuse to dissect the definition of the police power as it relates to necessity and choose instead to accept the *Bowditch* decision as authoritative. They write that "it has been around for a long time, has never been questioned, and has been characterized as falling squarely within the state's police power."[259] Quite simply, the exception exists and does not require compensation, regardless of how that exception is reached. Justice Holmes's comment that this area of law is determined "as much upon tradition as upon principle" continues to control how courts interpret the text of the Constitution.

III. A MATTER OF POLICY

The Constitution may not support the common law privilege of necessity destruction, but the exception arose because of a variety of policy concerns. Those policy concerns have been overstated, and they ignore the modern shift toward compensating any taking of property when the sovereign previously owed no such obligation. The most fascinating parallel to the doctrine of necessity, however, is the maritime law of general average, which does require compensation for property destroyed during necessity on the sea.

A. General Average

The law of general average exists in the oft-ignored body of maritime law. It is older than even Roman law and first came from Rhodes.[260] If sailors must lighten a ship in times of emergency, then all parties to the voyage contribute to compensate for the loss of the cargo.[261] This principle matches the principle behind compensation for takings, except that it is limited to necessity on the sea: "What is given, or sacrificed, in time of danger, for the sake of all, is to be replaced by a general contribution on the part of all who have been

259 DANA & MERRILL, *supra* note 149, at 120.

260 RICHARD LOWNDES, THE LAW OF GENERAL AVERAGE 1 (Edward L. de Hart & George Rupert Rudolf eds., 6th ed. 1922).

261 *Id.*

thereby brought to safety."[262] The destruction of property in a time of necessity yields compensation for the injured property owner on the *sea*, but not on *land*.

The sacrifice is not limited to the jettison of cargo, but includes the sacrifice of portions of the ship and even other "extraordinary expenses."[263] The loss, and subsequently the appropriate share of the compensation, "must be borne proportionably [sic] by all who are interested."[264] Despite its pejorative definition as "peculiar communism,"[265] its application has never been seriously questioned for two millennia. The American law of general average has four particular requirements:

> First, the sacrifice or expenditure has to be "extraordinary"; secondly, it has to be "voluntarily and reasonably" made; thirdly, it has to be incurred in time of "peril;" and finally, the sacrifice or expenditure has to be incurred for the purpose of preserving the property "imperilled [sic] in the common adventure."[266]

The "voluntariness" requirement excludes compensation for losses to pirates or the weather. The loss must also benefit the "common adventure," a requirement that ostensibly matches "public use."

In land-based cases of public necessity, the four American elements of general average all apply. The loss is "extraordinary" and in a time of "peril," because the loss is the total destruction of property in a time of urgent necessity. The loss is "voluntary" because it has been caused by an individual and not by the natural events themselves. Finally, the loss is for the "common adventure," because the loss occurs to benefit the entire public.

The "common adventure" element does not appear to fit as neatly into the analytical framework, because on a ship it is easy to determine the number of the parties and the size of the benefit. In the case of a fire, though, the community undoubtedly benefits, but the number and the size are more difficult to determine. One recommendation suggests that the compensation should "be raised either from the municipality at large, or from the specific district at risk by

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262 *Id.*

263 The Star of Hope, 76 U.S. (9 Wall.) 203, 228 (1869); LOWNDES, *supra* note 260, at 20.

264 LOWNDES, *supra* note 260, at 21 (emphasis omitted) (quoting Birkley v. Presgrave, (1801) 102 Eng. Rep. 86, 89 (K.B.) (Lawrence, J.)).

265 *Id.* at 1.

266 SUSAN HODGES, LAW OF MARINE INSURANCE 439 (1996) (quoting Marine Insurance Act, 1906, 6 Edw. 7, ch. 41, § 66(2) (Eng.)).

the fire, if that district is definable."[267] This principle is the most precise when determining the scope of compensation for acts committed by a private individual or a municipal officer in cases of natural disaster. The municipality threatened should compensate the individual, or, if the benefit is determined to have a more limited and defined scope, then just the benefited district should contribute. In cases where either the state or federal governments act, the benefit extends to the jurisdiction of the actor, and the state or federal government should compensate.

The size of the benefit is easily calculable for passengers on a ship, because the precise value of their goods is determinable from the record of the ship's cargo and the market prices of the goods when they leave port. In a community, the size of the benefit has never been an important calculus for compensation for takings, because general principles of taxation apply to compensation for property taken for the public use.

Commentators have argued that the measure for compensation for destruction in times of necessity should be based "on the principle of maritime general average."[268] Their arguments have been largely ignored. Indeed, the expansion of general average into any similar area of the common law has been resisted, and "there is no authority at common law for extending it to property not engaged in a common maritime adventure in the nature of a voyage."[269] One English case refused to extend general average to railroads, despite the argument that "the carriage on board the ship and the carriage by railway are linked together."[270] Another commentator argued "that the doctrine of general average will not be extended to aircraft,"[271] and the idea of applying it to losses caused in stopping the spread of fire "has never been entertained."[272]

Those who hold such hostility to expansion do not consider the merit of giving compensation to property owners who lost property for the sake of the greater good. The contemporary justification for general average remains elusive. The principle behind its application has been seen as a form of "natural justice," arising from an implicit

267 Henry C. Hall & John H. Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 U. ILL. L. REV. 501, 522 (1907).

268 *Id.*

269 *See* LOWNDES, *supra* note 260, at 53.

270 Crooks & Co. v. Allan, (1879) 5 Q.B.D. 38, 40.

271 J.F. DONALDSON & C.T. ELLIS, LOWNDES & RUDOLF'S LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES 26 (8th ed. 1955).

272 *Id.*

contract when the parties engage in a joint venture on the sea.[273] Lord Justice Bowen emphasized that under

> [t]he maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea.[274]

If these are the policy reasons behind general average, then they ought also to apply in common law for public necessity. The injured property owners are identically harmed on land or at sea. Their property, which would otherwise inevitably be lost, has been sacrificed for the good of the community. The loss occurs under exceptional circumstances. The statement that "sea perils" require a unique form of compensation is as vacuous an explanation as stating that the wooden frames of most houses make them particularly vulnerable to fires.

Unique to maritime law is the "character of mercantile enterprises."[275] During the sea voyage, all the parties on the ship seek the common preservation of merchandise for a safe passage on the water. The parties have a common interest in preserving their cargo, and so they should pay when one party's cargo is sacrificed to save the rest. In a similar manner, though not as tightly analogous, each community member shares with all others a collective interest in the preservation of property in the community.

While general average law supports the application of the principle to necessity destruction takings, it does not solve the problem of *Mouse's Case*.[276] Mouse brought suit for the jettison of cargo on a river, but the court refused to hold the destroyer liable. To assume that maritime law did not apply on the river where the episode took place is probably incorrect, because a barge was able to navigate the river and it therefore fell under the maritime jurisdiction of navigable waterways.[277] The application of the public necessity exception, however, does not explain why the law of general average did not apply.

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273 *Id.* at 20–26; LOWNDES, *supra* note 260, at 28.

274 Falcke v. Scottish Imperial Ins. Co., (1886) 34 Ch.D. 234, 248–49 (Bowen, Lord J.).

275 *Id.*

276 *See supra* notes 49–54 and accompanying text.

277 *But see* Frederick B. Sussmann, *The Defence of Private Necessity and the Problem of Compensation*, 2 OTTAWA L. REV. 184, 191 n.37 (1967) (stating that the law of general average did not apply to *Mouse's Case* because the episode took place on a river).

Because Mouse did not bring suit for general average against the entire ship, but only a suit against a single actor, the court could not apply general average. While Mouse had "a right to contributions towards his loss from those whose property is saved," he could not bring a claim against the *magister navis*, the actor, or any individual.[278] The injured property owner could not request compensation from a single individual but could only receive a remedy through the law of general average, and receive a contribution from all. Even "though nothing was there said about general average contributions, there can be little doubt that if the jettison for the general safety has been lawful, the rule of contribution applies, however it was made."[279] Despite the fact that *Mouse's Case* is the preeminent case that justifies no compensation, Mouse *would* be compensated under a parallel theory of law, only because the destruction took place on a boat.

Several scholars have advocated some kind of application of general average to cases of necessity. Vattel compares eminent domain to general average, holding, "The same rules are applicable to this case as to the loss of merchandise thrown overboard to save the vessel."[280] Dwarris also admits, "In Marine losses of this nature the common law has been able to establish a just rule of compensation and assessment; and the same principle, so far as it is possible to apply it, would be equally equitable in similar losses by land."[281] The policy considerations behind general average and the very application of the law are lucid, categorical, and uniformly applicable.

American courts have not read the law of maritime average with such a jaundiced eye as to classify it a "peculiar communism;" indeed, the Supreme Court has approvingly called it "[c]ommon justice."[282] While the Court has classified the voyage as a "sea risk," the Court nevertheless allows reimbursement if a party "makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety."[283] The broader policy of "fairness and justice" articulated by the American courts suggests that justice demands compensation for destructions of property that benefit the public. As one article asked, "The common law, from the very beginning, justified the trespass for the private citizen who acted for the community; why, then, should not the community reimburse in such cases

278 THOMAS GILBERT CARVER, A TREATISE ON THE LAW RELATING TO THE CARRIAGE OF GOODS BY SEA § 15, at 18 (James S. Henderson ed., 7th ed. 1925).

279 *Id.* § 374, at 531.

280 VATTEL, *supra* note 47, at 112.

281 DWARRIS, *supra* note 78, at 449 (footnote omitted).

282 The Star of Hope, 76 U.S. (9 Wall.) 203, 228 (1869).

283 *Id.*

also?"[284] If bad history and poor constitutional interpretation can no longer prevent compensation, some other policy concern must be offered to block the exercise of "common justice."

B. A Consistent Approach to Takings

Because the privilege of necessity does not fit the actual text of the Constitution, the policy behind the Takings Clause, the traditional exercise of the police power, or its maritime counterpart, the only remaining basis for preserving the privilege lies in general policy considerations. Defenders of the privilege insist that certain policy benefits outweigh the harm caused to property owners. Even these policy reasons, free from the constraints of constitutional interpretation, fail to justify adherence to this privilege in light of the great losses borne by citizens for the public's benefit.

Attempted policy justifications of the privilege overwhelmingly reject concern for the injured property owner. As a matter of policy, this rejection is fundamentally contrary to the values of the early common law philosophers and the nation's Founders. The Takings Clause reflected a new concern for individual rights, and in particular property rights, during the founding era.[285] The "inviolability of property" became a valuable part of American legal policy.[286] As William Michael Treanor states, the Takings Clause "inculcated the belief that an uncompensated taking was a violation of a fundamental right."[287] If compensation for injured property owners is the primary policy concern in the United States, the policy behind the necessity privilege must overcome this concern.

First, some argue that the privilege ensures that swift action will be taken in times of necessity. If individuals are concerned with liability, "they may not act with the requisite dispatch to avert a larger disaster."[288] Without the spectre of liability, individuals will act in the best interest of the community.

The "swift action" theory has no historical support and does not correctly consider the role of compensation in takings. The only historical example of hesitation for liability is the Great Fire of London of 1666, a myth previously debunked.[289] Additionally, if the *public*

284 Hall & Wigmore, *supra* note 267, at 521.

285 Treanor, *supra* note 154, at 701.

286 *Id.* at 712 (citing James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 266, 267 (R. Rutland & T. Mason eds., 1983)).

287 *Id.* at 714.

288 DANA & MERRILL, *supra* note 149, at 120 (citing Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788)).

289 *See supra* Part I.A.3.

pays the compensation to the individuals harmed, then the actors bear no personal liability, and the incentive to act remains the same. While public officials may fear the wrath of an electorate who will hold them accountable for payments for compensation for destroyed property, the electorate would presumably be more upset with a public official who failed to prevent the spread of disaster in a time of need.

Second, the theory of ex ante compensation suggests that property owners benefit from lower insurance rates if individuals are permitted to destroy property for the benefit of the public. This justification would only apply to public necessity relating to natural disaster, because homeowners do not insure against acts of the military or the police. Dana and Merrill explain, "The practice of allowing the government to destroy buildings in the path of fire significantly reduces the total amount of destruction caused by catastrophic fires. All owners thus receive implicit compensation in the form of reduced insurance rates for giving up the right to ex post compensation."[290] Property owners receive a benefit before destruction occurs, so the economic benefit is distributed according to the economic risk of harm.

The ex ante theory assumes that all individuals have insurance and still leaves property owners without compensation for their losses. Not everyone purchases adequate insurance, so property owners may still be injured more than the economic benefit received.[291] Additionally, insurance companies will reimburse the homeowner for natural harm but not for destruction committed by the state. The homeowner has received the benefit of nominally lower insurance rates because the city may destroy property and lessen the risk of fire, but the homeowner would be in a better position if his home were destroyed by the fire.[292] Homeowners in the same situation receive radically different compensation depending on the cause of the destruction. While everyone receives the same benefit of lower insurance, only some receive compensation for destroyed property. Similarly-injured property owners should receive similar compensation for their injuries.

Third, an argument related to ex ante compensation is the causation argument. It states that "[i]f the claimant's property would have been engulfed by fire in any event, then the government's intervention should not be regarded as the cause of its demise."[293] Freund

290 DANA & MERRILL, *supra* note 149, at 119.

291 Hall & Wigmore, *supra* note 267, at 523.

292 *Id.* at 506.

293 DANA & MERRILL, *supra* note 149, at 119.

insists, "Of course there can be no constitutional or moral duty of compensation, where the property destroyed could not have been saved in any event."[294] Another defense of the theory argues "that in such a case the party has virtually made no sacrifice at all for the community."[295] The causation argument leaves homeowners in the same position as the ex ante compensation theory does. Among identically injured property owners, some would be compensated by insurance while others would not. Injured property owners would again have no source of compensation.

Finally, the valueless property theory states that because the property is valueless just before destruction, compensation is not required. A home approached by fire, a sack of flour about to be seized by the enemy, and a structure barricaded by a criminal all seem to be worthless at the moment they are destroyed, because they are in imminent peril. Dana and Merrill argue that "the government's intervention should not be regarded as the cause of its demise."[296] Judge Posner has mused, "[T]here would always be the question whether, given the approaching fire, the house that was pulled down to create a firebreak had any positive market value at the instant before it was damaged."[297] The intervening cause of government action, then, harms only valueless property.

This theory, however, ignores the need for compensation for goods destroyed exclusively by the government's action and again leaves the property owner without a remedy. In cases like *Bowditch*, the property owner may seek compensation for property that he could have removed from harm before the disaster hit.[298] Also, the property owner again has no remedy through insurance, because imperiled property does possess a value: the amount of compensation that an insurance company would pay for the loss.

CONCLUSION

None of the policy justifications for the privilege of necessity destruction can stand against the "fairness and justice" principle that property owners harmed to benefit the public should receive compensation. It is somewhat ironic, then, that Justice Scalia's opinion in *Lucas* has been described as "characteristically hard-edged, looking for a

294 FREUND, *supra* note 250, at 565.

295 Hall & Wigmore, *supra* note 267, at 506.

296 DANA & MERRILL, *supra* note 149, at 119.

297 Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1286 (7th Cir. 1993).

298 *See supra* notes 95–96 and accompanying text.

rule courts could apply rather than invoking a balancing test, seeking some rule that could be applied 'on an objective, value-free basis.'"[299] It is his opinion that continued to protect the necessity privilege from examination under the Takings Clause. The text, history, and policy of the Fifth Amendment cannot support the continued exception of this privilege. Citizens like Mr. Strickland ought not bear property losses that benefit the public as a whole. It is time to shift this "tradition" to a "principled" application: compensation should be granted to injured property owners whose property has been destroyed in times of public necessity.

299 TUSHNET, *supra* note 214, at 289.