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## Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of Police Activities?

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**EVERYONE BENEFITS, EVERYONE PAYS:  
DOES THE FIFTH AMENDMENT MANDATE  
COMPENSATION WHEN PROPERTY IS DAMAGED  
DURING THE COURSE OF POLICE ACTIVITIES?**

*The Fifth Amendment of the United States Constitution, along with similar provisions in state constitutions, forbids the taking of private property by the government for a public use without just compensation. Despite this protection, many courts have denied takings claims made by innocent third party landowners when police officers caused damage to their property during the course of executing their official duties. These courts held that the damage was not for a "public use" in the narrow sense, and have refused to analyze the claims under takings jurisprudence. This narrow view of "public use" ignores the fact that society as a whole benefits from the police activity, including any resulting damage to property, while the innocent, individual owner alone is forced to bear the burden. This Note argues that a broader interpretation of "public use" is required to redistribute justly and fairly the costs of such burdens to the society that benefits from them in order to comport with the mandate of the Fifth Amendment.*

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INTRODUCTION AND THESIS

[When may] . . . those called upon to sacrifice for the public good . . . justly demand that the state compensate them for the financial sacrifices they are called upon to make?<sup>1</sup>

The Fifth Amendment of the Federal Constitution provides that "private property [shall not] be taken for public use, without just compensation."<sup>2</sup> As the Supreme Court has recognized, this guarantee was designed to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>3</sup> Individual states have adopted similar clauses in their respective state constitutions, which make generally the same guarantee as the Federal Constitution.<sup>4</sup> Though most courts

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<sup>1</sup> BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 1 (1977).

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that materialmen could recover just compensation for value of uncompleted boat hulls and building materials conveyed to the United States); see also William Michael Treanor, *The Armstrong Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

<sup>4</sup> Compare U.S. CONST. amend. V., with CAL. CONST. art. I, § 19, GA. CONST. art. I, §

traditionally have awarded compensation when private property is taken by the government for a public use, some state courts (and federal courts interpreting state law) have refused to grant compensation when private property is damaged or destroyed as a result of actions taken by police in the course of apprehending criminal suspects.<sup>5</sup> Instead, these courts have found that this type of damage is not a taking, but rather a tort, and have refused to allow recovery in inverse condemnation, or claims that stem from the provisions of the Fifth Amendment.<sup>6</sup> Unfortunately for the property owner, due to immunity protection given state officials in the operation of their duties, the injured property owner frequently cannot recover under a tort claim unless he or she can prove unreasonable government activity.<sup>7</sup> This application of the law results in a paradoxical legal sinkhole: the injured property owner is directed from one cause of action to another, but in the end is afforded no means to remedy his damage.

The courts that have denied recovery in such actions have held that the damage was not a "public use" within the meaning of the takings clause,<sup>8</sup> or have clung to the "emergency" or "public necessity" exceptions in an effort to justify non-compensation.<sup>9</sup> In either scenario, the innocent third party property owner is forced

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3, para. 1, IND. CONST. art. I, § 21, MINN. CONST. art. I, § 13, N.J. CONST. art. I, para. 20, OHIO CONST. art. I, § 19, OKLA. CONST. art. II, § 24, and TEX. CONST. art. I, § 17.

<sup>5</sup> See, e.g., *Patel v. United States*, 823 F. Supp. 696 (N.D. Cal. 1993); *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996); *Bray v. Houston County*, 348 S.E.2d 709 (Ga. Ct. App. 1986); *McCoy v. Sanders*, 148 S.E.2d 902 (Ga. Ct. App. 1966); *Ind. State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984); *Blackman v. City of Cincinnati*, 42 N.E.2d 158 (Ohio 1942); *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997).

<sup>6</sup> An inverse condemnation claim is one that alleges that the government, or some state actor, has "condemned" private property and appropriated it for a public use without compensating the owner. A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting 6 P. NICHOLS, *EMINENT DOMAIN* § 25.41 (3d rev. ed. 1972)). "The fundamental policy underlying the concept of inverse condemnation is to spread among the benefitting community any burden disproportionately borne by a member of that community, to establish a public undertaking for the benefit of all." *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 751 (Ct. App. 1999) (citing *Belair v. Riverside County Flood Control Dist.*, 764 P.2d 1070, 1074 (1988)).

<sup>7</sup> See, e.g., *Customer Co.*, 895 P.2d 900; *Ind. State Police*, 469 N.E.2d 1183; *Sullivant*, 940 P.2d 220 (all discussed, *infra*, beginning at note 11 and accompanying text). Note that individual officers, who are acting in the public interest, are entitled to qualified immunity against tort claims. See 42 U.S.C. § 1983 (1995).

<sup>8</sup> See, e.g., *Customer Co.*, 895 P.2d 900; *Ind. State Police*, 469 N.E.2d 1183; *Sullivant*, 940 P.2d 220 (all discussed, *infra*, beginning at note 11 and accompanying text); see also *Jed Rubinfeld*, *Usings*, 102 YALE L.J. 1077 (1993).

<sup>9</sup> Emergency situations or "exigent circumstances" have justified immediate government actions in order to protect the larger public good, but they sometimes work to undermine the rights of certain affected citizens as a consequence. See generally Norman Karlin, *Back to*

to bear the entire cost of a damage that benefits the whole community (i.e., the apprehension of criminals and the prevention of crime). This application runs contrary to the fundamental principles of fairness and justice, as well as the basic theory in takings jurisprudence that no one person should be made to bear the entire burden when everyone receives a benefit.<sup>10</sup>

This Note first will explore the rulings of certain state courts that deny compensation to private property owners who incur damage as a result of police or government action and suggest why this analysis is flawed. Second, it will argue that takings analysis is proper in this context, despite some courts' strict interpretation of the words "public use" as they apply to takings claims. Third, it will propose ways that losses borne by private property owners can and should be redistributed throughout the community when that community benefits from the loss, in order to comply with the constitutional mandate of "just compensation." Finally, it will suggest that this analysis be extended to other cases where private property has been taken or damaged, but not compensated.

## I. BACKGROUND

### A. *Customer Co. and the Rule in California*

California embraces what may be termed the majority position (among those states that have addressed the issue) in that its supreme court has denied "just compensation" when private property is damaged incident to police activities. In *Customer Co. v. City of Sacramento*,<sup>11</sup> the owner of a convenience store brought actions both in tort under the Tort Claims Act<sup>12</sup> and in inverse condemnation under the "just compensation" clause of the California Constitution<sup>13</sup> to recover for damage to his store and its contents caused by the efforts of the police to apprehend a suspect who had taken refuge in the building.<sup>14</sup> In superior court rulings, both

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*the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 653-57 (1988) (discussing cases where the Supreme Court found actions justified by emergency situations).

<sup>10</sup> See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>11</sup> 895 P.2d 900 (Cal. 1995).

<sup>12</sup> CAL. GOV'T CODE §§ 810-997 (West 1995).

<sup>13</sup> The California takings clause provides, in part, that "[p]rivate property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." CAL. CONST. art. I, § 19 (emphasis added).

<sup>14</sup> See *Customer Co.*, 895 P.2d at 901-04. Undercover police officers trailed a criminal suspect who took refuge in the plaintiff's convenience store. After a two and one-half hour standoff, the police launched twelve to thirteen tear gas canisters into the building, causing extensive property damage in excess of \$275,000, which included "nearly \$90,000 in contaminated inventory, approximately \$150,000 to dispose of this hazardous waste, and over \$18,000 to repair the building and fixtures." *Id.* at 904.

claims were denied.<sup>15</sup> The California Supreme Court (reviewing only the takings claim, as plaintiff waived the right to relief under the Tort Claims Act)<sup>16</sup> found that a takings action was not proper in this context, stating that “[i]nverse condemnation” is pursued when the state or other public entity improperly has taken private property for public use without following the requisite condemnation procedures.<sup>17</sup> Pointing to history and judicial interpretation, the court said that the “takings” clause “was [never] intended, and [had] never [] been interpreted, to impose a constitutional obligation upon the government to pay ‘just compensation’ whenever a governmental employee commits an act that causes loss of private property.”<sup>18</sup>

Arguing that the property of the store owner was not taken for a “public use,” the court cited *Miller v. City of Palo Alto*,<sup>19</sup> which held that:

[a] public use is “a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals; public usefulness, utility, or advantage, or what is productive of general benefit; a use by or for the government, the general public, or some portion of it.”<sup>20</sup>

Ignoring the more general public benefit that ensued from the damage to the property,<sup>21</sup> the court found that since the damage bore no relation to a “public improvement” or “public work,” it was not actionable under the umbrella of takings jurisprudence.<sup>22</sup>

Additionally, the court compounded its refusal to find a taking by asserting that

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<sup>15</sup> See *id.* at 901.

<sup>16</sup> It is prudent to note that the Tort Claims Act contains a section that provides immunity for public entities: “A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.” CAL. GOV’T CODE § 815(a) (West 1995). Thus, had they been called upon to review this claim, this court most likely would have found the state to be immune from liability, as mirrored by other state courts faced with similar situations. See, e.g., *Ind. State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984) (discussed, *infra* notes 49-54 and accompanying text).

<sup>17</sup> *Customer Co.*, 895 P.2d at 905.

<sup>18</sup> *Id.* at 906.

<sup>19</sup> 280 P. 108 (Cal. 1929) (holding that the plaintiff, whose property was destroyed as a result of a fire caused by the city’s allegedly careless disposal of incinerated garbage, could not recover in an inverse condemnation claim).

<sup>20</sup> *Id.* at 109 (quoting 32 Cyc., and cases there cited).

<sup>21</sup> These benefits include the effective capture and securing of dangerous criminals and the prevention and deterrence of future crime. See *infra* notes 91-94 and accompanying text (discussing use as connoting public benefit).

<sup>22</sup> See *Customer Co.*, 895 P.2d at 910-11.

the “emergency exception” precludes recovery in this instance.<sup>23</sup> The court stated that “law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally-mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action.”<sup>24</sup> Further, the court found that

[i]t is a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause. “[I]n its legitimate exercise the police power often works not only damage to property but destruction of property. Injury to property can and often does result from the demolition of buildings to prevent the spread of conflagration, from the abandonment of an existing highway, from the enforced necessity of improving property in particular ways to conform to police regulations and requirements. . . . And equally well settled and understood is the law that in the exercise of this same power property may in some, and indeed in many, instances be utterly destroyed. The destruction of buildings, of diseased animals, of rotten fruit, of infected trees, are cases that at once come to mind as applicable to both personalty and realty.”<sup>25</sup>

The court pushes the “use, not destruction” argument further, stating that “[t]his is not a case in which law enforcement officers commandeered a citizen’s automobile to chase a fleeing suspect, or appropriated ammunition from a private gun shop to replenish an inadequate supply.”<sup>26</sup> In that extreme case, the court concedes that such circumstances “might constitute an exercise of eminent domain, because private property would be taken for public use.”<sup>27</sup> The court ignores the fact that the property owner suffers the same loss regardless of what the government did with his or her property; he or she is in no different a position than had the officer *destroyed* the ammunition or the vehicle. As pointed out by the dissenting justice, the majority interprets the “just compensation” clause to mean that it “never requires compensation for physical damage inflicted by legitimate exercises of the police power, never when the government’s action was compelled by ‘emergency’

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<sup>23</sup> See *id.* at 911.

<sup>24</sup> *Id.* at 910-11.

<sup>25</sup> *Id.* at 909-10 (quoting *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 638-39 (1917) and citing *Archer v. City of Los Angeles*, 19 Cal.2d 19, 24 (1941)).

<sup>26</sup> *Id.* at 913.

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

or 'necessity,' and never where the mere negligence of public employees may be at issue."<sup>28</sup>

### B. *Sullivant and the Rule in Oklahoma*

Of the seven other states that have addressed this issue, four take California's position. For instance, Oklahoma has been reluctant to apply a takings analysis to these scenarios. In *Sullivant v. City of Oklahoma City*,<sup>29</sup> the landlord of an apartment house sued under both the Governmental Tort Claims Act<sup>30</sup> ("GTCA") and the "takings" clause of the Oklahoma Constitution<sup>31</sup> for damages done to the outer doors and two interior doors by the police in the execution of a valid search warrant.<sup>32</sup> Normally, a state actor is immune under the GTCA, but the court found that there were issues as to whether the search was lawful.<sup>33</sup> The Oklahoma Supreme Court denied the landlord's takings claim because:

(1) a reasonable construction of [the Takings Clause] does not support a taking claim under these circumstances, (2) [the Takings Clause] may not be used to permit recovery for the tortious actions of government employees and (3) the proper exercise of police power in the present case did not amount to a "taking" within the meaning of [the Takings Clause].<sup>34</sup>

Citing prior cases decided in its jurisdiction, the court found that there was not

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<sup>28</sup> *Id.* at 924 (Baxter, J., dissenting).

<sup>29</sup> 940 P.2d 220 (Okla. 1997).

<sup>30</sup> OKLA. STAT. ANN. tit. 51, § 151-72 (West 2000).

<sup>31</sup> The clause provides, in part:

Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken.

OKLA. CONST. art. II, § 24.

<sup>32</sup> See *Sullivant*, 940 P.2d at 222.

<sup>33</sup> See *id.* at 223. The exceptions to § 155 of the GTCA provide that the city "shall not be liable if a loss or claim results from: . . . (3) [e]xecution or enforcement of the *lawful* orders of any court; . . . and (9) [e]ntry upon any property where that entry is expressly or impliedly *authorized by law*." OKLA. STAT. ANN. tit. 51, § 155 (West 2000), *quoted in Sullivant*, 940 P.2d at 223 (emphasis added). If a search is unlawful, then the exceptions would not apply, and the injured landowner, theoretically, may recover under a tort theory. The focus here is on due process considerations and the liability of the police rather than a takings theory.

<sup>34</sup> *Sullivant*, 940 P.2d at 224.

“sufficient interference” with the landlord’s use and enjoyment of his property in order for a “taking” by the sovereign to have occurred.<sup>35</sup> The Oklahoma court does not interpret its clause quite as narrowly as the California court; it suggests that recovery under a takings theory is not impossible in these instances: “[T]he validity of the exercise of the police power does not necessarily preclude compensation for property taken or damaged by such exercise, but there must be sufficient interference with landowner’s use and enjoyment to constitute a taking.”<sup>36</sup> Nevertheless, the court cited to and agreed with the rulings in *Customer Co.* and other cases,<sup>37</sup> suggesting that the test of “sufficient interference” is difficult to meet.<sup>38</sup>

### C. Georgia

Like Oklahoma and California, Georgia also has refused to apply a takings analysis in cases where property is damaged during the course of police duties. In *McCoy v. Sanders*,<sup>39</sup> a landowner sued under the takings clause of the Georgia Constitution<sup>40</sup> for damage that resulted when police drained his pond (killing all the fish, among other things) to search for a murder victim.<sup>41</sup> Asserting the “inherent and plenary” nature of the police power, the court denied the takings claim, finding that “[u]nder certain circumstances and conditions, a municipality may, acting under its police power for the general welfare of the public, take or use the property of a

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<sup>35</sup> *Id.*; see also *State ex rel. Coffey v. Dist. Ct.*, 547 P.2d 947 (Okla. 1976) (finding no “sufficient interference” with private property when concussion from a gun salute by Oklahoma Air National Guard caused damage to several houses nearby).

<sup>36</sup> *Sullivant*, 940 P.2d at 225-26 (citing *Matton v. City of Norman*, 617 P.2d 1347 (Okla. 1980) (holding that owner’s land flooded as a result of city public works)). The Oklahoma Supreme Court seems to be suggesting that these cases should be decided on an *ad hoc* basis, as has been the practice with respect to regulatory takings. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978) (declining to hold that taking occurred even though economic loss was great). One could speculate that this court would have found “sufficient interference” on the facts of *Customer Co.*, given that the damage was in excess of \$275,000. See *Customer Co. v. City of Sacramento*, 895 P.2d 900, 904 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996).

<sup>37</sup> The court also cites to and adopts the rulings in *McCoy v. Sanders*, 148 S.E.2d 902 (Ga. Ct. App. 1966), *Ind. State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984), and *Blackman v. City of Cincinnati*, 42 N.E.2d 158 (Ohio 1942), all discussed beginning, *infra*, at note 39 and accompanying text.

<sup>38</sup> *Sullivant*, 940 P.2d at 225.

<sup>39</sup> 148 S.E.2d 902 (Ga. Ct. App. 1966).

<sup>40</sup> The Georgia provision states that “[p]rivate property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid.” GA. CONST. art. I, § 3, para. 1.

<sup>41</sup> See *McCoy*, 148 S.E.2d at 903. The landowner alleged that the damage “reduced the value of his place from \$25,000 to \$20,000.” *Id.*



person or corporation without paying compensation therefor."<sup>42</sup>

Later, in *Bray v. Houston County*,<sup>43</sup> the Georgia Court of Appeals continued to apply the rationale used in *McCoy*. In that case, the owner of an automobile sued to recover damages incurred when he volunteered his vehicle to assist the sheriff's office in a nighttime search for a weapon.<sup>44</sup> The court found that since the taking of the vehicle "was pursuant to the state's police powers he cannot be compensated for it as a matter of law."<sup>45</sup>

#### D. Ohio

In *Blackman v. City of Cincinnati*,<sup>46</sup> the owner of an automobile sued under the takings clause of the Ohio Constitution<sup>47</sup> to recover damages resulting from a collision after his vehicle was commandeered by a city patrolman in pursuit of a suspect. The Ohio Supreme Court denied the application of the takings clause to this situation, stating that it "was not designed or intended as a measure covering the appropriation of private property for a public use, and may not be invoked by the appellants to compel the city of Cincinnati to pay for the harm done to Blackman's automobile when it collided with the truck."<sup>48</sup>

#### E. Indiana

In *Indiana State Police v. May*,<sup>49</sup> an Indiana Court of Appeals was even less willing to consider the extension of a takings<sup>50</sup> analysis to situations where police

<sup>42</sup> *Id.* at 904 (quoting *Atl. Coast Line R. Co. v. S. R. Co.*, 104 S.E.2d 77, 80 (1958)).

<sup>43</sup> 348 S.E.2d 709 (Ga. Ct. App. 1986).

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 711.

<sup>46</sup> 42 N.E.2d 158 (Ohio 1942).

<sup>47</sup> In language that, ironically, seems very "pro-compensation," the Ohio provision states: Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money: and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO CONST. art. I, § 19.

<sup>48</sup> *Blackman*, 42 N.E.2d at 160.

<sup>49</sup> 469 N.E.2d 1183 (Ind. Ct. App. 1984).

<sup>50</sup> The Indiana Constitution provides, "[n]o man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." IND. CONST. art. I, § 21.

destroy private property during the course of apprehending suspects. In that case (not unlike the *Customer Co.* case), a murder suspect entered the home of the plaintiffs and took hostages.<sup>51</sup> After surrounding the premises, a state police SWAT team launched multiple canisters of tear gas into the home, causing \$2,500 in damages.<sup>52</sup> In a brief opinion, the court held that the state is immune from liability under the Tort Claims Act.<sup>53</sup> Most shockingly, this court, with absolutely no citation to authority, dismisses the takings claim, asserting simply that the takings action "is without merit. This conduct is in the nature of tort."<sup>54</sup>

## II. THE MEANING OF USE WITHIN THE COMPENSATION CLAUSE

### A. *Jed Rubenfeld and the Narrow Interpretation of "Use"*

As pointed out above, the courts' justification for denying compensation in these cases has to do with their interpretation of the words "for public use"<sup>55</sup> in the takings clauses of the federal and state constitutions. In his article, *Usings*, Professor Jed Rubenfeld denounces a broad application of this terminology in favor of the more limited view taken by the California, Oklahoma, Georgia, Ohio, and Indiana courts.<sup>56</sup> He posits that "a taking for public use . . . can occur only when some productive attribute or capacity of private property is exploited for state-dictated service."<sup>57</sup> In his view, "[public use] requires a utilization of property going beyond mere deprivation or destruction."<sup>58</sup>

Rubenfeld employs a "use-value" test for determining whether the government action is exploiting the private property in question so as to invoke a takings analysis: "If the state's interest in taking or regulating something would be equally well served by *destroying the thing altogether* (putting aside any independent considerations that might make such destruction undesirable to the state for other reasons), no use-value of the thing is being exploited."<sup>59</sup> He points to cases like *Miller v. Schoene*,<sup>60</sup> where cedar trees were destroyed in order to prevent a pest

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<sup>51</sup> See *May*, 469 N.E.2d at 1183.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*; see also IND. CODE § 34-4-16.5-3(7) (Michie 1998), repealed by Pub. L. No. 1-1998, sec. 221.

<sup>54</sup> *May*, 469 N.E.2d at 1184.

<sup>55</sup> See U.S. CONST. amend. V.

<sup>56</sup> See Rubenfeld, *supra* note 8.

<sup>57</sup> *Id.* at 1114-15.

<sup>58</sup> *Id.* at 1115.

<sup>59</sup> *Id.* at 1116.

<sup>60</sup> 276 U.S. 272 (1928). The U.S. Supreme Court found that the destruction of defendant's cedar trees was not a taking since it was required to protect the nearby apple orchard. See *id.*

indigenous to them from destroying neighboring orchards, as examples of cases where total destruction achieves the state's goals as well as regulation or taking.<sup>61</sup> This test derogates the basic purpose of the Compensation Clause, stated whenever it is cited,<sup>62</sup> by ignoring the loss suffered by the property owner.

Rubinfeld points to one of the original exemplars of the Federal Compensation Clause, a provision in the Massachusetts Constitution of 1780, to strengthen his argument that property must be used in order to qualify for compensation.<sup>63</sup> The provision reads:

[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.<sup>64</sup>

Rubinfeld argues that this language draws a distinction between property that was "applied to public uses" and that which was merely "taken from" the owner, such that the latter "did not have to be compensated."<sup>65</sup>

Contrary to Rubinfeld's assertion, the language of the early Massachusetts Constitution suggests nothing of a requirement that the property taken be used in some way. In fact, the content of the provision is wholly concerned with the proper reimbursement to the individual whenever he is deprived of his property in order to serve the general public—not with semantic distinctions between "use" and "damage."<sup>66</sup>

Rubinfeld also traces the Supreme Court's interpretation of "public use" back to early cases in which property was "taken" during wartime.<sup>67</sup> He cites *United*

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<sup>61</sup> See Rubinfeld, *supra* note 8, at 1117; see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding regulation closing gravel pit); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding ordinance prohibiting operation of brick factory); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (upholding ordinance that barred operation of livery stable in residential area); *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding prohibition on manufacture of alcohol at brewery).

<sup>62</sup> See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>63</sup> See Rubinfeld, *supra* note 8, at 1120.

<sup>64</sup> MASS. CONST. of 1780, art. X (1780).

<sup>65</sup> Rubinfeld, *supra* note 8, at 1120.

<sup>66</sup> Moreover, the use of the words "public exigencies" suggests that the innocent third party property owner should be compensated when his property is taken in emergency situations or as a result of exigent circumstances, which would seemingly undercut the emergency exceptions that pervade the case law in this area. See MASS. CONST. of 1780, art. X (1780); see also *infra* notes 86-90 and accompanying text (discussing "public necessity").

<sup>67</sup> See Rubinfeld, *supra* note 8, at 1125.

*States v. Caltex, Inc.*,<sup>68</sup> in which the Supreme Court drew a line between “destruction” and “use.” Because the claimant’s property was demolished in order to prevent capture by the enemy, rather than appropriated for subsequent use, the Supreme Court refused to grant compensation.<sup>69</sup> The Court distinguished two earlier cases in which compensation was granted,<sup>70</sup> arguing that

[b]oth cases involved equipment which had been impressed by the Army for subsequent use by the Army. In neither case was the Army’s purpose limited, as it was in this case, to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully.<sup>71</sup>

This nonsensical distinction epitomizes the paradox faced by injured property owners: the way in which their property is taken—either by the government’s using it in the strict sense or physically damaging or destroying it—is of absolutely no consequence to them because they face the same loss in that they have been deprived of their property.<sup>72</sup> Consequently, it is illogical to afford a remedy in the former instance but deny one in the latter.

The restrictive construction of “public use” articulated by Rubenfeld and embraced by some courts is inconsistent with the way the clause has been interpreted in other contexts.<sup>73</sup> It has become clear that a taking occurs when a

<sup>68</sup> 344 U.S. 149 (1953).

<sup>69</sup> *See id.*

<sup>70</sup> *See United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

<sup>71</sup> *Caltex*, 344 U.S. at 153.

<sup>72</sup> *See generally* ACKERMAN, *supra* note 1. Ackerman presents a common sense illustration for this point:

Just as it makes perfect ordinary sense to say that [a person’s] *thing has been taken from him* when his car is shipped to Montana, so too an Ordinary English speaker can say that same thing with the same conviction to describe the consequences of a state decision that *destroys* [the thing].

*Id.* at 137 (second emphasis added).

<sup>73</sup> The U.S. Supreme Court has found that the property need not be “used” in the narrow sense in order for a taking to have occurred:

It would be a very curious and unsatisfactory result, if in construing [the Compensation Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

*Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871) (construing a provision of the Wisconsin Constitution, identical to the Federal Compensation Clause, to mandate compensation when the building of a dam in connection with a state project caused flooding

landowner is deprived of his property in some way—there is no requirement that the taken property itself be used, but rather that the result of its destruction benefit the greater public in some fashion.<sup>74</sup> Further, the Just Compensation Clause is not simply a restraint on the government's motive (i.e., the idea that the government must be restrained from taking more and more private property for public use).<sup>75</sup> It is an assurance that the individual will not shoulder alone a burden from which the public benefits; the motive of the government seems irrelevant to the loss of the private property owner.

Rubinfeld applies his "usings" analysis to Supreme Court cases like *Pennsylvania Coal Co. v. Mahon*<sup>76</sup> in order to find justification for denying compensation in cases where private property is destroyed but not used: "The Kohler Act forced the Pennsylvania Coal Company to do nothing with its coal. Yet under our construction, the Act plainly took property for use. Property was not merely taken but used in the sense that the state exploited the coal's capacity to sustain weight for government-directed service."<sup>77</sup> Contrary to Rubinfeld's assertions, this analysis may be applied effectively to other cases where compensation was denied. For example, in *Customer Co.*, the police exploited the valuable aspects of the store: the fact that it contained the criminal and the means to apprehend him (an enclosed space, which will force a person out when tear gas is introduced).<sup>78</sup> The fact that the taking was temporary should not make a difference; otherwise, the government would become the thrifty shopper who buys a shirt on credit, wears it once and stains it, and then takes it back to the store expecting not to pay.

Agreeing with Rubinfeld's theory, the concurring justice in *Customer Co.*

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on the plaintiff's land). Later cases have continued to embrace this construction of the term "use." See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (holding flood control ordinance prohibiting construction on landowner's property constituted a taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (forcing owners of marina to grant public access was sufficient to constitute a taking); *United States v. Dickinson*, 331 U.S. 745 (1947) (holding land flooded intentionally was taking, as was the land washed away by the flooding); *United States v. Causby*, 328 U.S. 256 (1946) (holding flights of army and navy aircraft over private property at low altitudes were sufficient to constitute a taking).

<sup>74</sup> See *id.*

<sup>75</sup> "If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003-04 (1992) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>76</sup> 260 U.S. 393 (1922).

<sup>77</sup> Rubinfeld, *supra* note 8, at 1115.

<sup>78</sup> See *Customer Co. v. City of Sacramento*, 895 P.2d 900 (1995).

argues that the store property was not put to any “utility or advantage.”<sup>79</sup> The property itself may not have given the government a utility or advantage, but its destruction did. There was a significant *collateral public benefit*.<sup>80</sup> Further, the “use” of private property by government action almost inevitably leads to its “destruction.” Therefore, “use” should be given a broader meaning, such that if the greater public derives a benefit from the destruction of private property, this action would be characterized as a use.

The concurring justice in *Customer Co.* posits that government takings claims—when the property is actually used—are guided appropriately by the Just Compensation Clause, whereas when property is destroyed, they should be analyzed under the Due Process Clause.<sup>81</sup> Pointing out that the Due Process Clause of the Federal Constitution (“No person shall be . . . deprived of . . . property, without due process of law”<sup>82</sup>) immediately precedes the Just Compensation Clause (“nor shall private property be taken for public use without just compensation”<sup>83</sup>), the concurring justice asserts that these are separate rights, meant to address two separate kinds of takings.<sup>84</sup> What this construction really suggests is that “just compensation” should be provided for *both* cases.<sup>85</sup> Furthermore, if an owner is to be compensated when his property is *used*, why would he not be compensated when his property is *destroyed*?

#### B. *Public Necessity*

In 1851, the Supreme Court seemed settled that although private property may be taken in emergency situations, such as wartimes, compensation was still due:

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the

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<sup>79</sup> *Id.* at 919 (Kennard, J., concurring) (quoting *Miller v. City of Palo Alto*, 280 P. 108 (1929)).

<sup>80</sup> In this particular case, the people of the community, or, more broadly, the entire state, benefitted equally from the effective capture of the dangerous criminal.

<sup>81</sup> See *Customer Co.*, 895 P.2d at 921. The due process considerations implicated here include a requirement of notice and opportunity to be heard before a person is deprived of property and a prohibition on arbitrary and unreasonable deprivations. See *id.*

<sup>82</sup> U.S. CONST. amend. V.

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

<sup>84</sup> See *Customer Co.*, 895 P.2d at 922 (Kennard, J., concurring).

<sup>85</sup> It is crucial to note that in cases of criminal pursuit and apprehension, the emergency exception will most likely be invoked, thereby precluding due process considerations of notice, etc. See *supra* note 23 and accompanying text.

public service or take it for public use. Unquestionably, in such cases, *the government is bound to make full compensation to the owner.*<sup>86</sup>

Twenty years later, the Court continued to embrace this principle:

Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if emergency is fully proved, is not a trespasser, and that *the government is bound to make full compensation to the owner.*<sup>87</sup>

Despite this initially broad approach to compensation in cases of public exigencies, the Supreme Court apparently derogated from this guarantee in holdings like *United States v. Pacific Railroad*.<sup>88</sup> That case involved bridges that had been destroyed during the war between the states by a retreating Union Army to impede the advance of the Confederate Army.<sup>89</sup> In deciding whether this act constituted a compensable taking, the Court held:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.<sup>90</sup>

Thus, the principle of awarding just compensation, in the case where the taking was justified by public exigencies, was cut off at the knees, without regard to the damage suffered by the private property owner, to whom it makes no difference

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<sup>86</sup> *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (emphasis added).

<sup>87</sup> *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) (emphasis added).

<sup>88</sup> 120 U.S. 227 (1887).

<sup>89</sup> *See id.*

<sup>90</sup> *Id.* at 234.

whether an emergency warranted the taking or not: he remains in the same innocent, but unremedied, situation.

C. *"Use" as Connoting Public Benefit*

As expressed by the dissenting justice in *Customer Co.*, "the just-compensation clause ensures that when government exercises its *valid and necessary* power to take or damage private property for public benefit, the adversely affected owner will not absorb alone a cost which the benefitted community should share."<sup>91</sup> The construction of the clause is just not as narrow as Rubenfeld and others argue. "By their plain meaning, the broad terms 'take,' 'damage,' and 'public use' appear to apply regardless of the powers under which government purports to act, the goals it seeks to achieve, or the circumstances in which injury is inflicted."<sup>92</sup> Note that considerations of negligence on the part of the police officials are not relevant to this analysis.<sup>93</sup>

Besides language considerations, there are also great policy considerations that demand such broad application of the takings law, as discussed by the dissenting justice in *Customer Co.*:

When a deliberate law enforcement action physically invades, destroys, or damages unoffending property, a "public use" has arisen by every logical measure. The authorities may be wholly entitled to act, and the owner has no right to prevent them from doing so. The damage is inflicted on behalf of the "whole community," by its representatives, for a public purpose. The public thereby "use[s]" and "enjoys" the damaged property just as in every case where deliberate government conduct undertaken for public benefit physically invades, destroys, or damages private property. Failure to compensate the owner under these circumstances may thus single it out for a burden which, under the Constitution, should be distributed throughout the benefitted society at large.<sup>94</sup>

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<sup>91</sup> *Customer Co. v. City of Sacramento*, 895 P.2d 900, 927 (1995) (Baxter, J., dissenting).

<sup>92</sup> *Id.* at 925.

<sup>93</sup> In *House v. L.A. County Flood Control Dist.*, 153 P.2d 950 (1944), then-Justice Traynor noted: "The destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." *Id.* at 956. In the cases at hand, the damage results not from police negligence, but from the dangers inherent in police activities; accordingly, the damage constitutes "public use."

<sup>94</sup> *Customer Co.*, 895 P.2d at 931 (Baxter, J., dissenting).



#### D. *Support from Other States*

##### 1. Texas: *Steele v. City of Houston*

Several state courts have recognized and followed a broad application of the takings clause in these scenarios. In *Steele v. City of Houston*,<sup>95</sup> the owner and residents of a house brought suit against the city under the takings clause of the Texas Constitution<sup>96</sup> for property damages suffered as a result of the police setting fire to their house in an effort to recapture escaped convicts hiding in the house.<sup>97</sup> The Texas Supreme Court ruled that the property owner was entitled to compensation, holding that "[t]he Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use."<sup>98</sup>

Also, the Texas court recognized that destruction of property is compensable when it is done for a public use.<sup>99</sup> The court distinguishes a taking action from cases where police officials were negligent: "We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property."<sup>100</sup> Texas, then, embraces the less restrictive construction of "public use."<sup>101</sup>

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<sup>95</sup> 603 S.W.2d 786 (Tex. 1980).

<sup>96</sup> The Texas provision reads:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money.

TEX. CONST. art. I, § 17.

<sup>97</sup> See *Steele*, 603 S.W.2d at 788.

<sup>98</sup> *Id.* at 791.

<sup>99</sup> See *id.* at 792.

<sup>100</sup> *Id.* at 793.

<sup>101</sup> But see *State v. Southwind Auto-Sales*, 951 S.W.2d 849 (Tex. Ct. App. 1997). In this case, police confiscated an automobile used in an attempted murder, and the innocent owner sued for recovery. See *id.* A Texas appellate court, following a United States Supreme Court ruling, found that since the car was lawfully acquired "under authority other than the power of eminent domain, no compensation is required." *Id.* at 855; see also *Bennis v. Michigan*, 516 U.S. 442 (1996) (upholding Michigan's statutory abatement scheme in a case of automobile forfeiture).

2. Minnesota: *Wegner v. Milwaukee Mutual Insurance Co.*

In *Wegner v. Milwaukee Mutual Insurance Co.*,<sup>102</sup> a homeowner sued the insurer and the city under the takings clause of the Minnesota Constitution,<sup>103</sup> for damages caused by police who fired tear gas into his home during the course of apprehending an armed suspect barricaded in his home.<sup>104</sup> The Minnesota Supreme Court ruled in favor of compensation, rejecting the city's invocation of the police power exception, stating that "labeling the actions of the police as an exercise of the police power 'cannot justify the disregard of the constitutional inhibitions.'"<sup>105</sup> Like the Texas court, the Minnesota court recognized the constitutional mandate for compensation, even in cases of emergency exercise of the police power. Further, the court correctly directed the focus away from considerations of police liability or misconduct and toward the objectives of the takings clause: "We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property."<sup>106</sup>

The court declined to allow the city to defend on grounds of public necessity:

We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. . . . *At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice.*"<sup>107</sup>

This rationale, reflecting a loyalty to the spirit of the takings clause, continues to be the rule followed by Minnesota courts.<sup>108</sup>

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<sup>102</sup> 479 N.W.2d 38 (Minn. 1991).

<sup>103</sup> The provision states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." MINN. CONST. art. I, § 13.

<sup>104</sup> See *Wegner*, 479 N.W.2d at 39.

<sup>105</sup> *Id.* at 40 (quoting *Petition of Dreosch*, 47 N.W.2d 106, 111 (1951)).

<sup>106</sup> *Id.* at 41.

<sup>107</sup> *Id.* at 42 (emphasis added).

<sup>108</sup> See *McGovern v. City of Minneapolis*, 480 N.W.2d 121 (Minn. Ct. App. 1992) (finding that damage inflicted during the course of a forced entry into a private residence suspected of being a crack house was for a public purpose within the meaning of the constitution and was thus a compensable taking).

### 3. New Jersey: *Wallace v. City of Atlantic City*

In *Wallace v. City of Atlantic City*,<sup>109</sup> a landlord sued under New Jersey's Tort Claims Act<sup>110</sup> and the takings clause of the New Jersey Constitution,<sup>111</sup> when the doors to his apartment building were damaged as a result of the execution of a police search warrant and arrest.<sup>112</sup> The court found that in light of the absence of negligence or excessive force on the part of the police, the tort claim failed.<sup>113</sup> However, this court was willing to grant recovery under the takings theory. The court found that the search was conducted "for a public purpose."<sup>114</sup> Since the damage to plaintiff's property occurred incident to that search, "he [as the innocent third party property owner] should not bear the sole financial burden of such an undertaking . . . the public should bear the cost."<sup>115</sup>

The New Jersey court relied on the "intended beneficiary" test established in *National Board of Y.M.C.A. v. United States*,<sup>116</sup> noting that in this case the "particular intended beneficiary was the public, rather than a private individual, [thus] compensation [is] warranted."<sup>117</sup> This analysis reaches the correct conclusion in this case, but it becomes problematic in its application in that it encourages courts to engage in ad hoc, intensely factual inquiries: outcomes would vary based on the particular facts of each scenario, even though the property owner suffered a loss each time.<sup>118</sup> While appropriate in other takings contexts, such as regulatory takings,<sup>119</sup> this analysis is poorly suited for assessing whether to grant just

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<sup>109</sup> 608 A.2d 480 (N.J. Super. Ct. 1992).

<sup>110</sup> N.J. STAT. ANN. § 59:3-3 (West 1992).

<sup>111</sup> The New Jersey provision states, "[p]rivate property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." N.J. CONST. art. I, para. 20.

<sup>112</sup> See *Wallace*, 608 A.2d at 481.

<sup>113</sup> See *id.* Like tort claims in most states, the injured plaintiff has his hands tied unless he can prove negligence or misconduct on the part of the police. See also *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997); *Ind. State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984) (discussed *supra* beginning at note 29 and accompanying text).

<sup>114</sup> *Wallace*, 608 A.2d at 483.

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

<sup>116</sup> 395 U.S. 85 (1969).

<sup>117</sup> *Wallace*, 608 A.2d at 483.

<sup>118</sup> Note that the Oklahoma court in *Sullivant* engaged in a similar ad hoc analysis, stating that recovery is possible, but that plaintiffs must show "sufficient interference." *Sullivant*, 940 P.2d at 225.

<sup>119</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958))).

compensation when property is damaged due to police activities. It is better to acknowledge that the intended beneficiary of police activity is *always* the general public and thus avoid becoming caught up in an identification and evaluation of the primary beneficiary.

### III. REDISTRIBUTION OF THE LOSS

#### A. *Statutes and Municipal Programs*

The majority in *Customer Co.* points to another avenue by which injured property owners may recover—namely statutorily authorized programs established to aid victims of crime.<sup>120</sup> “The Legislature has enacted Government Code sections 29631<sup>121</sup> and 29632,<sup>122</sup> which specifically authorize cities and counties to establish reimbursement programs for damage to the property of ‘innocent residents’ caused by peace officers engaged in detecting crime or apprehending suspects.”<sup>123</sup>

All states should have programs like these in place, as built-in safety nets for “just compensation” claims in which private property is damaged in the course of police activity. Rather than being simply “authorized,” they should be mandatory, such that municipalities will have the means to comply effectively with the mandate of the federal “takings” clause and the spirit of the *Armstrong* principle enunciated by the Supreme Court.<sup>124</sup> The idea is to ensure that the individual is not forced to

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<sup>120</sup> See *Customer Co. v. City of Sacramento*, 895 P.2d 900, 916 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996).

<sup>121</sup> This provision states:

The Legislature hereby declares that it serves a public purpose, and is of benefit to the state and to every county and city in the state, to indemnify those innocent residents of the State of California whose property has been injured or destroyed as a result of the acts specified in Section 29632.

CAL. GOV'T CODE § 29631 (West 1995).

<sup>122</sup> This provision states:

The legislative body of a county or of a city may establish a program which provides for the reimbursement of any innocent resident . . . whose property is or has been . . . injured or destroyed as the consequence of: (a) An act of a peace officer in the detection of crime or the apprehension or arrest of any person for any public offense; or (b) An act of a person in resisting or avoiding arrest.

CAL. GOV'T CODE § 29632 (West 1995).

<sup>123</sup> *Customer Co.*, 895 P.2d at 916.

<sup>124</sup> Note that the Supreme Court has held that claims to recover compensation are grounded in the Constitution itself: “Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. [These kinds of] suits [are] thus founded upon the Constitution of the United States.” *Jacobs v. United States*, 290 U.S. 13, 16 (1933); see also *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *United States*

pay for something that he did not cause but yet from which the whole community benefits.<sup>125</sup>

In his article, *The Defense of Necessity Considered from the Legal and Moral Points of View*, George C. Christie observes that many jurisdictions have such statutory schemes in place to provide compensation in situations where property is damaged or destroyed for reasons of public necessity.<sup>126</sup> He cites as an example *Mayor of New York v. Lord*,<sup>127</sup> which discussed a "municipal ordinance in New York passed in 1806 which directed the mayor to compensate property owners whose property was destroyed at the mayor's direction to prevent the spread of fire."<sup>128</sup> Further, he points to a federal statute that provides "partial compensation to the owners of cattle that are legally required to be destroyed because they suffer from foot-and-mouth disease."<sup>129</sup> According to Christie:

The latter scheme not only recognizes that the public should bear a large part of the loss, since the benefits of destroying the cattle to prevent the spread of the disease redound to the public good, but also recognizes the more pragmatic consideration that the cattle owners, whose cooperation is essential, are more likely to cooperate with the public authorities if they receive at least some compensation.<sup>130</sup>

Also important to note here is that while Congress characterizes these cases as emergencies, and authorizes the Secretary of Agriculture to act immediately, Congress also provides that the property owner must be compensated for his loss after the Secretary acts.<sup>131</sup> Thus, the state of "emergency" should affect only

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v. Clarke, 445 U.S. 253 (1980).

<sup>125</sup> In the spirit of effectively allocating costs to those who are responsible, California has also enacted a statute that allows the court to make the criminals pay as well. Government Code section 29636 provides, in pertinent part, that a court may order a person convicted "of a crime which has resulted in the injury or destruction of property for which reimbursement is provided for under a program established pursuant to this article . . . to pay a fine in an amount sufficient to pay for the replacement or repair of the property injured or destroyed." CAL. GOV'T CODE § 29636 (West 1995).

<sup>126</sup> See George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999).

<sup>127</sup> 17 N.Y. 285 (1837).

<sup>128</sup> Christie, *supra* note 126, at n.123.

<sup>129</sup> *Id.*; see also 21 U.S.C. §§ 114a, 134a (1995).

<sup>130</sup> Christie, *supra* note 126, at n.123.

<sup>131</sup> Section 134a(b) of the statute authorizes the action, stating that whenever the Secretary [of Agriculture] determines that an extraordinary emergency exists because of the outbreak of such a disease anywhere in the United States, and that such outbreak threatens the livestock or poultry of the United States, he may seize, quarantine, and dispose of, in such manner as he

*whether the government can take property, not whether or not the property owner can be compensated when it is taken.*

Legal commentator William Michael Treanor, in his article, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*,<sup>132</sup> suggests that the legislature should construct new compensation statutes to deal with damage to private property as a result of government *regulations*. Arguing that the statutes should embrace the *Armstrong* principle (that individuals should not bear an unfair share of public burdens),<sup>133</sup> Treanor posits that the statutes “offer the only mechanism available to help those who, despite being greatly harmed by regulation, have no hope of judicial redress . . . [the] statutes . . . are necessary if the Takings Clause is to reach its appropriate role in the constitutional framework.”<sup>134</sup>

Treanor advocates a broader judicial construction of the Takings Clause in order to reach the purpose the clause was initially meant to serve; he traces the original rationale behind the Takings Clause, which was to provide “heightened protection for those who could not protect adequately their property through the political process.”<sup>135</sup> With this principle as a foundation, compensation for property owners in the police activity context is completely justified; here, as well, the injured landowners are not able to seek redress in tort given the government actor immunity statutes and, accordingly, risk not being compensated for their loss. Following Treanor’s rationale, these plaintiffs should not be allowed to fall through the cracks of our justice system, particularly since they are precluded from bringing an action in tort.

#### B. *United States Court of Federal Claims*

While there are no precedents for securing compensation for injured property owners when federal officers cause the damage in the course of their duties, it seems a logical extrapolation to apply the above analysis to such scenarios. For instance, if an FBI agent, in the course of apprehending a fleeing suspect, is forced to destroy private property, the innocent third party should be able to assert a takings claim against the government to recover for his or her loss.

In such a case, the injured property owner would have redress in the United

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deems necessary or appropriate, any animals in the United States which he finds are or have been affected.

21 U.S.C. § 134a(b) (1995). Section 134a(d) mandates compensation, providing that “the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section.” § 134a(d).

<sup>132</sup> Treanor, *supra* note 3.

<sup>133</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>134</sup> Treanor, *supra* note 3, at 1157.

<sup>135</sup> *Id.* at 1171. “[S]upporters of the Takings Clause believed that landowners and slaveowners would be peculiarly unable to enter into winning political coalitions.” *Id.*

States Court of Federal Claims. The Tucker Act<sup>136</sup> grants jurisdiction to United States Court of Federal Claims judges to hear "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."<sup>137</sup> This forum has been particularly useful in adjudicating takings claims involving challenges to government regulatory action.<sup>138</sup> The Court of Federal Claims has been successful in redressing situations which, "if left untouched, would have left the property owner severely and adversely affected by the operation of a government regulation."<sup>139</sup> The success of injured property owners in these situations may be attributed in part to the Court of Federal Claims' focus on the inequity of a given situation, where property owners are singled out to bear the burden of a regulation.<sup>140</sup>

The innocent landowner whose property is damaged by federal officer activities faces a blight similar to those harmed by government regulations in that they are often denied a remedy.<sup>141</sup> Because they too have been singled out to bear alone a burden that should be shared by the public, it is likely that the Court of Federal Claims would view their harm to be compensable.

### C. *The Public Should Pay*

A commentator on the *Sullivan* case argues that the person whose property is damaged benefits from the government action taken, and thus may not be

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<sup>136</sup> 28 U.S.C. § 1491 (1995).

<sup>137</sup> § 1491(a)(1).

<sup>138</sup> See Roger J. Marzulla and Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991). In their article, Roger and Nancie Marzulla examine the Claims Court's Fifth Amendment jurisprudence with respect to five regulatory takings cases. See *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (ruling loss of mining leases compensable); *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (rendering loss due to turkey quarantine compensable even though plaintiff's stock was not contaminated); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (holding loss resulting from regulation of limestone mining operation compensable); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (finding loss resulting from wetlands regulation compensable); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *cert. denied*, 502 U.S. 952 (1991) (rendering loss resulting from mining regulations compensable).

<sup>139</sup> Marzulla, *supra* note 138, at 563.

<sup>140</sup> See *id.* at 559.

<sup>141</sup> See, e.g., *Ind. State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984) (discussed *supra* at note 49 and accompanying text).

compensated.<sup>142</sup> Though the doors were damaged incident to the police action, the property value of the apartment house is increased when criminals are removed; in essence, "the taking itself . . . constituted just compensation."<sup>143</sup> It is true that certain individuals may receive personal benefits as a corollary to police action, but the reason the police are sent into action to begin with is to protect society as a whole. As citizens, we pay for the services of law enforcement and emergency officials via state and federal taxes; it is not a pay-per-use system.<sup>144</sup> This is because we recognize that police provide a benefit to everyone (this includes both the apprehension of criminals and the prevention of future crimes). Similarly, when private property is damaged or destroyed in the course of police action, everyone receives a benefit from the destruction of private property incident to police activity (i.e., the efficient and effective apprehension of dangerous criminals). Accordingly, the cost of the damage to the property should not fall solely on the innocent third party property owner, but rather on the entire community that benefits from the damage.

The better policy is not to focus on the intended beneficiary of the taking, but rather simply to acknowledge that *all* police action has its roots in public benefit. Once this has been established, it becomes clear that any damage done to private property in this process is done to benefit the entire public; accordingly, the cost should not be borne solely by the owner of the damaged property, but rather by the whole, benefitted public.

There are other advantages to compensating innocent third party property owners. First, property owners will be more willing to assist police if they know that they will not have to bear the whole burden of their loss.<sup>145</sup> Second, police officers will not be hindered by the knowledge that the government will be responsible for reimbursing any damage they cause. As pointed out by Judge Winkelstein in the *Wallace* case:

Placing the burden on the public purse rather than on the purse of the innocent third party should not impair the police from effectively doing their job. It is a question of allocation of financial resources which local

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<sup>142</sup> See Lior J. Strahilevitz, Book Note, *When the Taking Itself Is Just Compensation*, 107 YALE L.J. 1975 (1998).

<sup>143</sup> *Id.* at 1978.

<sup>144</sup> See Charles K. Rowley, *The Supreme Court and Takings Judgments: Constitutional Political Economy Versus Public Choice*, in TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE 79, 107-08 (Nicholas Mercurio ed., 1992). Rowley suggests that the takings clause "reflects a judgment that if government is seeking to produce some public benefit, it is appropriate that the payment should come from the public at large—taxpayers—rather than from identifiable individuals. The compensation requirement indeed operates as an insurance to that effect." *Id.*

<sup>145</sup> See Christie, *supra* note 126, at 996 n.123 and accompanying text.



governments face every day. Just as a local government must decide how many police to hire, whether to purchase new equipment, and similar issues, the decision of how much to allocate for the destruction of property during the execution of search warrants is a question to be determined at budget time, not by the police officer on the street.<sup>146</sup>

Applying the Takings Clause, in this context, does not abrogate the right and the need for federal and state police officials to conduct their activities efficiently and successfully; it would simply require that any damage done to private property in the process be duly compensated. As articulated by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>147</sup>

the [Fifth] Amendment . . . is designed *not to limit* the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."<sup>148</sup>

Thus, the focus is, rightly, on compensating the injured rather than punishing the injurer.

#### CONCLUSION

Courts that deny compensation to the innocent landowner when his or her property is destroyed as a result of government action are not acting in compliance with the demands of the Fifth Amendment.<sup>149</sup> Semantic distinctions between "use" and "damage" cause the ultimate purpose of the Just Compensation Clause to be frustrated. The clear mandate of the Just Compensation Clause is to provide recompense for the innocent third party whose property has been damaged by government action.<sup>150</sup>

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<sup>146</sup> *Wallace v. City of Atlantic City*, 608 A.2d 480, 484 (N.J. Super. Ct. 1992).

<sup>147</sup> 482 U.S. 304 (1987).

<sup>148</sup> *Id.* at 315 (emphasis added) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>149</sup> See U.S. CONST. amend. V.

<sup>150</sup> If compensation may be recovered in cases where the government damages or destroys property in the apprehension of criminals, then it seems a natural conclusion that compensation should also be provided in cases where private property is damaged or destroyed by the government in conjunction with natural disasters, particularly when the government decides to break a levee or drain a lake. See, e.g., *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095 (9th Cir. 1995) (holding that owners of homes near

The question is not one of liability; the concern is not in making the government “pay” for its actions. There is a clear and uncontroverted interest in allowing government officials to perform their duties unhampered by threats of civil suits. However, when the actions taken by the government harm one individual in order to benefit the larger community, the tenets of fairness and justice dictate that the cost to the individual be distributed out to the whole community. If everyone benefits, everyone should pay.

*C. WAYNE OWEN, JR.*

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lake, and of dam and land beneath lake could not recover when government breached dam); *Odello Bros. v. County of Monterey*, 63 Cal. App. 4th 778 (Cal. Ct. App. 1998) (holding that the County’s decision to breach a dam and flood plaintiff’s land was within its discretion, thus no recovery).