

# EMERGENCY TAKINGS

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*Takings law has long contained a puzzle. The Fifth Amendment to the U.S. Constitution requires the government to pay “just compensation” to owners of private property that the government “takes.” In ordinary circumstances, this requirement applies equally whether the property is confiscated or destroyed, and it also applies to property confiscated in emergencies. Remarkably, however, courts have repeatedly held that if the government destroys property to address an emergency, then a “necessity exception” relieves the government of any obligation to compensate the owner of the property that was sacrificed for the public good. Although the roots of this startling principle stretch back for centuries, existing literature offers neither a systematic analysis of the justifications that have been offered for the principle nor a developed normative account of what the correct approach should be. This Article seeks to remedy both of these significant gaps in the current understanding of takings law. The Article identifies three pivotal but commonly overlooked distinctions and explains how they interact to provide a general theory of compensation for emergency takings. First is a distinction among different roles that compensation may play in any given situation. Second is a distinction between two different types of “necessity,” each of which has a different normative implication. Third is a distinction among amounts of compensation that might be owed. Recognizing these distinctions in turn reveals why the main justifications of the necessity exception are unpersuasive, why courts nevertheless so often have been inclined to endorse that exception, and what the correct approach to emergency takings actually is: when the need to destroy property in an emergency is accompanied by grave constraints on the ability to pay compensation, then an obligation to pay “just compensation” for the destroyed property remains, but the amount of that compensation changes. Under such circumstances, what justice requires is partial compensation.*

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#### INTRODUCTION

Takings law has long contained a puzzle. The Fifth Amendment to the U.S. Constitution explicitly requires the government to compensate owners of property that the government "takes" for public use.<sup>1</sup> Ordinarily this requirement applies equally whether the government confiscates the property through eminent domain or destroys the property without taking possession of it.<sup>2</sup> This consistent requirement to pay compensation is unsurprising, since the owner's loss is the same whether the government destroys the property or puts it to some other use.<sup>3</sup> Even if a crisis gives rise to extraordinary circumstances, the government still owes compensation to owners of private property that the government confiscated and used to address the emergency.<sup>4</sup> One naturally would expect, therefore, that the same rule would

1. U.S. CONST. amend. V. In 1897 the U.S. Supreme Court held that the Fourteenth Amendment "incorporated" the Fifth Amendment's just-compensation requirement and therefore made that requirement binding on state governments. *See* *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897). Many state constitutions contain similar provisions. *See, e.g.*, CAL. CONST. art. 1, § 19, cl. a; CONN. CONST. art. 1, § 11; N.Y. CONST. art. 1, § 7, cl. a.

2. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *see also* *United States v. Causby*, 328 U.S. 256, 261–62 (1946).

3. *Cf. Causby*, 328 U.S. at 261 (citing *United States v. Miller*, 317 U.S. 369 (1943)) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.").

4. *See, e.g.*, *Standard-Vacuum Oil Co. v. United States*, 127 F. Supp. 195, 196–97 (Ct. Cl. 1955); *Chi. League Ball Club v. City of Chicago*, 77 Ill. App. 124, 138–39 (1898); *cf. United*

apply when the government destroys private property to address an emergency. Remarkably, however, courts have repeatedly held that if the government responds to an emergency by destroying private property altogether, instead of merely confiscating and using it, then the owner ceases to be entitled to any compensation.<sup>5</sup> Although the government has directly inflicted a potentially enormous loss on the innocent and unfortunate property owner in order to benefit others in the community, the government owes the owner nothing. Many courts at many different levels have affirmed this exemption from paying compensation, which, for convenience, one might call the “noncompensation principle.”<sup>6</sup> Indeed, courts and scholars have said that the noncompensation principle has been well-established law for centuries.<sup>7</sup>

Nevertheless, on its face, this noncompensation principle is quite puzzling. From the property owner’s perspective, there is no significant difference between the government’s confiscating the property to use it and the government’s destroying the property. In both cases, the effect on the property owner is the same—she is deprived of the property that she once had. And yet despite this fundamental equivalence, in one case the government must compensate her for her loss, and in the other it need not.

Others have recognized the puzzling nature of this principle. For example, the authors of the Second Restatement of Torts, while acknowledging the rule’s existence, assert that “the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is

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States v. Caltex, Inc., 344 U.S. 149, 152–53 (1952) (addressing prior Supreme Court cases that had required compensation and distinguishing them on the grounds that those cases involved wartime use rather than destruction).

5. See, e.g., *Caltex*, 344 U.S. at 152–53; see also cases discussed *infra* Parts II and IV.

6. See, e.g., cases discussed *infra* Part III. Existing literature sometimes refers to the assertion as the “conflagration rule,” because many of the cases invoking this principle have involved destruction to create firebreaks. DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 118–19 (2002). However, because the assertion appears in a wide range of contexts beyond fires, this Article will use a more general name. Likewise, this Article will avoid the term “necessity exception” because one of this Article’s central contentions is that distinguishing among different types of “necessity” is essential.

7. See, e.g., *Caltex*, 344 U.S. at 154 (“[T]he common law had long recognized that in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.”); 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 118 (2d ed. 2011) (referring to the “time-honored example” of destruction of a house to create a firebreak in a conflagration); cf. *Workman v. New York City*, 179 U.S. 552, 584 (1900) (Gray, Brewer, Shiras & Peckham, JJ., dissenting) (referring to the “ancient rule” that, in the context of destruction in public emergencies, “a thing for the commonwealth every man may do without being liable to an action” (quoting *The King’s Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294 (K.B.); 12 Co. Rep. 12)); *RESTATEMENT (SECOND) OF TORTS* app. § 196 (AM. LAW INST. 1965) (asserting that “[e]ntry upon the land of another to prevent or mitigate the effects of an impending public disaster is upheld by many old dicta” and citing cases from the sixteenth through nineteenth centuries as support).

obviously very great, and is of the kind which should be recognized by the law.”<sup>8</sup> Some academic commenters have expressed similar sentiments.<sup>9</sup>

These scattered criticisms, however, have not offered any systematic analysis of the justifications that have been offered for the noncompensation principle, nor made any attempt to explain why courts so often have endorsed that principle despite its apparent incompatibility with other key features of takings law. These deficiencies, in turn, have prevented existing literature from being able to offer a rigorously grounded foundation for an alternative approach.

This gap in the current understanding of takings law is particularly unfortunate in light of the noncompensation principle’s influence on other contested areas of property law, especially regulatory takings. For example, both the majority and a dissent in *Lucas v. South Carolina Coastal Council*, a seminal regulatory-takings case, cite emergency-destruction cases in support of their respective analyses.<sup>10</sup> Moreover, the principle’s potential practical implications are growing. Today the scope of government emergency destruction has expanded beyond classic paradigms of urban fires and wartime emergencies to include activities as diverse as law enforcement, storm and flood mitigation, and disease eradication.<sup>11</sup> (This last category’s significance may continue to grow as governments around the world increasingly seek to avert deadly global pandemics by destroying potential vectors, such as poultry and livestock, that may incubate and transmit new infectious diseases.<sup>12</sup>)

Hence, a comprehensive analysis of the government’s obligations with respect to emergency takings is long overdue. This Article aims to fill this gap, both by providing a detailed critical examination of the main arguments that courts and commentators have offered over the past two centuries in defense of the noncompensation principle and by developing an account of what the correct approach should be.

Accomplishing these tasks, this Article argues, requires recognizing three crucial distinctions that both courts and commentators have overlooked.

First, this Article distinguishes between the different roles that compensation can have in any given interaction. Discussions of emergency takings

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8. RESTATEMENT (SECOND) OF TORTS § 196 cmt. h.

9. See, e.g., DOBBS ET AL., *supra* note 7, § 119, at 367–68 (“If the city was not in fact saved but the plaintiff’s property was intentionally damaged or destroyed by a city’s agent, it is still right that the public as a whole bear the costs of harms inflicted to serve public purposes rather than that the individual be forced to sacrifice his property for the good of others.”); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127 (2013); Derek T. Muller, Note, “As Much upon Tradition as upon Principle”: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481 (2006). For a similar example from a century ago, see Henry C. Hall & John H. Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 514–24 (1907).

10. 505 U.S. 1003, 1029 (1992); *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).

11. See *infra* Section I.C.

12. See, e.g., sources cited *infra* notes 41–42.

routinely assume that the purpose of requiring the government to pay compensation for takings is to serve as restitution for the wrong done to owners by inflicting a property loss on them.<sup>13</sup> Under this assumption, establishing that destruction in emergencies is not wrongful would be sufficient to show that no compensation is owed. This Article argues, however, that rectifying wrongs is only one role that compensation may play. The role that compensation actually does play in takings generally, and in emergency takings specifically, is importantly different.

The second pivotal distinction is between two different types of “necessity.” Defenses of denying compensation to owners of destroyed property commonly rely heavily on assertions that the destruction was “necessary” under the circumstances. The underlying assumption is that the presence of “necessity” eliminates any obligation to compensate those who suffered the costs of that destruction.<sup>14</sup> Such arguments overlook a crucial distinction between two different types of necessity—“destruction necessity” and “noncompensation necessity.” While the former type of necessity is relevant for determining whether destroying property without the owner’s consent may be permissible, only the latter type is relevant to answering the separate question of whether compensation is owed for that destruction. This Article argues that recognizing the distinction between these two forms of “necessity” provides the key to understanding two pieces of the emergency-takings puzzle: it unlocks the ability to understand both how the noncompensation principle diverges from the correct approach to emergency-takings compensation and why, nevertheless, courts and commentators have so often found that principle appealing.

When both destruction necessity and noncompensation necessity are present, the third overlooked distinction becomes relevant. A common assumption in many areas of law, including discussions of emergency destruction, is that the amount of compensation owed in any given case must be either full compensation (if the plaintiff prevails) or zero compensation (if the defendant prevails). Between those two extremes, however, lies an entire spectrum of potential intermediate amounts of compensation, and this Article argues that when noncompensation necessity is present in the aftermath of an emergency, the proper amount of compensation may be neither full compensation nor zero compensation, but rather partial compensation.

The Article proceeds as follows. Part I briefly describes some prominent examples of emergency destruction to provide a concrete foundation for the subsequent discussion. Part II introduces the three pivotal distinctions that

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13. See, e.g., sources cited *infra* note 56.

14. One note about terminology. Although this Article is concerned with situations that are commonly referred to as situations of “necessity,” for the sake of clarity this Article generally refers to them as “emergencies,” because “necessity” is sometimes also invoked to justify ordinary eminent-domain confiscations of property, confiscations which unquestionably do require compensation. Use of “emergency” in this context, although not common, is also not unique. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (“It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.”).

courts and commentators have commonly overlooked and explains how they interact to provide a general theory of compensation for emergency destruction.

Part III builds on the discussion in Part II to provide a systematic examination and critique of the leading attempted justifications of the noncompensation principle. The Part sorts these justifications thematically into four categories: The first category focuses on questions of efficient incentives. The second focuses on attributions of responsibility for the destruction—specifically focusing on attempts to remove responsibility from the government by asserting either that the threatening condition itself was really responsible for the destruction or that the destroyed property was analogous to a nuisance and therefore could be abated without compensation. The third category asserts that providing monetary compensation would be superfluous for one of three reasons: (1) the owner of the destroyed property has already received sufficient nonmonetary in-kind compensation, (2) private insurance is an adequate substitute for government-provided compensation, or (3) the risk of opportunism in emergency-destruction situations is sufficiently low that requiring the government to pay compensation is unnecessary. The fourth category of justifications of the noncompensation principle asserts that emergency destruction is fundamentally distinct from eminent domain, and thus immune to the latter's constitutional obligation to pay compensation. This distinction rests on the grounds that either the government-ordered destruction was no different from what private individuals have a natural right to do, or that—in the case of wartime emergency destruction—the destruction was similar to ordinary “battle damage,” which is not compensable. Drawing on the three distinctions identified in Part II, this Part shows why each of these traditional justifications is largely unpersuasive.

Part IV then addresses the question of why, nevertheless, courts have so often found the noncompensation principle attractive. This Part shows how the distinctions drawn in Part II illuminate the judicial history, revealing both that it is less definitive than commonly asserted and that it in fact supports the partial-compensation approach introduced in Part II.

## I. DESTRUCTION IN ACTION

To set the stage for the discussion to follow, a few brief examples of emergency-destruction situations in practice may be helpful.

### A. *Conflagrations*

Historically, many seminal discussions of the noncompensation principle have involved the government's destruction of property to create fire-breaks. One particularly fertile source of litigation was the Great New York Fire of 1835, which broke out on a December night in what was then New York City's warehouse district, near Wall Street.<sup>15</sup> High winds drove the fire

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15. See 5 I.N. PHELPS STOKES, *THE ICONOGRAPHY OF MANHATTAN ISLAND 1735* (1926).

relentlessly forward, while bitterly cold temperatures froze the water in fire hydrants, rendering them useless.<sup>16</sup> As the hours passed, the situation grew increasingly desperate. An eyewitness recalled that:

[b]y midnight it was evident that no earthly power could stay the *then* [sic] Etna-like rapid progress of the raging torrent, which increased every moment most alarmingly, and spread in every direction, except toward the east. . . . Who can tell where the calamity would have paused, for there were immense blocks of wooden buildings on Water and Cherry and Pearl Streets . . . and inflammable magazines which, once fired, could extend the common destruction over the city.<sup>17</sup>

The fire was contained only after the mayor ordered the demolition of several warehouses that had not yet been emptied of the goods stored inside.<sup>18</sup>

A New York statute had provided for compensating owners of buildings destroyed by public officials to create a firebreak, but that law made no provision for the owners of goods that had been stored in those buildings and destroyed as a result of the demolition.<sup>19</sup> The predictable result was a long series of lawsuits by the goods' owners demanding compensation for their losses.<sup>20</sup>

The 1835 fire was not unique. Demolition of buildings to create firebreaks was a common tactic for fighting the vast urban fires of the nineteenth century.<sup>21</sup> Although improved fire-safety and firefighting technology have mitigated the need for urban firebreaks, destruction of property to create firebreaks ahead of advancing forest fires or wildfires is still common.<sup>22</sup>

16. TERRY GOLWAY, *SO OTHERS MIGHT LIVE: A HISTORY OF NEW YORK'S BRAVEST: THE FDNY FROM 1700 TO THE PRESENT* 44–45 (2002).

17. WILLIAM L. STONE, *HISTORY OF NEW YORK CITY* 472 (New York, Virtue & Yorston 1872) (reporting the reminiscences of Gabriel P. Disosway).

18. *Id.* at 475.

19. *See* *Russell v. Mayor of New York*, 2 Denio 461, 461–65 (N.Y. 1845).

20. *See, e.g., Am. Print Works v. Lawrence*, 23 N.J.L. 590 (N.J. 1851); *Mayor of New York v. Lord*, 17 Wend. 285 (N.Y. Sup. Ct.), *aff'd*, 18 Wend. 126 (N.Y. 1837).

21. *See, e.g., Surocco v. Geary*, 3 Cal. 69 (1853) (resolving a suit for compensation for property destroyed to fight a fire in San Francisco); *see also* F.E. FROTHINGHAM, *THE BOSTON FIRE* 10 (Boston, Lee & Shepard 1873) (describing the demolition of sixty buildings in a futile effort to stop the spread of the Great Boston Fire); J.H. GOODSSELL & C.M. GOODSSELL, *THE CHICAGO FIRE AND THE FIRE INSURANCE COMPANIES* 17 (New York, The Spectator 1871) (describing the use of demolitions to stop the Great Chicago Fire of 1871).

22. *See, e.g., TrinCo Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013) (addressing a takings claim arising out of the Forest Service's destruction of \$6.6 million of timber to fight a forest fire). Several states have statutes authorizing compensation for property commandeered for use in an emergency but, in strikingly similar language, exempting from those provisions timber or other property destroyed to create a firebreak. *See, e.g.,* ARK. CODE ANN. § 12-75-124 (2013); FLA. STAT. ANN. § 252.43 (West 2015); TEX. GOV'T CODE ANN. § 418.154 (West 2014).

B. *Wartime Destruction*

A prominent example of wartime emergency takings arose out of the fall of Manila at the start of World War II. Mere hours after the attack on Pearl Harbor in December 1941, Imperial Japan began a sustained assault on the Philippines Islands.<sup>23</sup> Slow to react, the U.S. Army quickly lost much of the air power that it had been relying on for its defense of the islands, and successful Japanese strikes against local naval facilities caused the American fleet to withdraw.<sup>24</sup> Further deterioration in the Allied military situation was steady and rapid. Less than three weeks after the initial attacks, General MacArthur declared Manila an open city, and desperately retreating American forces began to destroy resources that might be useful to the advancing Japanese.<sup>25</sup>

Among those resources was Caltex's Manila petroleum depot, which U.S. forces had been using as a source of fuel.<sup>26</sup> The U.S. Army destroyed Caltex's transportation vehicles and key parts of the facility's machinery; it also opened the spigots of the petroleum tanks, emptying their contents into a nearby river. The U.S. government compensated Caltex—an American company—for the fuel and equipment that the Army used, and for the fuel and transport vehicles that it destroyed. But it refused to pay compensation for the destroyed facilities.

After the war, Caltex sued the U.S. government, seeking compensation for those facilities. The case ultimately reached the Supreme Court, which invoked the noncompensation principle to deny Caltex's claim.<sup>27</sup>

The facts in *Caltex* were not unique. Prominent cases addressing emergency takings by the military have arisen both out of traditional wars, such as the American War for Independence,<sup>28</sup> the Mexican-American War,<sup>29</sup> and the Civil War,<sup>30</sup> as well as out of domestic disturbances, such as a revolution in Arizona during the Civil War<sup>31</sup> and riots in the Panama Canal Zone.<sup>32</sup> Recent cases have involved a 1998 cruise missile strike against an alleged terrorist target in Sudan<sup>33</sup> and the First Battle of Fallujah in 2004 in Iraq.<sup>34</sup>

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23. For a general account of the Japanese invasion, see LOUIS MORTON, *THE WAR IN THE PACIFIC: THE FALL OF THE PHILIPPINES* (Kent Roberts Greenfield ed., 1953). An especially vivid ground-level view of the chaos and confusion that enveloped the collapsing U.S. forces appears in W.L. WHITE, *THEY WERE EXPENDABLE* (1942).

24. MORTON, *supra* note 23, at 88, 96–97.

25. *Id.* at 232–35.

26. Caltex was a joint venture of Standard Oil of California and Texaco. (“Caltex” was a combination of the two parent companies’ names.)

27. *United States v. Caltex, Inc.*, 344 U.S. 149 (1952).

28. *See, e.g.*, *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788).

29. *See Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

30. *See, e.g.*, *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871).

31. *See Grant v. United States*, 1 Ct. Cl. 41 (1863).

32. *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969).

33. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1348 (Fed. Cir. 2004).

34. *Doe v. United States*, 95 Fed. Cl. 546 (2010).

### C. Crime, Disease, and Floods

Police activities to apprehend criminal suspects are also a fertile source of emergency-takings claims.<sup>35</sup> For example, suits have sought compensation for the destruction of windows (and other property damage) when a SWAT team shot tear gas and “flash-bang” grenades into a house to flush out fleeing suspects after a gun battle;<sup>36</sup> for the loss of a home when police set it on fire to help capture escaped prisoners who had taken refuge there;<sup>37</sup> and for the impossibility of inhabiting a home after the police removed two walls in the process of collecting evidence during a felony investigation.<sup>38</sup>

The need to limit infectious diseases has produced another, globally prominent, set of examples of emergency destruction. Destroying buildings to prevent the spread of infection has historically been one important strategy for protecting public health.<sup>39</sup> Airborne pathogens also can threaten economically valuable plants and orchards, requiring the destruction of vegetation that could function as a conduit for the blight.<sup>40</sup> Perhaps the most familiar use of emergency destruction in the farming context today lies in the destruction of healthy poultry and livestock to prevent them from transmitting diseases that are deadly to farm animals or, potentially, to human beings.<sup>41</sup> Emergency destruction of farm animals to address emerging strains of avian influenza (“bird flu”) has been especially prominent worldwide.<sup>42</sup>

35. For general discussions of police-related emergency-destruction cases, see 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 (2002); C. Wayne Owen, Jr., Note, *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property Is Damaged During the Course of Police Activities?*, 9 WM. & MARY BILL RTS. J. 277 (2000); Lior J. Strahilevitz, Case Note, *When the Taking Itself Is Just Compensation*, 107 YALE L.J. 1975 (1998).

36. *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 39 (Minn. 1991).

37. *Steele v. City of Houston*, 603 S.W.2d 786, 788 (Tex. 1980).

38. *Eggleston v. Pierce County*, 64 P.3d 618, 621 (Wash. 2003) (en banc). The walls themselves were taken away as evidence.

39. See, e.g., *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909) (addressing claims arising out of the U.S. military's demolition of several buildings to prevent the spread of yellow fever during the Spanish-American War).

40. See, e.g., Terence J. Centner, *Legitimate Exercises of the Police Power or Compensable Takings: Courts May Recognize Private Property Rights*, 7 J. FOOD L. & POL'Y 191 (2011) (discussing litigation arising out of Florida's destruction of trees in an effort to stop the spread of citrus canker); cf. *Miller v. Schoene*, 276 U.S. 272 (1928).

41. See, e.g., *Judge Upholds Killing of Vermont Sheep in 'Mad Cow' Case*, N.Y. TIMES (Aug. 2, 2000), <http://www.nytimes.com/2000/08/02/us/judge-upholds-killing-of-vermont-sheep-in-mad-cow-case.html>. For a general discussion of this issue in the United States, see Stephen Ott, *Issues Associated with US Livestock Disease Compensation in the 21st Century*, in THE ECONOMICS OF LIVESTOCK DISEASE INSURANCE 68 (S.R. Koontz et al. eds., 2006); see also *Two Months that Changed the Face of Rural Britain*, TELEGRAPH (Apr. 20, 2001), <http://www.telegraph.co.uk/news/1316726/Two-months-that-changed-the-face-of-rural-Britain.html> (offering a timeline of the start of the 2001 “foot and mouth” disease crisis that required livestock destruction in Britain).

42. See, e.g., Mike Hughlett, *Bird Flu Outbreak Could Last for Years*, STAR TRIB. (Minneapolis), Apr. 17, 2015, at A1 (describing millions of dollars in costs from destroying poultry as

As the world becomes increasingly interconnected, the need for such property destruction is likely to grow even more common.

Just as increased global trade and travel increase the potential need to destroy property to avert pandemics, changes in global climate increase the potential need for governments to destroy property to address the risk of devastating flooding.<sup>43</sup> In some cases, the government itself is responsible for flooding certain property to reduce risks to other property. For example, after the Ohio River, swollen by days of heavy rainfall, was predicted to crest at a record high level, the U.S. Army Corps of Engineers deliberately breached a levee at Bird's Point, Missouri, to divert the water over thousands of acres of privately owned farmland to reduce the flooding risk to the town of Cairo, Illinois.<sup>44</sup> The demolition occurred despite fierce opposition from the owners of the affected farmland.<sup>45</sup>

In other cases, the government destroys property to create barriers to floods. For example, in the aftermath of "Superstorm Sandy," New Jersey (using federal disaster funds) sought to purchase and demolish hundreds of seashore homes so that "the land will be permanently preserved as open space . . . [to] serve as natural buffers against future storms and floods."<sup>46</sup> The Blue Acres project could proceed by means of ordinary purchases, rather than by condemnation, because the state offered to purchase storm-damaged property at its pre-storm market value.<sup>47</sup> Hence, owners were more than happy to sell.<sup>48</sup> Less generously funded government purchase programs

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a result of bird flu outbreak in midwestern United States); *112,000 Chickens Destroyed After Bird Flu Outbreak*, S. CHINA MORNING POST (Apr. 14, 2014, 5:14 AM), <http://www.scmp.com/news/asia/article/1481263/112000-chickens-destroyed-after-bird-flu-outbreak> (describing destruction in Japan).

43. Although climate change may make this issue more prominent, the issue has deep historical roots and is not limited to destruction by official government agents. *See, e.g., Newcomb v. Tisdale*, 62 Cal. 575, 575–76 (1881) (holding that necessity was a possible defense against a trespass suit for flooding caused by breaching a levee).

44. Stephen Deere, *Missouri Farmland Swamped After Levee Breach to Help Cairo, Ill.*, ST. LOUIS POST-DISPATCH (May 3, 2011, 1:45 PM), [http://www.stltoday.com/article\\_3c73c9f8-74ff-11e0-a74d-0019bb30f31a.html](http://www.stltoday.com/article_3c73c9f8-74ff-11e0-a74d-0019bb30f31a.html).

45. Stephen Deere & Tim O'Neil, *Leaders Lining Up for, Against Army Corps Levee-Breach Plan, Evacuation Continues*, ST. LOUIS POST-DISPATCH (Apr. 27, 2011, 12:10 AM), [http://www.stltoday.com/news/local/metro/leaders-lining-up-for-against-army-corps-levee-breach-plan/article\\_d808ec00-fb8f-53ba-b44a-1b1f21c43ea8.html](http://www.stltoday.com/news/local/metro/leaders-lining-up-for-against-army-corps-levee-breach-plan/article_d808ec00-fb8f-53ba-b44a-1b1f21c43ea8.html). Similar controversy had attended breach of the same levee in 1937. *See* Robert Koenig, *First Birds Point Breach and 'Levee Rebellion' Happened 75 Years Ago*, ST. LOUIS BEACON (Jan. 24, 2012, 10:38 AM), [https://www.stlbeacon.org#!/content/11254/first\\_birds\\_point\\_breach\\_and\\_levee\\_rebellion\\_happened\\_75\\_years\\_ago](https://www.stlbeacon.org#!/content/11254/first_birds_point_breach_and_levee_rebellion_happened_75_years_ago).

46. State of N.J. Dep't of Cmty. Affairs, *Blue Acres Buyout Program*, RENEWJERSEY-STRONGER, <http://www.renewjerseystronger.org/homeowners/blue-acres-buyout-program/> (last visited Aug. 26, 2015).

47. *See* N.J. DEP'T OF ENVTL. PROT., SCOPE OF WORK FOR BLUE ACRES APPRAISAL SERVICES (Apr. 2014), [http://www.nj.gov/dep/greenacres/pdf/BlueAcresAppraisalSOW\\_2014-04\\_withHOF.pdf](http://www.nj.gov/dep/greenacres/pdf/BlueAcresAppraisalSOW_2014-04_withHOF.pdf).

48. *See, e.g.,* Susan Loyer, *Christie Announces Milestone Purchase Under Sandy Blue Acres Buyout Program*, MYCENTRALJERSEY.COM (Oct. 30, 2014, 12:12 PM), <http://www.mycentraljersey.com/story/news/local/middlesex-county/2014/10/29/governor-visited-south-river-announc>

might be expected to face more difficulties. Such losses from government efforts to address flooding may grow in importance if, as predicted, ongoing changes in global climate will increase weather variability and the severity of major storms.<sup>49</sup>

Because the firebreak and wartime cases have shaped the law on emergency takings the most, this Article's discussion focuses on those two types of emergency destruction. To the extent that this Article's analysis is convincing, however, its application to other contexts should be straightforward.

## II. UNDERSTANDING NECESSITY

A crucial first step in understanding and evaluating the noncompensation principle is recognizing three pivotal distinctions that discussions of emergency takings have routinely overlooked. First is a distinction among different roles that compensation may play in an interaction. Second is a distinction between two different types of necessity—destruction necessity and noncompensation necessity—each of which has different implications for the permissibility of actions taken in response to that necessity. And third is a refined distinction among the amounts of compensation that may be owed in any given case, moving beyond a rigid dichotomy between full compensation and zero compensation to recognize that, when noncompensation necessity is present, the just amount of compensation may be partial compensation. The following discussion elaborates on each of these three distinctions and identifies some of their key implications.

### A. *Compensation's Varied Roles*

The first distinction is among the roles that compensation may play when people interact. Before one can determine whether compensation is owed in a given situation, it is essential to understand what purpose compensation would serve in that situation. Accordingly, a brief catalog of some of compensation's possible roles will be useful.

The role that is perhaps most familiar to lawyers, or at least to litigators, is to serve as restitution or punishment for a wrong that the person paying compensation inflicted on the person receiving compensation. In property law, trespass damages are a straightforward example of compensation in this role. The owner of property on which an intentional trespass has occurred is entitled to compensation for the harm that the trespasser's incursion caused. Even if the owner suffered no physical or monetary loss, that owner is still entitled to at least nominal damages and may be able to obtain punitive

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ed-milestones-sandy-blue-acres-buyout-program/18152401 (quoting Deanna Glova, a former resident, saying "I am so grateful for the buyouts . . . I lived so close to the river[,] and I wouldn't have been able to sell it.").

49. See, e.g., *Future Climate Change*, EPA, <http://www.epa.gov/climatechange/science/future.html> (last updated July 21, 2015).

damages as well.<sup>50</sup> Because the trespasser's violation of the owner's right to exclude has wronged the owner, the trespasser must pay compensation.

But redressing wrongs is only one of several possible roles that compensation may play in interpersonal interactions. A second possible role is to alleviate a loss that was not caused by anyone's wrongful action, and perhaps not caused by human action at all. Examples of compensation playing this role include insurance policies against losses from natural disasters such as storms; workers' compensation programs, which pay compensation to workers injured on the job whether or not there was any wrongdoing by their employers;<sup>51</sup> and the maritime law of general average, which redistributes the losses suffered when cargo is jettisoned at sea in an emergency, spreading the loss among all who had cargo aboard the vessel saved by the jettison.<sup>52</sup>

A third role for compensation appears in claims arising out of the breach of a contract in circumstances in which the breach is not itself necessarily wrongful. For example, the prominent literature on "efficient breach" of contracts places compensation in this role.<sup>53</sup>

Fourth is what might be called "constitutive compensation," compensation that is a part of a compound action and has the effect of legitimizing that action.<sup>54</sup> For example, if Jones enters Smith's grocery store, picks up a loaf of bread, and then hands Smith a sum of money equal to the price marked on the bread, Jones's paying that sum is part of a compound action—in this example, a voluntary sale—and the payment creates a valid transaction. Jones is not giving the money to Smith as restitution for having wronged Smith by taking the bread, nor is the payment an additional act to help Smith recover from the loss of the bread. Jones is giving the money to complete the transaction, thereby making the bread acquisition legitimate. Although Jones owes Smith the compensation that Smith demands in exchange for transferring ownership of the bread, Jones commits no wrong in this situation unless she takes the bread without paying the required amount.

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

51. See, e.g., JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 22 (2010).

52. See, e.g., Raymond P. Hayden & Kipp C. Leland, *General Average – Issues to Consider*, 23 U.S.F. MAR. L.J. 103, 104–08 (2010).

53. See, e.g., RANDY E. BARNETT, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS* 22–23 (2010); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 304–10 (2004).

54. The idea of certain acts being important as constituents of some desirable end rather than as instrumental means of bringing about some wholly distinct end can trace its lineage as far back as Aristotle. For a seminal discussion of this idea, see JOHN M. COOPER, *REASON AND HUMAN GOOD IN ARISTOTLE* 81–82 (1975). Cooper's analysis explicitly built on ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, at 46–48 (L.H.G. Greenwood ed. & trans., Cambridge Univ. Press 1909) (c. 384 B.C.E.) (noting a distinction between "component" and "external" means and suggesting that Aristotle himself failed fully to grasp the importance of the distinction).

In this shop example, the interaction between the two parties is voluntary. However, compensation can play a similar role in interactions that are not mutually voluntary. Particularly relevant for present purposes are situations in which one party inflicts harm on another without that other person's consent, giving rise to a duty to pay compensation for the imposed loss, but because the reasons for imposing the harm were sufficiently compelling, the payment of adequate compensation is sufficient to make that infliction of harm not be wrongful. In such circumstances, the payment of adequate compensation is part of a legitimate compound action of inflicting compensated harms, and a wrong will arise only if the adequate amount of compensation is not paid.<sup>55</sup>

A natural question is which of these roles compensation plays in the takings context. In discussions of emergency takings, and sometimes takings in general, a typical but often tacit assumption has been that compensation's role is to rectify a wrong suffered by owners who have been compelled to relinquish their property involuntarily.<sup>56</sup> On this view, arguing that the government commits no wrong when it destroys property to address an emergency is sufficient to defend the noncompensation principle. If there has been no wrong, then there obviously is no just claim for restitution. William Lawrence, a prominent nineteenth-century congressman, offered an emphatically clear articulation of this view in the context of wartime emergency destruction: "[t]o require the government to pay where it is guilty of no wrong, in the exercise of both a right recognised by the civilized world and enjoined by the highest duty and for the common good, would be the harshest rule that could be recognised."<sup>57</sup>

But the assumption that the purpose of takings compensation is to rectify a wrong is implausible. Eminent domain has long been considered to be

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55. Gregory Keating has offered a general analysis of such cases in tort law. Gregory C. Keating, *Responsibility in Tort for Innocent and Justified Wrongs* (Aug. 14, 2014) (unpublished manuscript) (on file with author); cf. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 418–21 (1959) (distinguishing between "fault" and "conditional fault").

56. See, e.g., Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 249 (2007); cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972) (mentioning eminent domain as an example of a liability rule protecting an entitlement, rather than as a situation in which the relevant public interest causes the owner's entitlement to vanish). Considering emergency destruction through the lens of tort law has deep historical roots. See, e.g., *Maleverer v. Spinke* (1537) 73 Eng. Rep. 79 (K.B.) 81 ("Yet we will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good; as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down an [sic] house on fire for the safety of the neighbouring houses; for these are cases of the common weal.").

57. This assertion first appeared in a series of articles published in the American Law Register. Wm. Lawrence, *War Claims Against the United States*, [1874] 13 AM. L. REG. 265, 403. Lawrence later edited those articles into a congressional committee report advocating the rejection of certain claims arising out of the Civil War. See H.R. REP. NO. 43-134, at 283 (1875).

a power inherent in every sovereign.<sup>58</sup> It would be odd, to say the least, to assert that sovereignty necessarily includes a power to do a specific sort of wrong. Moreover, if some action is wrong to do, then when the state (or anyone else) is deciding whether to do that action, the correct decision is simply not to do it, rather than to do it and pay compensation. Hence, if the compensation provided for exercises of eminent domain really were compensation for a wrong, then the proper conclusion would be that the state should stop exercising its power of eminent domain altogether. But the state's power of eminent domain is now so rooted in practice, and so amply justified by theory, that the implication that the state should never exercise the power lacks credibility. It is no surprise, therefore, that modern judicial language has avoided treating takings as wrongs. For example, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a regulatory-takings case, the U.S. Supreme Court asserted that the Fifth Amendment's Takings Clause "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."<sup>59</sup>

It is evident, therefore, that compensation's role in eminent domain must not be to provide restitution for a wrong, but rather to help ensure that a wrong does not occur, by serving as a constituent part of a legitimate (albeit compelled) transfer.<sup>60</sup> Because takings compensation is not paid to redress a wrong, it further follows that showing that the government's destruction of property in an emergency was not *wrongful* does not, by itself, resolve whether the government owes compensation as a result of conducting that destruction. There are two distinct questions that need to be answered separately: whether an act is permissible, and whether compensation must be paid in conjunction with that act to make the interaction legitimate.

### B. *Two Types of Necessity*

Perhaps even more important than the first distinction is a second overlooked distinction between two very different types of "necessity." If a public official destroys a building to stop an out-of-control fire from spreading to the rest of the city, one may ask if that destruction was really necessary. If

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58. See, e.g., *Grant v. United States*, 1 Ct. Cl. 41, 43 (1863) ("[Eminent domain] is of the very essence of sovereignty . . ."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 339 (New York, O. Halsted 2d ed. 1832) ("The right of eminent domain, or inherent sovereign power . . . is admitted by all publicists . . ."); 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1 (3d ed., rev. 2015).

59. 482 U.S. 304, 315 (1987).

60. See also Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 80 (2012) ("Paying just compensation transforms what otherwise would have been an impermissible governmental act into a permissible one under the Takings Clause . . ."); cf. *Mayor of New York v. Lord*, 17 Wend. 285, 303 (N.Y. Sup. Ct. 1837) (Bronson, J., dissenting) ("The destruction of individual property, for the public safety, bears a strong analogy to the case of taking private property for the public use. In both cases the act is legal: it only amounts to a forced sale; and damages mean nothing more than compensation or value.").

the consequences of allowing the fire to spread would have been much graver than the loss of the destroyed building, and if destroying the building was the only practical means of stopping the fire, then one might plausibly conclude that “necessity” did indeed compel the destruction.<sup>61</sup> Thus, one type of “necessity” is the necessity to perform some act, such as crossing a property line to avoid an onrushing vehicle, or consuming some resource (such as food in a stranger’s cabin when one is lost in the woods), or destroying property to thwart a grave threat. In the emergency-destruction context, a natural name for this sort of necessity is “destruction necessity.”<sup>62</sup> Showing the presence of destruction necessity answers the question of whether the destruction was permissible, but it does not answer every relevant question.<sup>63</sup> In particular, it does not answer the crucial second question of whether compensation is owed as part of that act to make the act legitimate.<sup>64</sup>

The presence of destruction necessity may legitimize destroying property without the owner’s permission, but by itself it does no more: it cannot legitimize refusing to compensate the property owner for the loss caused by the destruction. This is because the payment (or refusal) of compensation for property destroyed to address a threat does not affect the destruction’s ability to stop threats.<sup>65</sup> For example, a firebreak’s effectiveness depends entirely on the laws of physics, not on whether anyone paid money to the owner of the destroyed property. Thus, even if destruction necessity compelled the demolition, it did not compel destroying the property *without compensating the owner*.

Because the question whether destruction is justified is distinct from the question whether compensation is required in conjunction with that destruction, if some “necessity” is to justify not paying compensation, it will

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61. Precisely identifying necessity’s normative implications is a potentially complex task. For example, killing an innocent person may remain wrong even when doing so is the only possible way to stop the deaths of two other innocent people and therefore is “necessary” in some sense. For the purpose of understanding emergency destruction, all that is important is that at least sometimes necessity can genuinely be exculpatory.

62. Similar names might be used in other contexts. For example, in cases involving defendants tying vessels to piers, without permission, to ride out a storm, one might talk of “mooring necessity.” For examples of such cases, see *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908). The fundamental idea common to all of these specific variant terms is to refer to the necessity of performing the action that caused the loss.

63. Cf. *Miller v. Horton*, 26 N.E. 100, 101 (Mass. 1891) (Holmes, J.) (asserting that although a decision to destroy a diseased animal in an emergency cannot be delayed to allow for a hearing, “it does not follow” that a decision not to compensate the animal’s owner also does not require a hearing).

64. Cf. Hall & Wigmore, *supra* note 9, at 517 n.10 (criticizing William Lawrence’s defense of the noncompensation principle for failing to “observe the distinction between the officer’s justifiable trespass and the government’s duty to reimburse the sacrifice”).

65. In doctrinal terminology, destruction necessity creates only an “incomplete privilege” to destroy. See, e.g., Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

have to be a second type of necessity, different from destruction necessity in its sources and implications. For convenience, one may refer to this type of necessity as “noncompensation necessity.”<sup>66</sup>

Noncompensation necessity can spring from two different sources—administrative constraints and fiscal constraints. Administrative-noncompensation necessity arises when, as a practical matter, it is infeasible to determine either who has a legitimate claim for compensation or what the legitimate size of that claim is.<sup>67</sup> For example, in the chaos of a headlong retreat in wartime, all relevant documentation may be lost (if there was an opportunity to create it in the first place), and those who were involved in wartime destruction may end up not surviving the conflict, or may have fuzzy memories years later when the war is over and a claim for compensation is litigated.<sup>68</sup> In such circumstances, administrative limitations make paying less than full compensation necessary.

Fiscal-noncompensation necessity arises when limitations on the relevant party’s available wealth restrict its ability to pay full compensation, independent of how easy it may be to determine accurately who is owed compensation and what the full amount of compensation would be. Individuals are especially likely to experience fiscal-noncompensation necessity in emergency-destruction situations, but even governments may do so in the aftermath of a catastrophe’s wholesale destruction of social wealth and creation of enormous recovery costs.

Noncompensation necessity has obvious parallels with destruction necessity, since in both situations acting contrary to that necessity may not be strictly impossible but may be too costly to be justly demanded. The normative implications of noncompensation necessity will likely depend on the extent to which the inability to pay is a result of culpable behavior by the party owing the compensation. In standard sorts of emergency destruction, however, any inability to pay compensation is likely to be nonculpable, and for the sake of simplicity, the discussion here assumes nonculpability.

Recognizing the distinction between questions of whether destruction is permissible and whether compensation is owed for that destruction, and thus between the two different types of necessity relevant to each question, makes clear that the presence of one type of necessity does not automatically entail the presence of the other. The presence of destruction necessity and the presence of noncompensation necessity need to be established separately, as do the implications of their presence in any given case. Destruction

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66. For examples of some cases decided in circumstances in which noncompensation necessity was likely significant, see *infra* Part IV.

67. Cf. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–15 (1967) (discussing the role of “settlement costs” in utilitarian analyses of which particular takings should receive compensation).

68. See, e.g., ALVIN P. STAUFFER, *THE QUARTERMASTER CORPS: OPERATIONS IN THE WAR AGAINST JAPAN* 327 (Kent Roberts Greenfield ed., 1956) (describing how most of the records of the local unit of the U.S. Army’s Quartermaster Corps, the branch of the Army responsible for supply, were permanently lost when the Philippines fell to the Japanese Army in 1942).

necessity's presence makes destruction of the relevant property not wrongful, even if the owner did not consent, at least as long as the appropriate amount of compensation is paid. As the next Section discusses, however, destruction necessity also can have a second effect: making noncompensation necessity, if present, potentially relevant for determining what amount of compensation is in fact appropriate.

### C. *Partial Compensation*

The third pivotal distinction that discussions of emergency takings have routinely overlooked is among amounts of compensation that may be owed. A customary assumption in a wide range of legal contexts is that someone who seeks compensation for a loss is entitled either to full compensation for the loss or no compensation, unless the plaintiff and defendant share responsibility for the loss.<sup>69</sup> This assumption is also ubiquitous in standard understandings of takings law.<sup>70</sup>

The extent to which legal remedies generally conform to this simple binary view lies outside the scope of this Article.<sup>71</sup> When compensation's role is to rectify a wrong, this binary choice between full compensation and zero compensation might seem natural. Intuitively, a defendant who has wronged a plaintiff owes a duty to repair that wrong fully, but if the defendant did no wrong, then the defendant has nothing to repair.

In the specific case of property law, however, it is clear that remedies do not always fit the all-or-nothing paradigm. Guido Calabresi and Douglas Melamed's famous distinction between protecting entitlements with a "property rule" and protecting them with a "liability rule" is a classic example.<sup>72</sup> Entitlements protected by liability rules might not receive full compensation when infringed, if "full" compensation is understood to be compensation equal to what the entitlement's holder would demand in order to be induced to relinquish the entitlement—that is, equal to what the

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69. The law of comparative fault or comparative negligence may require splitting the cost of the loss among the responsible parties, including the plaintiff, if the plaintiff bears some responsibility for the loss. Although the amount of damages awarded in a comparative-fault litigation may consequently be less than the amount of the loss suffered by the plaintiff, this result does not really diverge from the familiar dichotomy between full compensation or zero compensation, because each party is required to contribute the full amount of the loss attributable to it. See, e.g., SHAVELL, *supra* note 53, at 187.

70. See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken."); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES \*139 (asserting that legislatures do not effectuate takings arbitrarily but instead by giving the burdened owners "full indemnification and equivalent for the injury thereby sustained").

71. Complexities arise as soon as one begins to consider what constitutes "full" compensation. For example, the extent to which a prevailing plaintiff is entitled to receive consequential damages can be contentious. See, e.g., Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 71–72 (1999).

72. See Calabresi & Melamed, *supra* note 56, at 1092–93.

entitlement is worth in the eyes of the holder.<sup>73</sup> Instead, the holder of the entitlement receives only a sum determined by some outside entity, such as a court or the market. One of the paradigms of Calabresi-Melamed liability-rule protection in action is property taken through eminent domain.<sup>74</sup> Owners of taken property are entitled only to the property's fair-market value, irrespective of the price that the property owner would actually demand to sell it.<sup>75</sup> As a result, it has long been asserted that the compensation paid to owners of property taken through eminent domain systematically undercompensates those owners.<sup>76</sup>

It is equally widely assumed that such undercompensation ideally would not occur—that in a perfect world each owner of taken property would receive compensation equal to his subjective assessment of that property's value—but that in the imperfect actual world practical considerations regrettably require paying a lesser amount.<sup>77</sup> Because subjective values exist only in the minds of the owners and therefore are not directly observable by outsiders, attempting to determine precisely what subjective value an owner places on his property simply is too difficult and too vulnerable to dishonesty or self-deception by the relevant owner. As a result, the law regrettably must rely instead on an imperfect proxy, such as market value.<sup>78</sup>

This standard account clearly reflects a view that concerns about administrative feasibility can excuse payment of compensation that is less than perfectly full, even in ordinary situations. In other words, full compensation is not required in practice, because administrative limitations make paying

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73. In economics terminology, “full” compensation would be equal to the entitlement holder's reservation price for selling the entitlement. See, e.g., Ian Steedman, *Reservation Price and Reservation Demand*, in 4 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 158, 158–59 (John Eatwell et al. eds., 1987).

74. Calabresi & Melamed, *supra* note 56, at 1093.

75. See, e.g., *Olson v. United States*, 292 U.S. 246, 255 (1934) (defining “just compensation” as market value).

76. See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962–67 [hereinafter Fennell, *Taking Eminent Domain Apart*]; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986). There is some controversy about the size of the undercompensation. See Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593 (2013). But see Lee Anne Fennell, *Just Enough*, 113 COLUM. L. REV. SIDEBAR 109 (2013), <http://columbialawreview.org/wp-content/uploads/2013/08/Fennell-113-Colum.-L.-Rev-109.pdf> (arguing that one of my arguments in *Just Undercompensation* rests on a tacit assumption, which Fennell suspects is incorrect, about the elasticity of supply in real estate markets). Fennell's observation about the unspoken role of that assumption in the relevant argument is correct. Fennell might also be correct that the assumption is unrealistic, but how well the assumption conforms to reality is ultimately an empirical question that neither my nor Fennell's theoretical discussions resolve.

77. See, e.g., Fennell, *Taking Eminent Domain Apart*, *supra* note 76, at 993–94 (discussing the “natural response” of favoring greater compensation and the problems with that response).

78. I have elsewhere challenged this standard opinion of the fairness of less-than-full compensation in eminent domain. See Lee, *supra* note 76 (arguing that in some circumstances justice does not require compensating for property owners' idiosyncratic value in their property).

less than full compensation necessary. In the terminology introduced in Section II.B, the presence of administrative-noncompensation necessity requires leaving the burdened owner less than whole.

This uncontroversial fact about ordinary takings law implicitly reflects two important principles. First, whether full compensation is owed for some action that causes a loss depends on whether necessity is present. But the relevant necessity is not the necessity to do the action (for example, to take some property through eminent domain) but rather the necessity not to pay full compensation for that necessary action. That is, whether full compensation is required depends on whether one of the two forms of noncompensation necessity, administrative or fiscal, is present.

The second implicit principle is that when noncompensation necessity in fact is present, the proper amount of compensation may be neither full compensation nor zero compensation, but instead partial compensation. While the existence of administrative impediments to determining the full subjective value of an owner's loss is widely, and plausibly, taken to excuse the government from paying compensation equal to that value, those impediments do not excuse the government from paying any compensation at all. Instead, the amount of compensation required in ordinary takings cases is some intermediate amount.

This observation naturally raises the question of how to determine when the presence of noncompensation necessity removes only the obligation to pay full compensation, leaving an obligation to pay partial compensation intact. Here, the distinction drawn above between administrative-noncompensation necessity and fiscal-noncompensation necessity becomes especially relevant.

To the extent that noncompensation necessity arises from practical administrative limitations, reducing the amount owed from full to merely partial compensation may often be insufficient to alleviate the necessity. The possibility of partial compensation might be sufficient if the source of the necessity is difficulty in determining the true size of a claim. As noted in the context of ordinary eminent domain, to the extent that courts are permitted to award compensation only for objectively determinable aspects of value, even when those aspects do not exhaust the total value that the owner places on the relevant property, administrative feasibility may significantly increase. In many cases, however, the administrative requirements for paying partial compensation may not differ greatly from those for paying full compensation, since determining who has a legitimate claim and what that claim's size is does not become easier or more feasible depending on what percentage of the total claim the government will in fact pay out. Accordingly, the presence of administrative-noncompensation necessity may require that compensation be denied altogether.

On the other hand, in fiscal-noncompensation necessity situations the possibility of paying only partial compensation can have a marked effect on whether noncompensation necessity exists. The fact that the government could not afford to compensate fully every American whose property Allied forces destroyed during World War II, for example, does not imply that it

could not afford to pay each of them some fraction of that property's value. Hence, the presence of fiscal-noncompensation necessity by itself does not plausibly eliminate every obligation to pay compensation, but only the obligation to pay more compensation than is feasible. Paying a lesser amount of compensation may be sufficient to make the corresponding harmful action legitimate.

Note, however, that in the absence of destruction necessity the presence of noncompensation necessity alone will not affect the amount of compensation owed when the government destroys property. If there is a need to withhold compensation but no need to destroy in the first place, then the obvious implication is that the government is obligated to refrain from this unnecessary destruction for which it cannot pay. If the government nevertheless does destroy the property, compensation's role actually would be to rectify a wrong, and the amount of compensation owed would consequently be (at least) full compensation.

As the following Part's discussion will make clear, these three key distinctions—among compensation's varied roles, between two types of necessity, and among possible amounts of compensation—provide an essential foundation for understanding and critically evaluating the arguments that courts and commentators have advanced in seeking to justify the noncompensation principle.

### III. JUSTIFYING NONCOMPENSATION

Scholars and courts have offered a wide range of defenses of the noncompensation principle over its centuries-long history, but these defenses can be arranged in four thematic groups. One set of arguments focuses on incentives for socially efficient government decisionmaking. A second set asserts that the government owes no compensation for emergency destruction because responsibility for that destruction really lies with the cause of the emergency or with the owner of the destroyed property, rather than with the government. A third set argues that paying compensation would be superfluous, either because the affected property owners have already received compensation of a nonmonetary sort, because adequate private alternatives to public compensation exist, or because compensation is unnecessary to deter opportunistic use of government power by small but politically influential groups. A final set of arguments contends that the government owes no compensation because the government's destruction of property in an emergency is not an exercise of its power of eminent domain but rather of some other power, one that does not require payment of compensation.

One general theme running through many of these arguments is that the various reasons that might exist for requiring compensation for ordinary exercises of eminent domain do not apply in the case of emergency takings. A standard modern taxonomy identifies three types of justification for ordinarily requiring the government to compensate for taken property: one type of justification focuses on fairness concerns and equal treatment; a second

focuses on incentives for efficient government decisionmaking, and the third focuses on limiting the ability of politically influential minorities to tilt the scales of justice for their own private benefit at the expense of the public good.<sup>79</sup> Because the diverse range of arguments raised over the course of the noncompensation principle's history cannot neatly be limited to these three categories, this Part shall follow the four-part taxonomy described above. Over the course of this discussion, however, each of the three standard justifications for takings compensation will receive due attention.

Examining each of these four sets of arguments with the aid of the distinctions developed in Part II will reveal that the arguments do not plausibly support exempting the government from paying compensation for emergency destruction. At most they support only the conclusion that sometimes full compensation may not be required.

#### A. *Incentives for Efficient Decisions*

One common argument in favor of the noncompensation principle is that if public officials “are concerned that the government—or perhaps they personally—may be held liable for a large compensation award, they may not act with the requisite dispatch to avert a larger disaster.”<sup>80</sup> The Great Fire of London provides a prominent historical example commonly invoked to motivate this concern about incentives. The Pennsylvania Supreme Court described the incident as

a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is mentioned, that the *Lord Mayor of London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.<sup>81</sup>

The Second Restatement of Torts refers to this story as “[a] striking illustration of the un wisdom of restricting this privilege [of entering another's property to avert an imminent public disaster] within too narrow limits.”<sup>82</sup>

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79. DANA & MERRILL, *supra* note 6, at 32–52.

80. See, e.g., *id.* at 120; see also *Surocco v. Geary*, 3 Cal. 69, 74 (1853) (“[I]f in such cases a party [who created a firebreak by destroying a house in which goods were stored] was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.”).

81. *Republica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788). Derek Muller challenges the accuracy of the court's account of the London fire, arguing that Samuel Pepys's diary provides evidence that London's mayor in fact was avidly destroying property in a futile effort to create firebreaks, and that starting the demolitions earlier would not have saved the city. Muller, *supra* note 9, at 489–91.

82. RESTATEMENT (SECOND) OF TORTS app. § 196 cmt. d (AM. LAW INST. 1965). Dana and Merrill's presentation of the incentives argument also cites *Republica's* account of the London fire. DANA & MERRILL, *supra* note 6, at 120.

There are two potential concerns here. One is a concern about requiring public officials personally to pay compensation for the destruction that they cause in responding to public emergencies; the other is a concern about requiring the government to pay compensation for such destruction.

The first concern is obviously compelling. No sane public official could be counted on to order the destruction of valuable property, even when doing so was vital to protecting the public, if by doing so the official became obligated to pay for the value of the destroyed property out of her own pocket. The amount owed would almost always dwarf the official's total income from holding the public office, and even if the value of the property saved was vastly greater than the value of the property destroyed, the public official has no means of personally acquiring a portion of that preserved value (unless the official happened to have owned some of the saved property).<sup>83</sup> As a result, ordering the necessary destruction would almost certainly force the official into bankruptcy. Hence, there is a good practical reason not to hold public officials personally liable for the costs of such destruction, even apart from the dubious justice of simultaneously requiring an official to bear enormous burdens alone as a result of having appropriately and competently acted to protect the well-being of others, while sparing those beneficiaries from any obligation to share in even part of those costs.

For the last several decades, however, the relevant question has been whether the government owes compensation for property that it destroys in an emergency, not whether individual government officials do.<sup>84</sup> So the modern version of the incentives argument must amount to a concern that even when public officials are immune from any personal liability, requiring the government to pay compensation for property that public officials destroyed to protect the public in an emergency will discourage those officials from ordering that socially beneficial destruction.

This argument against requiring compensation for emergency takings is striking because it precisely inverts a standard argument in favor of requiring compensation for takings made under the government's ordinary power of eminent domain: if the government were not obligated to compensate owners of taken property then the government would naturally be tempted to take property even when doing so is socially inefficient, because the government could enjoy the benefits of acquiring the property without suffering the corresponding costs that the acquisition imposed. On this theory, the

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83. In law-and-economics terminology, a public official who is liable to pay compensation for the value of the destroyed property would personally internalize the costs of the emergency-destruction decision even though the official has no way to personally internalize the benefits of the decision. When officials internalize all of the costs but none of the benefits of a certain course of action there is a near-perfect incentive for those officials to refuse to take that course of action, no matter how harmful that refusal might be to society overall.

84. See, e.g., *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952). For a brief discussion of Robert Brauneis's account of the historical background for this shift, see *infra* note 206 and accompanying text.

compensation requirement for eminent domain serves to dispel a “fiscal illusion” about the true social costs of the relevant project by compelling the government to internalize the costs of its takings decisions, thereby encouraging governments to take property only when the social benefit of doing so actually exceeds the social cost.<sup>85</sup>

The prima facie tension between these two incentives-based arguments is now evident.<sup>86</sup> In the ordinary eminent-domain context, requiring compensation is praised as discouraging government officials from taking property too often.<sup>87</sup> But in the emergency-destruction context, that same requirement to pay compensation is condemned as discouraging government officials from taking property often enough.

Since requiring compensation has the same effect in both contexts—it discourages takings that otherwise would occur—these two arguments will be consistent only if, in the absence of a compensation requirement, the government’s natural tendency would be to take too much property in ordinary eminent-domain situations and take too little (or exactly the right amount) in emergencies.<sup>88</sup> Only then would a disincentive provided by the compensation requirement both beneficially moderate the government’s behavior in ordinary circumstances and harmfully intensify the government’s behavior in emergencies.

I am not aware of any empirical evidence that the government’s natural tendency to take in ordinary circumstances exceeds its natural tendency to take in emergencies.<sup>89</sup> Nor is there any obvious a priori reason to think that

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85. DANA & MERRILL, *supra* note 6, at 41–46; *see, e.g.*, SHAVELL, *supra* note 53, at 129–30; Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1682–83 (2010).

86. For an example of how applying the incentives-based explanation of the compensation requirement for ordinary takings would naturally lead to endorsing a compensation requirement for emergency takings as well, *see* Strahilevitz, *supra* note 35, at 1979 (suggesting that damage caused by police while apprehending a suspect might have been reduced if the officers had believed that the state would have to pay compensation for what they destroyed).

87. Both the “fiscal illusion” argument and the emergency-destruction version of the incentives argument rest on controversial assumptions about the motivations of government officials. *See, e.g.*, SHAVELL, *supra* note 53, at 130; Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 140 (2006). Reaching a conclusion about the accuracy of those assumptions is unnecessary for present purposes since, even if those assumptions are correct, the incentives argument turns out not to vindicate the noncompensation principle and thus fails on its own terms.

88. This dichotomy is slightly simplified. The two arguments would still be consistent even if governments were naturally inclined to take slightly too much in emergencies, as long as that tendency both is less pronounced in emergencies than in ordinary circumstances and is sufficiently weak that a compensation requirement’s relatively large disincentive would create a net incentive to take far too little. The pivotal question, however, remains why the government’s natural tendency to take property would be predictably less in emergency situations than in ordinary situations.

89. The Constitution’s “just compensation” requirement poses a significant obstacle to any such empirical study, since it effectively precludes acquiring data about how governments would behave if such a requirement did not exist.

such a difference would exist.<sup>90</sup> In fact, one might suspect that political incentives would be more likely to encourage overreaction to emergencies than underreaction, since public officials' responsibilities are broader than just managing the government's budget. Decisionmakers are likely to find the immediate peril of fire or invasion to be at least as salient as future budget issues.<sup>91</sup> A mayor's job is to protect the city, and voters may hold that mayor accountable for conspicuous failures to do so, irrespective of budgetary concerns.<sup>92</sup>

Furthermore, decisionmakers may not even know what the ultimate budgetary implications of the emergency destruction decision would be, because the soundness of a community's finances depends not only on the government's level of expenditures but also on the amount of revenue that it can raise. Although public officials cannot themselves internalize the benefits of destruction, governments can, because they have the power to tax. Since the devastation wrought by an unchecked conflagration might foreseeably cause severe damage to the community's tax base, engaging in compensated emergency destruction might actually have milder net budgetary consequences than refraining from such destruction would. As a result, the incentive implications that arise in the context of public officials' concerns about their own personal liability do not automatically translate to the context of public officials' concerns about government liability.

In addition, a guarantee of compensation to owners of demolished property might actually *decrease* public officials' reluctance to destroy property in emergencies. Just as insurance insulates people from the adverse consequences of their actions and can thus create a "moral hazard" that encourages risky behavior, so too a compensation requirement insulates third parties from the full adverse effects of an official's decisions to destroy their property and thus might encourage that official to be more willing to engage in the destruction, knowing that the owners harmed by that decision

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90. In theory, a difference could arise if the government is less able to internalize the benefits created by emergency destruction than the benefits created by ordinary eminent domain. In that case, one might predict a greater reluctance to take in emergencies than in ordinary circumstances. In practice, however, the government's ability to internalize the benefits provided by an ordinary public project, such as a highway, is not obviously greater than its ability to internalize the benefits provided by addressing a devastating emergency. Therefore, this theoretical difference seems unlikely to have actual relevance.

91. See, e.g., David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1342–47 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007)). But see GOLWAY, *supra* note 16, at 52 (reporting that during the Great New York Fire of 1835, the mayor and the head of the fire department were reluctant to take direct part in creating a firebreak, ultimately foisting the job onto James Hamilton, Alexander Hamilton's son). Note, however, that accounts of the 1835 fire do not all agree, and Golway's account is out of step with James Hamilton's own memoirs. See JAMES HAMILTON, *REMINISCENCES OF JAMES A. HAMILTON* 285–88 (New York, Charles Scribner & Co. 1869).

92. For a similar criticism of the incentives argument, see Muller, *supra* note 9, at 523–24.

will not be left destitute.<sup>93</sup> Moreover, this effect is possible even if public officials are motivated less by empathy than by political self-interest. Commentators have noted that paying compensation to owners of property taken through eminent domain may decrease those owners' political opposition to the public projects that require those takings, and there is no obvious reason to think that the same would not also be true of postdestruction political repercussions in the emergency context.<sup>94</sup>

Nevertheless, there is one set of circumstances in which the assumed difference in the government's natural tendencies to take might in fact arise. When the scale of the emergency is great, as historically was common in the crises that shaped the development of the noncompensation principle, the cost of paying compensation may simply be beyond the government's ability to bear. Those circumstances are much less likely to arise in ordinary cases than in catastrophes, with their attendant wholesale loss of wealth. In emergency situations of that daunting sort, the government may face not only destruction necessity, that is, the need to destroy property to protect the community, but also noncompensation necessity, that is, the need not to pay full compensation to the owners of the destroyed property. When both sorts of necessity are present, requiring the government to pay full compensation to owners of property destroyed to address an emergency indeed conceivably might cause government officials to hesitate before ordering such destruction, even when that destruction is in fact necessary. Thus, to the extent that the incentives argument is plausible, its true implication is not that the government should routinely be exempt from paying *any* compensation in emergency-destruction cases, but rather that it should be exempt from paying *full* compensation when noncompensation necessity accompanies destruction necessity.

### B. *Shifting Responsibility*

Another strategy for defending the noncompensation principle has been to assert that the government owes no compensation to the owner of the destroyed property because the government was not really responsible for that destruction. This approach has commonly taken two forms. One version of the argument seeks to shift responsibility from the government to the threatening condition that gave rise to the emergency. The other version seeks to shift responsibility to the owner of the destroyed property. Because these two arguments are independent, each can be considered separately, as

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93. For basic accounts of "moral hazard" see, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 48 (6th ed. 2012); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 593–94 (1984). A striking example of the phenomenon appears in Charles Haswell's memoir of the 1835 Great New York Fire. CHAS. H. HASWELL, *REMINISCENCES OF AN OCTOGENARIAN OF THE CITY OF NEW YORK (1816 TO 1860)* 305–06 (New York, Harper & Brothers 1896) (noting that owners of valuable goods threatened by the fire made costly efforts to move the goods to safety only "after it became evident that all policies for insurance were of no value").

94. See, e.g., SHAVELL, *supra* note 53, at 130; Blume & Rubinfeld, *supra* note 93, at 594.

well as a special case that arises when destruction is inevitable no matter what the government does.

### 1. The Threatening Condition Is Responsible

One defense of the noncompensation principle asserts that responsibility for emergency destruction really lies with the forces that created the emergency—for example, the fire or the invading army—rather than with the government that acted to counteract those forces. If the government's action was in fact necessary, the argument asserts, then it is the necessity—or the causes of that necessity—that bear the responsibility, not the government. And if the government was not responsible for the destruction, then it should not be obligated to pay for the destruction. The Supreme Court may have had this sort of argument in mind in *Bowditch v. Boston*, a nineteenth-century emergency-destruction case, when it asserted that “[a]t 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.”<sup>95</sup>

One difficulty with such an argument is doctrinal. If the argument were correct, then we would expect that the government would also not owe compensation for private property that it commandeers and uses to address an emergency, since “responsibility” for that acquisition and use would then be attributed to the “necessity” rather than to the government. If the government is not responsible for actions done out of “necessity,” then its lack of responsibility should be the same whether the act in question consists of use or destruction. As we have already seen, however, the government has an established obligation to pay compensation for such uses.

Moreover, this argument would equally imply that many ordinary takings have no just claim for compensation. If responsibility for the government's destruction of a warehouse to create a firebreak lies not with the government but with the fire, then it would seem equally plausible that the responsibility for the government's occupying property to build a prison would lie not with the government but with the need to incarcerate more criminals, and similarly that the responsibility for the government's building a freeway across formerly privately owned property would lie with the increase in vehicular traffic. So if the lack of this sort of “responsibility” is supposed to relieve the government of a responsibility to pay compensation, the government would have no obligation to pay compensation for uses of eminent domain for public projects such as prisons, roads, schools, hospitals, and post offices. But of course those are paradigm instances of takings that in fact do require compensation.

The argument's problems extend beyond concerns about doctrinal coherence. Assertions that the presence of necessity removes responsibility for

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95. *Bowditch v. Boston*, 101 U.S. 16, 18 (1880); cf. *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887) (“For all injuries and destruction which followed necessarily from [military operations during the Civil War] no compensation could be claimed from the government. By the well settled doctrines of public law it was not responsible for them.”).

actions taken to address the necessity, and therefore the need to pay compensation, effectively shift responsibility to the source of the necessity. This in turn raises the question of who bears that responsibility.

In typical instances of emergency takings, the answer may seem simple: responsibility lies with whoever or whatever created the dangerous threat, such as an out-of-control fire or an invading army.<sup>96</sup> The situation is more complicated than this simple picture suggests, however, because the necessity is not the result of a single factor, but rather of a confluence of three factors: the presence of the threatening agent (such as a fire or invading army), the presence of property that may augment or transmit that threat (that is, the property demolished to address the emergency), and the presence of valuable property that may be harmed by receiving the effects of that threat.<sup>97</sup> The threatening phenomenon alone cannot bear all the responsibility for the necessity, because there would have been no need to destroy the relevant property if the fire or invading army had been present but no one else was nearby to protect. Hence, asserting that responsibility for the demolition lies with the source of the “necessity” would not divert that responsibility solely onto the threat. Instead, it would impose that responsibility jointly on the threat *and* the community *and* the owner of the demolished property.

Someone wedded to the noncompensation principle might reply that this argument shows that no one (and nothing) is “responsible” for the emergency demolition, not that everyone is. Such a reply would merely be

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96. If the government in fact was responsible for creating the threat, for example, by intentionally or negligently starting the fire that now threatens the property that the emergency destruction seeks to protect, then the justification for denying compensation for the effects of that destruction is especially weak. Susan Kuo has gone even further in the specific context of natural disasters, arguing that because “[t]he state’s comprehensive responsibility for disaster response extends beyond the immediate crisis,” therefore “an evaluation of the defense of public necessity should include the state’s responsibility, if any, for the factors that led to the crisis and the adequacy of its plans concerning tradeoffs that might become necessary.” Kuo, *supra* note 9, at 141.

97. These situations are in some ways similar to Ronald Coase’s analysis of ordinary nuisance cases: “We are dealing with a problem of a reciprocal nature. . . . The real question that has to be decided is: should [person] A be allowed to harm [person] B or should B be allowed to harm A?” R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Coase’s analysis of nuisance is controversial. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 165 (1973) (arguing that even Coase’s own discussion of nuisance examples does not treat them as purely reciprocal). However, the partial similarity between these two types of situation should not obscure an important difference. While Coasean reciprocal causation may be controversial in the context of ordinary nuisance disputes, when different uses occur in incompatibly close proximity—for example, a brickworks next to private homes—in emergency-destruction cases the uses themselves, such as having a building on a lot, are identical; what varies are the surrounding circumstances in which those uses occur. For example, a fire that is approaching from one particular direction will reach some buildings before others, making the first buildings a means for the fire to reach the others. If the fire approaches from a different direction, the buildings that were potential conduits would change, even without any change in their owners’ behavior. Thus, analyzing emergency-destruction situations as involving mutual causal elements should be less controversial than in the ordinary nuisance situations about which Coase and his critics disagree.

an evasion, even if one refuses to attribute “responsibility” to natural phenomena, because the government affirmatively chose to destroy the relevant property. (The government could have let everything burn. Such a policy would have been unwise, but not impossible.) Because there was a choice, the only possible question is who or what bears the responsibility for that choice, not whether anyone did.

This conclusion that the community bears some responsibility for the “necessity” should not be startling. An inescapable fundamental reality of firebreaks and other paradigms of emergency takings is that when the government decides to destroy private property to address an emergency, it acts on behalf of the community to protect the interests that that community had developed as a result of its own choices. Therefore, even if one grants this argument’s premise that the test for owing compensation is bearing responsibility for a loss, it would still follow that the community would owe at least some compensation to the owner of the sacrificed property, although perhaps not full compensation.

Moreover, if property owners were never responsible for destructive actions taken in self-defense to avoid losses from fire, on the grounds that the fire (or other threat) is solely responsible for that destruction, then it would follow that the owner of the property targeted for destruction would be permitted to use self-help to stop the demolition of his property. Since the responsibility for the demolition was attributed to the fire rather than to the people who chose to undertake the demolition, stopping the demolition would just be stopping damage caused by the fire. It is true that if the self-help is successful in stopping the demolition, then many other properties might burn, but responsibility for those losses, by hypothesis, would have to be attributed to the fire rather than to the owner who exercised self-help. Hence, this attempt to justify demolishing certain property without paying compensation would equally justify intervention by the owner of that targeted property to prevent the demolition.

A further concern about arguments based on shifting responsibility for the destruction arises from the question of why the government has the right to destroy the property at all. Presumably the answer derives from two facts: first, that the well-being of many members of the public depends on that destruction, and, second, that the state has an inherent duty to protect certain aspects of its public’s well-being, such as by limiting violent crime or conflagrations. The “necessity” that compels the government’s action in conducting emergency destruction inherently depends on the existence of a duty to protect those specific people over whom the government exercises sovereignty, which of course includes the owner of the demolished property. Hence, if one asserts that the responsibility for any loss of property as a result of a fire, including property demolished to create a firebreak, lies with the fire, it would follow that the government had failed to fulfill its duty to protect the owner of the demolished property from fire.

Ordinarily, the government may not be liable for its failure to act in ways that duty arguably would have required.<sup>98</sup> This particular failure, however, would not be the result of government inaction, but rather of an affirmative act of destruction—demolishing the building to address the oncoming threat. Unless the destruction of that property was inevitable anyway (that possibility shall be considered in a moment), the government’s action increased the probability of the property’s destruction from a mere possibility or likelihood to a certainty (that is, to 100 percent). Whatever else a duty of protection against certain types of threat may require, actively ensuring that the threat is in fact successful presumably violates that duty of protection. And such a violation would naturally seem to justify a claim for compensation. Hence, attempting to transfer responsibility for the destruction from the government to the threat merely alters the grounds on which compensation could be demanded. It does not defeat such a demand.

## 2. A Special Case: Inevitable Destruction

A variant of this lack-of-responsibility argument arises in the special case of a government action that destroys property that the calamity inevitably would have destroyed anyway.<sup>99</sup> Intuitively it makes sense that in such circumstances the deliberate destruction gives the owner of the destroyed property no legitimate claim for compensation. Dana and Merrill suggest that this is because “[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.”<sup>100</sup>

Although the conclusion of that argument is sound, the reasoning is not quite right. The government clearly *is* the cause of the property’s demise at the particular time that it is destroyed. The question is what follows from that causal relationship.<sup>101</sup> That the property’s eventual destruction is inevitable does not make the government’s action cease to be the cause of destruction now. Were it otherwise, the fact that someday the universe will end, destroying everything on Earth, would entail that my smashing a vase now is not the cause of that vase’s destruction, since its eventual destruction was inevitable. And the same would hold true of any other act ordinarily thought of as destructive. Nevertheless, Dana and Merrill are correct that, as

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98. For an argument that, under certain circumstances, the government in fact should be liable for failures to act, see Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 377–84 (2014).

99. See, e.g., *Taylor v. Plymouth*, 49 Mass. (8 Met.) 462 (1844) (holding that a statute requiring compensation for property destroyed to create a firebreak should not be construed to apply to the destruction of property that was already aflame and would inevitably have been lost); *Pentz v. Receivers of Aetna Fire Ins. Co.*, 9 Paige Ch. 568, 570 (N.Y. Ch. 1842) (noting that New York City could not be assessed for its order to blow up homes during the Great Fire, since the homes would have been destroyed anyway).

100. DANA & MERRILL, *supra* note 6, at 119.

101. For a prominent philosophical discussion of attributions of legal responsibility in situations of causal overdetermination generally, see H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 235–49 (2d ed. 1985).

a practical matter, compensation is not owed in the sorts of situations that they have in mind. The reason, however, springs not from the fact that the property's eventual destruction was inevitable but rather from the fact that the inevitable destruction was imminent.<sup>102</sup> The amount of compensation that the owner of doomed property could justly claim is solely for the value of the property during the time between the government's destruction of the property and its inevitable demise.<sup>103</sup> Since that period would have been both very short and quite unpleasant, that value lies somewhere between de minimis and zero. So the government indeed does owe no compensation to owners of demolished property in situations of inevitable destruction—not, however, because the government is inherently not liable for such destruction, but rather because the amount of damages deserved on account of that liability is zero.

### 3. The Property Owner Is Responsible for a "Nuisance"

A variant of the responsibility-shifting argument seeks to defend the noncompensation principle by attributing responsibility for the threatening condition—for example, the threat caused by a conflagration—to the owner of the demolished property. The assertion is not that the owner started the fire or otherwise created the dangerous condition, but that the owner nevertheless participates in the existence of that condition by maintaining property that could transmit the threatening condition to neighboring properties.

This argument commonly takes the form of analogies to the doctrine of nuisance or, more generally, of invocations of the state's "police power." The Supreme Court in *Mugler v. Kansas* provided a classic statement of this general doctrine in the context of takings law:

The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from

102. Cf. *id.* at 240 ("The notion of causing death is not as logically simple as might seem. Since everyone dies, 'causing death' involves the notion of shortening the span of life which the victim might normally expect and not merely determining the manner of dying . . . ." (footnote omitted)).

103. Cf. *Grant v. United States*, 2 Ct. Cl. 551, 552 (1863) (Loring, J., dissenting) ("I think the United States are to pay only for what they added to [the depreciation of the owner's property], viz: the substitution of its burning for its abandonment, or the difference between these to the petitioner."); HART & HONORÉ, *supra* note 101, at 240–41 (asserting that when death is overdetermined, "the damages payable [by a negligent actor] would be minimal in view of the fact that [the victim] was doomed").

depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.<sup>104</sup>

At first glance, application of this general principle to emergency-destruction situations might seem natural. For example, Dana and Merrill assert that one possible explanation for the noncompensation principle in fire cases “is based on an extension of the nuisance exception. Although 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.”<sup>105</sup>

Before considering the normative foundations of such a comparison, it is worth noting that as a doctrinal matter, Dana and Merrill are correct to treat this sort of argument as an “extension” of the nuisance exception. Ordinary nuisance doctrine in fact would not be likely to justify uncompensated destruction in such circumstances, and it useful to pause a moment to understand why that is.<sup>106</sup>

There are two standard categories of nuisance—public and private—and although they have certain important differences, they also have much in common. One key element shared by both is the idea that property owners may be liable for their “unreasonable” property-related activities that cause harm, or pose a risk of harm, to other members of the community. In the case of private nuisance, the concern is unreasonable interference with other property owners’ use and enjoyment of their own property.<sup>107</sup> In the case of public nuisance, the concern is unreasonable interference with a public right, such as a general right to health or safety.<sup>108</sup>

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104. 123 U.S. 623, 669 (1887). In *Mugler*, the “noxious use” in question was the production of alcoholic beverages. *Id.* at 623. A long line of cases have followed *Mugler* over the past century. See e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“A law or decree [that prohibits, without compensation, all economically beneficial use of land] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”); cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987) (“[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.”).

105. DANA & MERRILL, *supra* note 6, at 119–20.

106. *But see Surocco v. Geary*, 3 Cal. 69, 73 (1853) (“A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society.”). In *Surocco*, however, the court may have had in mind only situations in which “it was perfectly evident that [the relevant] building must be consumed [by the fire],” in other words, when destruction was inevitable. *Id.*

107. E.g., 66 C.J.S. *Nuisances* § 9 (2015).

108. E.g., *County of Westchester v. Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (“The County must . . . establish that some offensive or obstructive condition interferes with a right common to the general public [to claim public nuisance].”); RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979) (“A public nuisance is an unreasonable interference with a right common to the general public.”).

One central question that naturally arises in nuisance contexts—and that is the focus of much nuisance law and commentary—is what sorts of acts are in fact “unreasonable.” The Restatement (Second) of Torts offers a prominent, and controversial, example of a very broad, utilitarian conception of “unreasonable” activity. Among the “[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable,” the Restatement authors include “[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”<sup>109</sup> Moreover, the Restatement authors assert, if the activity in question was intentional rather than accidental, the activity will qualify as “unreasonable” if “the gravity of the harm outweighs the utility of the actor’s conduct.”<sup>110</sup> If the relevant conduct is unintentional, then under the Restatement approach a private nuisance will arise only if the activity was “otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”<sup>111</sup>

In the context of takings law, such a broad understanding of nuisance, if taken literally, invites a straightforward comparison between an abatable nuisance and a building destroyed to create a firebreak, or a petroleum depot destroyed to slow an invading army. Such destruction typically occurs when the public safety is at stake, and when the social benefit of engaging in such destruction clearly outweighs the destruction’s social costs. Keeping the building or factory intact in such circumstances might, at first glance, seem clearly to qualify as an “unreasonable” interference with the property interests of others and therefore as either a public or a private nuisance.<sup>112</sup> And since a basic principle of nuisance law is that those who commit nuisances are not owed compensation for being required to cease their commission, a justification for likewise denying compensation in emergency-destruction cases would follow automatically.<sup>113</sup>

It is unlikely, however, that emergency destruction would qualify as abating a “nuisance” even under the broad Restatement understanding of nuisance. It is scarcely plausible that a property owner’s decision not to demolish a building is “intentional” if a conflagration or other sudden emergency arises while the owner is away from the property, and therefore lacks the ability to interact with the property or perhaps does not even know that

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109. RESTATEMENT (SECOND) OF TORTS § 821B(2).

110. *Id.* § 826(a). This rule is supposed to apply to both private and public nuisances. *Id.* § 826(a) cmt. a.

111. *Id.* § 822(b).

112. In addition to positive actions, the failure to act when acting is required by law can be a grounds for finding a public nuisance. *See, e.g.,* *People v. Wing*, 81 P. 1104 (Cal. 1905) (per curiam) (holding that maintenance of a building that was a fire hazard in violation of municipal code would constitute a public nuisance).

113. *See, e.g.,* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 775–77 (1986) (acknowledging that only one nuisance case had ever required a prevailing plaintiff to compensate the defendant on whom the court had imposed an injunction).

an emergency exists. Moreover, merely maintaining a building on a lot that one day turns out to be in the path of a fire or an invading army is neither “negligent or reckless conduct” nor an “abnormally dangerous condition[ ] or activit[y].”<sup>114</sup> So the “invasion” caused by the risk of the spread of fire or aid to the enemy would not qualify as a nuisance under either the intentional invasion prong of the Restatement test or under the “unintentional and otherwise actionable” prong, or any plausible extension of that particular prong.

Moreover, there is a deep general difficulty with adopting a conception of nuisance that is so broad as to encompass property destroyed to address emergencies. If such a conception of nuisance is applied in the takings context, then even ordinary exercises of eminent domain would be immune from demands for compensation. If the government wishes to raze a tall building on privately owned property, or fell trees on that property to clear airspace for a new nearby airport, or occupy that property to construct a new prison or fire station, the owner’s refusal to allow that destruction or use might create “a significant interference with . . . the public safety, the public peace, the public comfort or the public convenience.”<sup>115</sup> Moreover, the utility of the private owner’s keeping those trees and buildings intact, or excluding the government from his property may well not outweigh the social cost of those activities. Hence, according to this broad conception of “nuisance,” forcing the owner to cease those activities would merely be abating a nuisance, and the government would owe that owner no compensation for the loss that he suffers as a result. However, those are quintessential examples of situations in which the government would be expected to exercise its power of eminent domain to take the land, and therefore to pay compensation. This incompatibility with a basic constitutional principle of eminent domain law renders this version of the nuisance analogy implausible.<sup>116</sup>

Because the source of the difficulty is that the analogy’s criteria for what constitutes a “nuisance” are simply too broad, the natural solution would be to narrow those criteria. And in fact, that is what the law generally does. Not every interference with “public convenience” constitutes an abatable nuisance, nor does every act or omission that fails to maximize overall social utility. Instead, nuisance liability is ordinarily limited to activities that either

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114. RESTATEMENT (SECOND) OF TORTS § 822(b).

115. *Id.* § 821B(2)(a).

116. Derek Muller has levied a similar criticism against the nuisance analogy. Muller, *supra* note 9, at 510–11. Muller also criticizes the analogy on the grounds that “an actual nuisance must exist before the state can control it; the potential for a nuisance is not enough,” and the sorts of property destroyed in emergency destruction, such as “[a] house that has not yet caught fire,” are “not ‘actual nuisances,’ but potential nuisances or not nuisances at all.” *Id.* at 511. This second argument is doctrinally suspect. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 822 cmt. d (“An injunction may be obtained in a proper case against a threatened private nuisance . . . .”); 66 C.J.S. *Nuisances* § 36 (2015) (“[A]n anticipatory nuisance is generally a valid cause of action, but the anticipated nuisance must be proven so as to make any argument that it is not a nuisance highly improbable.”).

are inherently wrongful or are unusual in the locality where they are conducted. Letting buildings decay into disrepair or accumulating garbage that can attract vermin and disease are examples of the former category of activity.<sup>117</sup> Conducting generally legitimate but exceptionally loud or noxious activities in a quiet residential neighborhood is an example of the latter. As the Supreme Court famously observed, “[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.”<sup>118</sup>

These restrictions avoid the implausible implications noted above, since ordinary exercises of eminent domain often involve taking property that is well-maintained and completely harmonious with its neighborhood.<sup>119</sup> Thus, such exercises would no longer be miscategorized as instances of “nuisance” abatement.<sup>120</sup> But this shrinking of the universe of abatable nuisances has the simultaneous effect of excluding the sorts of “activities” that emergency destruction addresses. Consider, for example, the goods owners in the Great New York Fire of 1835, or Caltex during the invasion of the Philippines. Neither was out of place in its locality: the goods owners were storing their perfectly ordinary goods in ordinary warehouses located in what was then New York City’s warehouse district. Indeed, the entire reason that a firebreak was needed was that neighboring owners also had property that might burn. Likewise, Caltex was operating an industrial facility in an area suitable for industrial activity. It was a factory in a factory district, a pig in a barnyard.

Nor were any of those parties in any way careless with their property or inattentive to its maintenance. To the contrary, the very reason why the Caltex facility needed to be destroyed was because it was in sufficiently good operating condition to be useful to the invading army. None of these owners had been violating any laws or regulations in the activities, nor had they been doing anything different from anyone else in the area.

So if the analogy to nuisance is to work at all, the argument would have to be that although the owners’ actions—keeping their property intact—were not wrongful in general, those actions became wrongful in the specific

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117. See, e.g., RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (providing a history of common-law public nuisances); 13 AM. JUR. 2D *Buildings* § 53 (2015) (giving “noncompliance of premises with building or sanitary regulations” as examples of public nuisances).

118. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

119. Even the designation of property as “blighted” does not automatically remove the obligation to compensate for that property if the government takes it from its owner, because “blight” designations are used to justify (often controversially) the exercise of eminent domain, not to attempt to avoid paying compensation to the owners of the taken property. See, e.g., Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 *FORDHAM URB. L.J.* 1119 (2011).

120. Lee Anne Fennell’s observation that “a nuisance-like rationale for the exercise of eminent domain, such as ‘blight,’ is not generally thought to relieve governmental actors of the requirement that just compensation be paid if land is taken away permanently,” offers additional support for the implausibility of the broad conception of “nuisance” in this context. Fennell, *supra* note 60, at 68.

immediate context of the ongoing emergency—the uncontained conflagration or the invading army’s inexorable advance on Manila. Even as a purely doctrinal matter, however, such an argument faces difficulties. For example, courts have held that a property owner cannot be found liable for nuisance if the condition in question is solely the product of natural forces independent of any culpable action by that owner.<sup>121</sup> And in the ordinary instance of emergency destruction, there is nothing special that the owners of the demolished property have done to make themselves culpable. For all anyone knows, and for all the law cares, they have been exemplary owners.

Moreover, the suggestion that keeping one’s property intact in an emergency suddenly becomes wrongful loses any plausibility when one asks what the normative justification would be for extending nuisance law in this way. Nuisance law’s complexities have famously been described as an “impenetrable jungle,” and there is no canonical simple account of nuisance law’s normative foundations.<sup>122</sup> One essential component of any such justification, however, would clearly involve an attribution of responsibility to the owner of the property that is abated as a nuisance. Owners of property have certain social duties, and society, acting through the government, may require those owners to refrain from breaching those duties in ways potentially detrimental to others. If owners are responsible for a breach, for example by failing properly to maintain their property or by choosing to engage in activities that it was reasonable to expect them to recognize were inappropriate for that locality, then society is justified in making them bear the costs of their breach. By contrast, a principal reason why justice imposes no obligation on the property owners (or government) who complained about those activities—that is, the plaintiffs in a nuisance suit—to compensate the defendants is because those plaintiffs themselves bear no responsibility for the conflict in uses. Nuisance doctrine fairly clearly reflects this intuitive normative principle, as is evident from the fact that when plaintiffs are responsible for the conflict, such as by “coming to the nuisance,” that fact will limit their ability to prevail in their nuisance actions.<sup>123</sup>

In emergency-destruction situations, then, the underlying intuition justifying noncompensation for the destruction would have to be that, just as in nuisance cases, the owner of the property to be destroyed bears responsibility for the threat to the public safety, while the owners of the properties to be saved lack responsibility for that threat. But in the paradigmatic instances

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121. See, e.g., *Lussier v. San Lorenzo Valley Water Dist.*, 253 Cal. Rptr. 470, 474 (Ct. App. 1988) (“[W]here injury is allegedly caused by a natural condition, the imposition of liability on a nuisance theory, as a practical matter, requires a finding that there was negligence in dealing with it.”); see also *RESTATEMENT (SECOND) OF TORTS* § 822(b); 66 C.J.S. *Nuisances* § 14 (collecting example cases). *But see* *Miller v. Schoene*, 276 U.S. 272 (1928).

122. *PROSSER AND KEETON ON THE LAW OF TORTS* 616 (W. Page Keeton et al. eds., 5th ed. 1988).

123. Cf. *Spur Indus., Inc. v. Del E. Webb Devel. Co.*, 494 P.2d 700, 706–07 (Ariz. 1972) (en banc) (granting injunction against nuisance but requiring that the successful plaintiff pay compensation to the defendant, because the plaintiff’s actions were in part responsible for the existence of the problem).

of emergency destruction, that factual condition simply is not met. The owners in lower Manhattan whose property was sacrificed to protect other owners' property from fire were no more responsible for the conflagration than the protected owners were. Likewise, Caltex was no more culpable for the Japanese invasion of the Philippines than any other American was.<sup>124</sup> Moreover, the implausibility of deeming an activity a nuisance is especially high when the activity is as mundane as possessing an ordinary building. As one court noted in the nuisance context, "[c]ommon sense dictates that the quite ordinary activity of growing trees on one's land is, without more, pre-sumptively reasonable."<sup>125</sup>

Attempting to draw an analogy between emergency destruction and nuisance abatement raises one other peculiarity. In general, maintaining a public nuisance on one's property is a wrong act, both legally and morally.<sup>126</sup> So in emergency-destruction situations, if keeping the building standing is akin to "public nuisance," then it would follow that if a large fire approached property that could serve as a firebreak by being destroyed, the owner of that property would be morally and perhaps legally obligated to demolish it herself. Indeed, in at least some jurisdictions the owner of property deemed to be a public nuisance is liable for the costs of the government's razing that nuisance.<sup>127</sup> In the emergency-destruction context, there is little intuitive plausibility to the idea that if the relevant owners do not themselves destroy their own property, knowing that they will be refused compensation for their losses, they have somehow acted wrongly. Nor is it plausible to assert that the owners of property destroyed by the government actually *owe* the government money, to reimburse it for its expenses in demolishing the property that the private owners should have destroyed themselves.

Likewise, the law itself does not make such a self-protective owner liable for damages to everyone whose property burned but might not have if the owner had destroyed her own property, and it is hard to see how justice would demand such liability. Indeed, if it were otherwise, anyone who failed to demolish his own house when doing so could have served as a firebreak would be liable to everyone "downstream" whose houses burned as a result, which would amount to imposing liability on everyone except the owner of the last house to burn. So (almost) everyone would be a "wrongdoer" on this view, which seems wholly implausible as a characterization of disasters. Conflagrations create masses of victims, not masses of delinquents who have failed to act with enough solicitude of others to destroy their own buildings.

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124. As a purely doctrinal matter, the mere fact that more than one owner is engaged in some activity does not immunize that activity from being deemed a nuisance. However, if the plaintiff himself is also engaged in that same activity, that may affect the availability of a nuisance judgment. *See* 66 C.J.S. *Nuisances* § 22.

125. *County of Westchester v. Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (footnote omitted).

126. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (discussing the remedies available for public nuisances).

127. 13 AM. JUR. 2D *Buildings* § 52 (2015).

So, in the end, in spite of any superficial initial plausibility, attempting to “extend” nuisance doctrine to justify refusing to compensate owners of property destroyed to address emergencies is unconvincing.

### C. *Compensation Is Superfluous*

A third set of arguments contends that the government should not be required to pay compensation because it would be superfluous. One version of this argument asserts that the owner of the destroyed property in fact has already received “in-kind” compensation for her loss and therefore has no just claim to receive monetary compensation as well. A second version suggests that there is no need for the government to mitigate the losses suffered from emergency destruction because private insurance could protect property owners just as well, and perhaps more efficiently. And a third argument asserts that the compensation requirement’s general purpose in ordinary takings situations is to prevent socially inefficient opportunistic behavior, but that the risk of such opportunism is low in emergency-destruction situations, and therefore a compensation requirement is unnecessary. Each of these arguments can be examined separately, and their inadequacy will soon be evident.

#### 1. Implicit Ex Ante Compensation

One defense of the noncompensation principle asserts that monetary compensation for emergency destruction is unnecessary because the owners of the demolished property have already received compensation in a non-monetary form. For example, Dana and Merrill suggest that

[t]he 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.<sup>128</sup>

This sort of argument is one type of a common general invocation of “in-kind compensation” or “reciprocal advantage” to justify burdensome government actions that provide no monetary compensation to the people on whom the burdens fall, even though justice would appear to require compensation.<sup>129</sup> The typical suggestion is that the presence of “in-kind compensation” makes up for the lack of monetary compensation, ensuring

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128. DANA & MERRILL, *supra* note 6, at 119. Lior Strahilevitz argued for a similar conclusion in a case in which police damaged rental property while apprehending a suspected drug dealer. See Strahilevitz, *supra* note 35, at 1975, 1977–78 (arguing that the landlord was entitled to zero compensation because the economic value of not having a drug dealer nearby—value that the landlord could capture by charging higher rents—compensated the landlord for the \$718 loss).

129. The same basic concept goes under a variety of names. Justice Holmes famously referred to it as “average reciprocity of advantage” in *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Brandeis’s dissent in that case adopted similar language, referring to “reciprocal advantage.” *Id.* at 422 (Brandeis, J. dissenting). Some prominent modern commentators use

that the affected parties have been made whole and thus have no just claim for further compensation.<sup>130</sup> Space does not permit consideration here of the general plausibility of appeals to in-kind compensation. This Section argues, however, that such appeals lack plausibility in the specific context of emergency destruction.

Dana and Merrill's formulation of the argument can serve as a starting point for understanding the problem. The first thing to notice is that the suggestion that owners "receive implicit compensation in the form of reduced insurance rates for giving up the right to *ex post* compensation" cannot be quite right. The problem lies in the failure to distinguish between the two separate questions of whether the destruction of property in an emergency is permissible even without the owner's permission and whether the owner of such property is entitled to compensation for the loss inflicted by that destruction. (This distinction will be familiar from Part II's discussion of the difference between destruction necessity and noncompensation necessity.) As Dana and Merrill note, an affirmative answer to the first question—that is, an assertion that emergency destruction is permissible—tends to reduce the total amount of destruction caused by a large fire.<sup>131</sup> That decrease in turn tends to decrease the number and size of claims that fire insurance companies may be obligated to pay, and consequently tends to decrease the premiums that owners must pay to purchase such insurance.

But the source of this benefit is the ability to destroy property to create a firebreak. Removal of combustible material is what minimizes the destructiveness of fires. By contrast, relinquishing a "right to *ex post* compensation" has no effect on fires' harmfulness, and therefore provides no benefits to the owner of the destroyed property. Presumably what Dana and Merrill really had in mind, therefore, was a different argument: because the policy of allowing emergency destruction reduces the total destructiveness of fires, and thus insurance premiums, the owner of property demolished in such emergencies has already received in-kind compensation in the form of lower insurance premiums, and therefore is not owed separate monetary compensation specifically for the loss of the demolished property.

This argument rests on certain assumptions that may not be true in practice. One key assumption is that the owner of the demolished property has been paying for insurance against the relevant sort of loss. In the case of

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the term "in-kind compensation." See, e.g., RICHARD A. EPSTEIN, *TAKINGS* 195 (1985) ("implicit in-kind compensation"); Fennell, *Taking Eminent Domain Apart*, *supra* note 76, at 987 ("in-kind compensation").

130. General works on "in-kind compensation" include Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990); Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997). For a general critique of suggestions that in-kind compensation can reliably make owners "whole" when other forms of compensation are lacking, see Brian Angelo Lee, *Average Reciprocity of Advantage*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 99 (James Penner & Henry E. Smith eds., 2013).

131. DANA & MERRILL, *supra* note 6, at 119.

fire, that might commonly be true. The very poor, however, may not be able to afford fire insurance, in which case they would have received no benefit at all. Moreover, other forms of emergency destruction, such as wartime destruction, may involve catastrophes for which no insurance is available.

It will not help to suggest that even uninsured burdened parties received a compensating benefit from the general effect of decreasing the risk of losing one's property in a fire. Whatever plausibility such arguments might have in other contexts, in the context of emergency destruction they are quite paradoxical. It is difficult to see how someone whose property has been destroyed to protect other people's property has been made whole by the possibility that other people's property might have been destroyed to save his. Such an assertion would amount to the seemingly paradoxical claim that losing one's property is the price that one must be willing to pay to reduce the chances of losing one's property.

Even if one were to set aside those concerns, however, and stipulate that all of the relevant parties are insured, the argument still would not be convincing. As a general matter, it is hard to evaluate an argument of this sort unless it is accompanied by some empirical analysis showing that the size of the benefit received in fact does match or exceed the size of the loss—that is, in this case showing that the owner of the demolished property was in fact made whole by the lower insurance rates that the availability of emergency destruction made possible. Given the uncertainty that characterizes much of life, that calculation may often be difficult or impossible to make. In practice, such calculations are conspicuously absent from invocations of in-kind compensation. Consequently, assertions that in-kind compensation *in fact* makes owners of demolished property whole must be taken on faith, without any reason offered for embracing such a faith.

Moreover, this particular article of faith seems unlikely to be true. The point of insurance is to spread the costs of low probability but severe losses among a pool of people who agree to insure each other.<sup>132</sup> Thus, the total amount that an insured party pays in premiums should ordinarily be significantly less than the amount of the party's claim for insurance benefits if a loss actually does occur.<sup>133</sup> The very reason that insurance is attractive is the expectation that the sum of the premiums paid will be less than the amount of the covered loss if a loss occurs. Thus, there is no possible reduction in premiums that would equal the size of the loss that was actually experienced if a loss occurs.

But even if the magnitude of the loss and the magnitude of the in-kind benefit somehow happened to match, another basic problem remains. Although everyone shares the benefit of a reduction in insurance premiums, the cost of the destruction that enabled that reduction is imposed on the demolished property's owner alone. Thus, that owner's net result is worse

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132. See 1 JEFFREY E. THOMAS, *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION* § 1.01 (2015).

133. See Allan H. Willett, *Function of Fire Insurance*, in *FIRE INSURANCE* 41, 41–44 (Lester W. Zartman ed., 1909).

than everyone else's. This is a familiar issue in takings law in general.<sup>134</sup> As a result, takings doctrine has developed a standard solution: when an entire parcel is taken through eminent domain, compensation is paid for the fair market value of the parcel, and when only part of a parcel is taken, the amount of compensation paid to the parcel's owner is reduced to account only for any increase in value that the remaining portion *especially* enjoys as a result of the project.<sup>135</sup> It is not reduced to account for increases in value that are widely shared.<sup>136</sup> The underlying rationale is simple and intuitively plausible: to the extent that the government's confiscation has made the burdened owner worse off than everyone else, the government is obligated to remedy the inequality by paying compensation for the imposed loss.<sup>137</sup>

That some act of destruction occurs as the result of an emergency provides no obvious reason to abandon this basic principle. Hence, the presence of widely shared benefits in the form of lower insurance rates does not justify refusing to compensate those who were compelled to suffer the losses that produce those benefits. Indeed, effectively penalizing a party for being compelled to provide a benefit to others seems perverse.

## 2. Private Insurance as Substitute for Public Compensation

A related argument in favor of the noncompensation principle suggests that requiring the government to pay compensation is unnecessary because private insurance could protect property owners just as well, and perhaps more efficiently. This argument's basic premise—the idea that government compensation for takings might be considered a form of insurance—is not a recent invention. In an 1840 opinion addressing a claim arising out of the Great New York Fire of 1835, Gulian Crommelin Verplanck suggested that a New York statute providing compensation to owners of buildings destroyed to create firebreaks could be justified as akin to a mandatory insurance policy administered by the government:

As it is a calamity to which all parts of the city may at different times be subject, the whole city may fairly be made liable by law to contribute whenever it occurs. It is so far a sort of mutual insurance, and all property is held subject to that agreement and responsibility, with all the contingent future benefits of it as well as the burden.<sup>138</sup>

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134. For one statement of the issue in the standard takings context, see James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866.

135. 26 AM. JUR. 2D *Eminent Domain* § 338 (2015).

136. *Id.*

137. *Pennell v. City of San Jose*, 485 U.S. 1, 19–20, 22–23 (1988) (Scalia, J., concurring in part and dissenting in part) (noting the connection between regulatory-takings requirements and ensuring that owners burdened by regulations are not “singled out unfairly,” and applying that principle to a rent-control ordinance); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991) (noting compensation requirements to avoid “singl[ing] out”).

138. *Stone v. Mayor of New York*, 25 Wend. 157, 176–77 (N.Y. 1840) (opinion of Verplanck, Sen.).

It is then perhaps not surprising that some modern commentators have suggested that private insurance could, and arguably should, replace government-paid compensation for any form of taking, including eminent domain. For example, Steven Shavell has argued that because any compensation paid by the government would be funded through taxation, owners who receive the compensation would be no better off than if they had purchased private insurance:

[T]hrough payment of higher taxes to finance compensation for takings, individuals must implicitly pay exactly the premium they would be charged for private insurance coverage against takings. Thus, given the existence of well-functioning insurance markets, the social need for risk-averse individuals to be compensated against loss does not imply that the state should pay compensation if it takes property; a regime in which private parties purchase insurance coverage would be essentially the same as one of state payment of compensation.<sup>139</sup>

This argument rests on an empirical assumption about the presence of “well-functioning insurance markets” for coverage against government destruction of property.<sup>140</sup> That assumption is controversial.<sup>141</sup>

An additional complication is that a private insurance policy is only as good as the solvency of the firm that issued it, and widespread calamities may cause insurance companies to fail. For example, in the aftermath of the Great New York Fire of 1835, all but two or three insurance companies went bankrupt. (Accounts differ on the exact number.)<sup>142</sup> Today reinsurance providers may mitigate that danger, but even large reinsurance companies cannot necessarily be assumed to remain solvent in a crisis.<sup>143</sup> Also worth noting is that the cases that have shaped the emergency destruction doctrine over the centuries are ones in which insurance seems not to have been available, since

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139. SHAVELL, *supra* note 53, at 128; *see also* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602–06 (1986) (discussing the extent to which Kaplow’s basic criticism of governmental compensation for legal transitions applies to the specific case of takings).

140. In the case of private fire insurance, some jurisdictions have routinely interpreted fire-insurance contracts in a way that effectively requires fire-insurance companies to cover losses caused by the creation of firebreaks. *See, e.g.*, 13 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 131 (David S. Garland & Lucius P. McGehee eds., Northport, Edward Thompson Co. 2d ed. 1899); Hall & Wigmore, *supra* note 9, at 506–07.

141. *Compare* SHAVELL, *supra* note 53, at 128 & n.27 (responding to arguments that markets cannot be relied on to provide the necessary insurance coverage), *with* DANA & MERRILL, *supra* note 6, at 41 n.64 (arguing that “[s]ome confirmation of the market failure hypothesis is provided by the market for insurance against expropriation of foreign investments”).

142. *See, e.g.*, STONE, *supra* note 17, at 476. At least one of the firms that avoided bankruptcy did so merely because it had issued very little coverage in the burnt area. HENRY R. GALL & WILLIAM GEORGE JORDAN, *ONE HUNDRED YEARS OF FIRE INSURANCE* 75 (1919).

143. *See, e.g.*, J. David Cummins & Mary A. Weiss, *Systemic Risk and Regulation of the U.S. Insurance Industry*, in *MODERNIZING INSURANCE REGULATION* 85 (John H. Biggs & Matthew P. Richardson eds., 2014) (discussing the systemic risk of a “retrocession spiral” in reinsurance markets).

the plaintiffs were individuals or directly affected businesses, rather than insurance companies seeking indemnification.<sup>144</sup> This fact does not prove that a robust supply of such private insurance could not arise today, but it does suggest that obstacles to the creation of such insurance markets are not purely hypothetical.

Even on the assumption that such insurance would be readily available, any initial plausibility that this argument might have vanishes as soon as one looks beyond simple considerations of total social efficiency and begins to consider the argument's distributional consequences. Two major problems arise immediately. Although these two problems are not the only significant difficulties that this argument faces, they are sufficient for present purposes.<sup>145</sup>

First is the problem of how the funds to pay the compensation are raised. Even if the total amount raised through taxation (if the government pays compensation) would be the same as the amount raised through insurance premiums (if compensation is left to private insurance), the distribution of that fiscal burden across individuals may be quite different. Taxation in theory, and often in practice, can be "progressive," in the sense that the marginal tax rate may increase as the amount of the taxed item (for example, income) grows larger.<sup>146</sup> The effect is to impose average tax rates that are higher on the rich than on the poor. By contrast, insurance premiums are determined by applying a flat rate to the value of the insured property, with no regard to the insurance purchaser's ability to pay. Thus, for example, an insurance company might charge \$1 to insure against \$100 of loss, no matter how wealthy the owner of the insured property is, while the government might charge rich people more than \$1 and poor people less than \$1 to fund \$100 of compensation. To the extent that one thinks that the costs of government-provided social benefits in general should be borne on a "progressive" basis, there is no obvious reason to abandon that general principle when the particular benefit is the safety provided by emergency destruction.

Moreover, even if one favors a "flat" taxation system rather than a "progressive" system, one might nevertheless believe that there should be a level of wealth or income below which a poor citizen should not owe taxes. The current U.S. income-taxation system reflects that concern by having exemptions and deductions that effectively shield certain people from any income-tax liability.<sup>147</sup> The approach makes sense because the very poor may have so little money that necessary expenses consume it all and they simply cannot

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144. See *infra* Part IV.

145. Space does not permit a comprehensive consideration of proposals to substitute private insurance for government compensation, important though that topic is.

146. E.g., 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 3.5.3 (3d ed. Supp. No. 1 2015).

147. See, e.g., Robertson Williams, *Who Pays No Federal Income Tax? A 2013 Update*, TAX NOTES, Sept. 30, 2013, at 1615.

afford to lose any of it in taxes.<sup>148</sup> For the same reason, impoverished individuals who are barely getting by could not afford the additional expense of purchasing insurance against the government's destroying their property. The practical result of substituting private insurance for government compensation therefore would be to leave an entire group of property owners uncompensated for the losses imposed on them by the government, and, even worse, that group would disproportionately be made up of those who have the least resources to bear that loss.<sup>149</sup>

A second problem compounds this distributional inequity. For an insurance fund to remain solvent, it must take in enough money in premiums to cover the expected value of the benefits that it will have to pay.<sup>150</sup> As a result, the price of insurance for a given item is ordinarily based on two factors—the item's value and the likelihood that the item will suffer a loss.<sup>151</sup> As the value of the property increases, the cost of insurance increases, because in the event of a loss the insurance fund will have to cover a larger benefit. Likewise, as the risk of loss increases, insurance premiums increase because the likelihood that the insurance fund will have to cover a loss increases.

This fundamental structure of private insurance means that the premium charged to a purchaser of insurance against government destruction of a particular piece of property would increase as the risk of that destruction increased. That risk is not distributed equally or purely at random. Because the "necessity exception" applies only to the destruction of relatively less valuable property, done to protect relatively more valuable property, the risk of destruction is inherently greater for low-value property than it is for high-value property.<sup>152</sup> Moreover, from a public choice perspective, one may suspect that political pressure will lead to poor people's property being sacrificed more often than rich people's property. Politicians are unlikely to order the destruction of a row of mansions to save a few blocks of nondescript poor laborers' homes. Therefore, for each dollar of insurance coverage purchased, the price of that coverage for low-value property would be higher

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148. In economic terms, the marginal value of an extra dollar to a very poor person is very high, while the marginal value of an extra dollar to a very wealthy person is much less. See, e.g., SHAVELL, *supra* note 53, at 648. Granting the former a zero marginal tax rate while imposing a higher marginal tax rate on the latter therefore can maximize the social welfare achieved at a given level of tax revenue.

149. One way to address that problem would be for the government to subsidize purchases of private insurance. That approach, however, really just amounts to the government's paying compensation. All that changes is the mechanism by which that compensation is delivered.

150. See, e.g., COOTER & ULEN, *supra* note 93, at 48 ("Insurance companies attempt to set their premiums so that, roughly, the premium modestly exceeds the expected monetary value of the loss.").

151. For a basic description of mathematical expectation, see *id.* at 43–44.

152. See, e.g., RESTATEMENT (SECOND) OF TORTS § 197 cmt. d (AM LAW INST. 1965) (asserting, in the context of private necessity, that the exception applies "only where the property sought to be saved is of considerably greater value than the amount of probable harm to the possessor's land or chattels").

than the price of that coverage for high-value property. (The total price of the insurance coverage of course would likely be higher for highly valuable property than for less valuable property, because the total amount of coverage is higher, but the *rate* at which each dollar of insurance was charged would be greater for the low-value property.) Since it is likely that low-value property will tend to be owned by poorer people, while high-value property will tend to be owned by richer people, the ultimate effect would be to finance compensation by charging poor people at a higher rate than rich people. Thus a system of private insurance against losses from emergency takings would rest on a revenue-raising system that not only would lack progressivity, but would actually be regressive.

In sum, even if private insurance for losses imposed by the government as a result of emergency destruction is reliably available, which itself might be unlikely, a requirement that property owners purchase such insurance rather than receive compensation from the government lacks plausibility in light of established beliefs about the appropriate distribution of burdens imposed to provide social benefits.

### 3. Little Risk of Opportunism

An alternative justification for the noncompensation principle is that compensation is unnecessary because in emergency-destruction situations there naturally is little risk of opportunistic behavior by small but politically influential groups pursuing their own interests. This argument rests on an assumption that in ordinary cases the purpose of takings compensation is to diminish “rent-seeking” behavior by individuals or small groups who might be expected to seek to harness the state’s coercive power for their own personal benefit at the expense of the public good.<sup>153</sup> This danger is potentially acute in ordinary eminent-domain circumstances, in which the government might coercively take property from some private owners to give it to other private owners, thereby relieving the latter of the difficulty and expense of paying a purchase price to which the former would voluntarily agree. Prominent recent controversies surrounding redevelopment projects in Connecticut and New York testify to the political potency of concerns that powerful and wealthy private entities can co-opt the state’s eminent-domain power to increase their own private benefits.<sup>154</sup> Because a requirement to compensate

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153. There is no single canonical definition of “rent seeking” or “opportunism” in this context. One prominent definition of “opportunism” is Oliver Williamson’s: “self-interest seeking with guile.” OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 47 (1985). Saul Levmore defines “rent seeking” more broadly: “resource-consuming activity undertaken to gain a profit or government-sponsored advantage.” Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 818 (2010). For an example of judicial notice of this general phenomenon, see *Lichter v. United States*, 334 U.S. 742, 769 (1948) (“In this country, every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized.” (quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 309 (1942))).

154. See, e.g., George F. Will, Opinion, *In N.Y., Government’s Eminent Arrogance*, WASH. POST, Jan. 3, 2010, at A17 (criticizing the use of eminent domain for the Atlantic Yards project

owners of taken property sharply decreases the potential private gains available by co-opting the government's taking power, a compensation requirement might be expected to discourage such attempts and thus lead to a more socially fruitful allocation of resources.<sup>155</sup>

A simple argument in favor of the noncompensation principle results from combining this assumption about the purpose of takings compensation with a second assumption that private entities commonly stand to gain much less from the government's destruction of others' property than they would from the government's confiscating that property and transferring its ownership to them. Because there is much less incentive for opportunistic behavior with respect to emergency destruction than there is with respect to ordinary takings, there consequently is no need to require compensation when the government engages in such destruction.<sup>156</sup>

This argument faces several serious difficulties. First, as a matter of existing law and policy, the argument is difficult to reconcile with the well-established requirement that the government pay compensation to owners of property that the government destroys under ordinary circumstances.<sup>157</sup> If the purpose of takings compensation really were merely to avoid opportunism, and if the risk of opportunism really is low when the government destroys property, then one would expect there to be no compensation requirement for any instance of government destruction, whether it occurred in ordinary circumstances or in an emergency. Hence, the law's treating these two sorts of destruction differently remains puzzling on this account.

Likewise, if the argument's assumptions were correct, one would expect that compensation would be a focal point of disagreement in public controversies over projects in which opportunism was suspected to play a role. In the prominent examples noted earlier, however, the public debate and the relevant litigation revolved not around whether the owners of taken property should receive compensation, but rather around whether the taking

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in Brooklyn); Jeff Jacoby, Opinion, *Eminent Disaster*, Bos. *GLOBE* (Mar. 12, 2014), <https://www.bostonglobe.com/opinion/2014/03/12/the-devastation-caused-eminent-domain-abuse/yWsy0MNEZ91TM94PYQIh0L/story.html> (criticizing the use of eminent domain for the economic development project that prompted the takings dispute in *Kelo v. New London*); Jillian Kumagai, *Columbia Controversies: Eminent Domain in Manhattanville, December 2008*, COLUM. SPECTATOR (Aug. 26, 2012), <http://columbiaspectator.com/news/2012/08/26/columbia-controversies-eminant-domain-manhattanville-december-2008> (discussing the controversy over the use of eminent domain for Columbia University's expansion in New York's Manhattanville neighborhood).

155. See, e.g., SHAVELL, *supra* note 53, at 129–30; cf. Merrill, *supra* note 76, at 87 (“[E]minent domain is considerably less attractive as a target for rent seeking than, for example, a government grant or a tax abatement, neither of which requires [compensation or paying the implementation costs of condemnation].”).

156. Thanks to workshop participants for calling attention to this argument. For a version of this argument focusing on the danger of the government's acting to “enrich itself,” see Cohen, *supra* note 35, at 24. For a judicial opinion relying on the role of government choice as grounds for distinguishing emergency destruction from ordinary takings, see *Walker v. United States*, 34 Ct. Cl. 345, 347 (1899).

157. See sources cited *supra* note 2.

should be allowed at all.<sup>158</sup> The fact that the owners would receive compensation was tangential to the issues actually raised. (In doctrinal terms, the legal disputes focused on whether the relevant projects qualified as “public uses,” rather than on whether they involved “just compensation.”)<sup>159</sup>

Second, it is far from clear that the risk of opportunistic behavior in emergency-destruction cases would in fact be low in the absence of any requirement to pay compensation.<sup>160</sup> Although the arrival of emergencies is typically outside anyone’s control, emergency destruction, by nature, occurs only when stakes are high. That fact introduces the possibility that those whose wealth would be threatened by continued progress of the danger would be highly motivated to attempt to influence officials to destroy property as a bulwark against that progress even when the risks of catastrophe were still relatively low and disinterested prudence might ordinarily counsel waiting to see how circumstances develop.<sup>161</sup> This concern becomes even greater when the public officials themselves have a stake in the outcome because they own property in the threatened area or own investments that might otherwise be affected.<sup>162</sup> The limited information available about historical examples ultimately does not permit estimating the size of the risk of opportunism in emergency-destruction situations. If, however, one does subscribe to the view that a compensation requirement’s purpose is to discourage opportunism, one cannot assume that the relevance of such a requirement would vanish in emergencies.

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158. *Kelo v. City of New London*, 545 U.S. 469 (2005) (concerning the New London, Connecticut project); *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010) (concerning the Manhattanville project); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (concerning the Atlantic Yards project).

159. Cf. COOTER & ULEN, *supra* note 93, at 176 (arguing that the fair-market value compensation requirement will not prevent opportunistic confiscations and that the solution to this problem is the public-use requirement); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 125, 131 (1992) (arguing that the compensation requirement is unlikely to be effective at deterring rent-seeking, and therefore should not be understood as aiming at that goal); Levmore, *supra* note 153, at 851–52 (acknowledging that “uncompensated takings surely generate rent-seeking behavior,” while also arguing that paying compensation might have a similar effect).

160. Cf. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 872 (1995) (arguing that, in light of “process failure” justifications of the Takings Clause, that clause is best understood as requiring compensation when “a governmental action affects only the property interests of an individual or a small group of people and when, in the absence of compensation, there would be a lack of horizontal equity (that is, when compensation is the norm in similar circumstances)”).

161. See HAMILTON, *supra* note 91, at 285 (mentioning his having lobbied public officials to order destruction of warehouses during the Great New York Fire of 1835); cf. Kuo, *supra* note 9, at 130 (“[R]equiring the state to compensate individuals for economic loss would provide some assurance that disaster tradeoffs were meant to maximize aggregate welfare and not to protect powerful constituencies.”).

162. This concern is not purely hypothetical. In the Great New York Fire of 1835, New York’s mayor was far from a disinterested decisionmaker. See EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 595 (1999) (“Sam Ruggles was deeply concerned—doubly so because he, like many large property owners, including Mayor Cornelius Lawrence, held substantial shares in fire insurance companies.”).

A more fundamental difficulty with this argument is a general one shared by any argument that focuses exclusively on extrinsic justifications for requiring compensation in ordinary circumstances. Even if decreasing potential returns to opportunistic maneuvering plays some role in motivating compensation requirements, aiming at such a decrease could not be the sole consideration. The U.S. Supreme Court has repeatedly emphasized the fairness aspect of takings compensation, routinely invoking Justice Hugo Black's famous words in *Armstrong v. United States*, "[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."<sup>163</sup>

Reducing occasions for opportunism may promote fairness but is hardly sufficient to ensure fairness. It is difficult to imagine that any property owner who has suffered an uncompensated loss when the government took her property would find much consolation in reliable assurances that opportunism played no role in the confiscation of that property, nor in assurances that the taking did promote overall social efficiency. The fact that the public genuinely benefited from the destruction of one's property is no substitute for having an intact roof under which to take shelter when rain comes.

This problem arises even if one adopts a narrow, purely consequentialist idea of "fairness." Frank Michelman famously noted that utilitarian analyses of takings law need to take account of the psychological effects of government policies, specifically their potential "demoralization costs."<sup>164</sup> In the context of emergency takings, establishing merely that there was a low risk that opportunism influenced a government's decision to destroy property is insufficient to show that society can dispense with paying compensation for that property, because the uncompensated loss (as well as the risk of such losses) might create significant demoralization among owners who have suffered such losses or fear that they might. Moreover, a feeling of being exploited might intensify demoralization costs if the unlucky owners see that others are benefiting from the imposition of those losses. Whether those costs in any given case of emergency destruction would be large enough to outweigh the social benefits of not paying compensation—most likely benefits in the form of lower costs of administration—is an empirical question that cannot be resolved here. For present purposes, it is sufficient to recognize that this open question exists, and therefore even on assumptions favorable to the opportunism argument, that argument is insufficient by itself to justify the noncompensation principle.

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163. 364 U.S. 40, 49 (1960); see also William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153–54 (1997) (noting that Black's language has "received a remarkable degree of assent across the spectrum of opinion"). For later invocations of the principle, see, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

164. Michelman, *supra* note 67, at 1214–15.

#### D. *Alternative Sources of Authority*

A final set of defenses of the noncompensation principle asserts that the government's destruction of property in an emergency is not an exercise of the government's power of eminent domain but rather some other power, one that carries no obligation to compensate the destroyed property's owners. The two most prominent versions of these theories assert either that the government was merely doing what a private individual had a right to do without paying compensation, or that—in the case of wartime destruction—the government was exercising a war-making power that does not require compensation. As will soon be evident, both sets of arguments are unpersuasive.

##### 1. “Natural” Private Rights of Destruction

One version of this argument asserts that the government owes no compensation for acts such as destroying a building to create a firebreak, because the government's performance of those acts merely replicates what private individuals, at common law, may themselves do without owing compensation.<sup>165</sup> For example, in *Russell v. Mayor of New York*, a case arising out of the Great New York Fire of 1835, the highest court in New York asserted that

the assumption of the plaintiff, that this was a case of the exercise of the right of *eminent domain*, will prove a fallacy. . . . The destruction of this property was authorized by the law of overruling necessity; it was the exercise of a natural right belonging to every individual, not conferred by law, but tacitly excepted from all human codes.<sup>166</sup>

Similarly, the Restatement (Second) of Torts asserts that “[t]he privilege to avert a public disaster” by means of conducting emergency destruction “is given to the actor in his capacity as a private person” and thus applies to government officials even when statutory authority is lacking.<sup>167</sup> This privilege, the Restatement further asserts, immunizes the public official from liability for the destruction, unless that destruction was unreasonable.<sup>168</sup>

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165. See *Mayor of New York v. Lord*, 17 Wend. 285 (N.Y. Sup. Ct.), *aff'd*, 18 Wend. 126 (N.Y. 1837) (“No doubt, at common law, any person, in case of actual necessity to prevent the spreading of a fire, might prostrate a building in a block or street, without being responsible in trespass or otherwise. No legal redress existed for the injury though the sufferer might have been thereby ruined.”). The mention of “legal redress” leaves open the possibility that some equitable remedy might still have been available. See *Stone v. Mayor of New York*, 25 Wend. 157, 174–75 (N.Y. 1840) (opinion of Verplanck, Sen.) (suggesting that the owner of property destroyed to create a firebreak might have “an equitable right of compensation against those who have benefited by his loss in the preservation of their property”).

166. 2 Denio 461, 473–74 (N.Y. 1845) (opinion of Sherman, Sen.). For other examples, see *Surocco v. Geary*, 3 Cal. 69, 73 (1853); *Hale v. Lawrence*, 21 N.J.L. 714, 729 (N.J. 1848) (opinion of Nevius, J.).

167. RESTATEMENT (SECOND) OF TORTS § 196 cmts. c & f (AM. LAW. INST. 1965).

168. See *id.* § 196 cmt. b.

This argument obviously will not apply to destruction of property in the course of military operations, which are quintessentially not private actions. Moreover, whatever plausibility this argument had in the nineteenth century, the development of twentieth-century law has undermined its doctrinal foundations.<sup>169</sup> As even the Restatement acknowledges, private necessity today does not automatically exempt the private individual who inflicts damage out of necessity from a requirement to pay compensation for that damage.<sup>170</sup>

More important, however, is the argument's lack of general plausibility. Intuitively, it is far-fetched to assert that an act by a public official, on duty, to promote the public welfare is in fact a "private" act. Although typically no attempt is made to justify that assertion, a few courts and commentators have suggested that emergency destruction was not a "public" act because the act's beneficiaries were only the subset of the public that had been threatened by the harmful condition, rather than the entire public.<sup>171</sup> This argument relies on an implausibly stringent definition of the "public" good, a definition that would classify even paradigm instances of ordinary eminent domain as not for a "public" use, and therefore unconstitutional. For example, if the government takes land to build a highway, the beneficiaries will not be everyone in the public, but only those who travel in that particular geographic area (or, if the road happens to connect a commercial district, those who purchase goods that can be delivered more cheaply via that highway). Much of the population—perhaps the great majority—will experience no individual benefit at all. Nevertheless, such takings are routine. Any doctrinal argument implying that almost all exercises of eminent domain have been unconstitutional is unlikely to be correct.

An added doctrinal difficulty is that the Supreme Court has explicitly held that the amount of compensation owed for a taking is determined by the size of the loss suffered by the owner of the taken property, not by the size of the gain enjoyed by the taker.<sup>172</sup> In the emergency-destruction context, the fact that fewer people benefited from the destruction than might have benefited from some other taking—that is, that the benefit to the taker (the public) was smaller than it might have been—does not make the loss of

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169. Arguments of this sort may have seemed especially plausible in eras when firefighting services were provided by private companies rather than by the government. In such circumstances, government-ordered destruction during a conflagration would look like a natural extension of what private persons were already doing.

170. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 197 cmt. j; *see also* *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). The *Vincent* court did explicitly note that the issue before it was not one in which "life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster." *Vincent*, 124 N.W. at 222. That remark implies the court's openness to the possibility that the compensation requirement might differ in such a situation.

171. *E.g.*, *Stone v. Mayor of New York*, 25 Wend. 157, 173–74 (N.Y. 1840) (opinion of Verplanck, Sen.); *cf.* *Surocco v. Geary*, 3 Cal. 69, 74 (1853).

172. *E.g.*, *United States v. Miller*, 317 U.S. 369, 375 (1943); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

the destroyed property any less burdensome on the owner of that property, and thus presumably should not reduce the amount of compensation owed.

Even setting that worry aside, however, a basic problem with the argument is its incomplete analysis of the assertion that private individuals do not owe compensation for emergency destruction. Once one examines the reasons why such an exemption might have existed for private individuals, it becomes clear that, to the extent that those reasons are plausible at all, they do not survive translation to the very different context of governmental destruction.

As the passage quoted above from *Russell v. Mayor of New York* indicates, the traditional justification for not requiring compensation in such circumstances is that destroying property in an emergency to defend oneself or others is a “natural right belonging to every individual.”<sup>173</sup> Courts typically have not elaborated on the logic of this argument, but it implicitly takes the assumed existence of such a natural right to imply that the destruction was not wrongful, and therefore that there is no obligation to pay compensation for that destruction.<sup>174</sup>

This argument faces several difficulties. First, as noted in Part II, rectifying wrongs is only one potential role for compensation.<sup>175</sup> Hence, this argument would be sound only if it provided some plausible explanation of why none of compensation’s other roles are present in emergency-destruction situations. But no such explanation is offered, nor are there any obvious candidates to fill that gap.

Second, the argument’s appeal to natural rights as justifying the noncompensation principle is question-begging.<sup>176</sup> From an initial assumption that one has a natural right to destroy others’ property to protect one’s own, these arguments simply jump to the conclusion that one has a natural right to do so *without paying compensation* to the injured owner of the sacrificed property. Those two rights are quite different, however, and accepting the existence of the former does not itself settle whether the latter also exists. Having the right to do something does not by itself entail having a right to do it for free. For similar reasons, invoking “background principles” of property law as limiting the scope of claims for compensation would offer little

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173. 2 Denio 461, 473–74 (N.Y. 1845); see also *Bowditch v. Boston*, 101 U.S. 16, 19 (1880); *Am. Print Works v. Lawrence*, 23 N.J.L. 590, 605 (N.J. 1851) (opinion of Carpenter, J.); *id.* at 615 (opinion of Randolph, J.); *Lawrence*, *supra* note 57, at 409–10.

174. For a modern discussion of the “natural right” argument, focusing on the initial (1847) trial court opinion in the American Print Works litigation arising out of the Great New York Fire of 1835, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1589–91 (2003).

175. See *supra* Section II.A.

176. Although a general debate over the propriety of appeals to natural law and natural rights has continued for decades, the details of that debate are beyond the scope of this Article. See, e.g., Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955).

illumination here.<sup>177</sup> It obviously is true that owners have no valid claim to compensation for the loss of something to which they did not actually have a right, and that existing doctrine exempts emergency destruction from compensation. But that observation merely raises the question of the doctrine's soundness rather than resolving it. The descriptive observation that the scope of property rights has some limitations does not itself offer any insight into the normative question of what those limitations should be.<sup>178</sup>

Moreover, the existence of a natural right to destroy property in emergencies without paying compensation is implausible. Even if some natural right of self-preservation permits inflicting injuries on others, it is difficult to see how there could be a "natural" right to inflict more injury than necessary.<sup>179</sup> If the presence of necessity creates a natural right to destroy, the scope of that necessity would inherently limit the scope of the right.<sup>180</sup> A key fact to note then is that even when destruction is necessary to stop a conflagration or other emergency, the need to destroy the property does not itself constitute a need to destroy the property *without paying compensation*. Stopping the threat may be impossible without inflicting damage on property, but paying compensation for the inflicted damage does not reduce the destruction's effectiveness at stopping fires. Hence, the need to stop a threat does not by itself justify uncompensated destruction when compensated destruction is possible. Put another way, uncompensated destruction inflicts more injury than is necessary to address the threat, since it leaves the victim worse off than compensated destruction would and yet is no more effective at ending the emergency. Because only compensated destruction is strictly necessary, only that type of destruction can be justified by a natural right to defend against that threat.

Since the natural-right justification for exempting private individuals from an obligation to pay compensation for their acts of emergency destruction is unpersuasive, some alternative explanation for that exemption would need to be found. The most plausible explanation springs from Part II's

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177. For an influential example of the use of the term "background principles" in this context, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

178. Cf. Timothy M. Mulvaney, *Foreground Principles*, 20 *Geo. Mason L. Rev.* 837 (2013) (offering a general critique of the appeal to "background principles" to determine the scope of constitutional protections of what ordinarily would seem to be property rights).

179. See *RESTATEMENT (SECOND) OF TORTS* § 196 cmt. e (AM. LAW INST. 1965) ("The actor must use reasonable care to avoid doing unnecessary harm to persons or things . . ."). For judicial examples of this principle at work, see, e.g., *Bowditch v. Boston*, 101 U.S. 16, 20 (1880); *Barton-Barnes Inc. v. State*, 583 N.Y.S.2d 547, 548 (App. Div. 1992) ("[B]efore the converter can rely upon the public necessity doctrine to justify ultimate destruction of the chattel it must demonstrate that reasonable efforts, albeit unsuccessful, were made at eradication [of the relevant threat], thus rendering destruction reasonably necessary.").

180. Dennis Klimchuk offers a similar argument. Interpreting and applying some remarks by Hugo Grotius, Klimchuk suggests that a "duty to repair" arises in cases where "damaging without compensation is an instance of taking more than one needs, as one would if one kept property when all that was necessary was borrowing it, or destroyed it when merely using it would have sufficed." Dennis Klimchuk, *Property and Necessity*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW*, *supra* note 130, at 47, 55–56, 65.

observation that an inability to pay compensation may give rise to a second form of necessity—noncompensation necessity—and the amount of compensation owed may accordingly decrease. When private individuals destroy property to protect others, it is quite likely that those individuals will simply be unable to pay, out of their own pockets, the amount of compensation that would be required to make the owners of that property whole. Therefore, a rule requiring individuals to pay for the costs of emergency destruction that they conducted to benefit others would both be intuitively unfair and create a strong disincentive to destroying property in emergencies, even when doing so would be very beneficial to society.<sup>181</sup> In short, it made sense for common-law doctrine to hold individuals exempt from compensating for reasonable destruction to address emergencies because in such circumstances two types of necessity were present, not just one. There was not only the need to destroy the relevant property, but also a need for the individual causing the destruction not to pay compensation, or at least not to pay full compensation, for the resulting loss.

These fundamental features of emergency destruction as conducted by private individuals are absent when public officials cause the destruction as part of fulfilling their official duty to protect the public. The implausibility of the incentives-based argument for the noncompensation principle in the context of destruction by public officials has already been discussed.<sup>182</sup> Likewise, property taxes enable the government to internalize the benefits of emergency destruction in ways that private individuals cannot. As a result, emergency destruction by individuals is much more likely to merit an exemption from liability to pay full compensation than government destruction is. Thus, the fact that private individuals sometimes have been permitted to engage in uncompensated destruction does not imply that similar permission is always appropriate for destruction by governments. Such permission would be appropriate only when the government itself truly faces noncompensation necessity as well as destruction necessity.

## 2. Military Necessity and the “Fortunes of War”

The arguments discussed so far have addressed emergency takings in general. Historically, however, a distinct set of arguments has sought to justify the noncompensation principle in the specific context of military destruction during emergencies. These arguments often rest heavily, either tacitly or explicitly, on a doctrine asserting that the government has no obligation to pay compensation for property damaged or destroyed during the ordinary course of a battle.<sup>183</sup>

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181. See *supra* Section III.A for a discussion of the noncompensation principle’s effects on incentives.

182. See *supra* Section III.A.

183. For a conventional statement of this doctrine, see *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1356 (Fed. Cir. 2004) (“It is axiomatic that the fifth amendment is not suspended in wartime, but it is equally well recognized that a destruction of private

One prominent example of this line of reasoning appeared in President Grant's messages to Congress after vetoing three bills that would have paid compensation for a handful of properties destroyed by the Union Army to keep them out of Confederate hands.<sup>184</sup> Grant's explanation for vetoing compensation for the owners of the Manchester (Kentucky) Salt Works relied heavily on the battle-damage exception:

[I]t is difficult upon any ground of reason or justice to distinguish between a case of [battle damage] and the one under consideration. Had General Craft and his command destroyed the salt works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government whether the destruction was in driving the enemy out or in keeping them out of the possession of the salt works?<sup>185</sup>

A variant of this argument appeared in the Supreme Court's decision denying Caltex compensation for the Army's destruction of its Manila petroleum facility during the Second World War. The Court argued that:

[h]ad the Army hesitated, had the facilities only been destroyed after retreat, respondents would certainly have no claims to compensation. . . . Nor do we think it legally significant that the destruction was effected prior to withdrawal. The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy.<sup>186</sup>

There is an element of plausibility to these arguments, and it is useful to identify exactly what it is and how it arises. Equally important, however, is to see why each of these arguments is ultimately unsuccessful.

The *Caltex* passage contains two main arguments.<sup>187</sup> The final quoted sentence's appeal to utility is unconvincing for reasons that by now are familiar. It leaps from the premise that the destruction was useful to the

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property in battle or by enemy forces is not compensable.") (quoting Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 396 F.2d 467, 470 (Ct. Cl. 1968)).

184. See President Ulysses S. Grant, Veto Message (Feb. 11, 1873), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 216, 216-17 (James D. Richardson ed., Washington, Gov't Printing Office 1898) [hereinafter MESSAGES OF THE PRESIDENTS] (vetoing Senate bill 161, "[a]n act for the relief of those suffering from the destruction of salt works near Manchester, Ky., pursuant to the order of Major-General Carlos Buell"); President Ulysses S. Grant, Veto Message (Jan. 29, 1873), in 7 MESSAGES OF THE PRESIDENTS, *supra*, at 215, 215-16 (vetoing "[t]he bill No. 490, entitled 'An act for the relief of the East Tennessee University'"); President Ulysses S. Grant, Veto Message (June 1, 1872), in 7 MESSAGES OF THE PRESIDENTS, *supra*, at 172, 172-73 (vetoing "[a]n act for the relief of J. Milton Best").

185. President Ulysses S. Grant, Veto Message (Feb. 11, 1873), in 7 MESSAGES OF THE PRESIDENTS, *supra* note 184, at 216, 217.

186. *United States v. Caltex, Inc.*, 344 U.S. 149, 155 (1952).

187. The penultimate sentence of the quoted passage implies a brief third argument that can quickly be dismissed. See *id.* Although it is true that the Caltex facility "was destroyed, not

conclusion that no compensation is owed for the destruction. Even if the Court is right that destroying Caltex's facility was useful, indeed so useful as to have been necessary, that fact would show only that engaging in the destruction did not wrong the property owner, and therefore that the owner was not entitled to restitution for a wrong. It would not, however, automatically rule out all of the roles that Section II.A noted compensation plays in such a situation, such as being a constitutive part of a legitimate taking. Nor does the need to destroy the facility establish the existence of a noncompensation necessity that would override those other sources of obligation.<sup>188</sup>

Grant's veto message offered a version of this utility argument that was slightly more sophisticated but no more plausible. Grant sought to buttress the analogy by pointing to a similarity in effect: "[The salt works'] destruction . . . though not happening in actual conflict, was perhaps as disastrous to the rebels as would have been a victory in battle."<sup>189</sup> There are two general reasons to doubt the assertion that because the destruction had the same usefulness as a victory in battle it therefore should be treated similarly for the purposes of determining whether there is an obligation to pay compensation. First, from a doctrinal perspective, a well-established principle of takings law is that the amount of compensation to be paid is determined by the size of the loss to the person whose property is taken, not by the gain to the taker.<sup>190</sup> Hence, determining whether compensation is owed by invoking the taking's great usefulness to the taker is precisely the opposite of the ordinary approach in assessing takings compensation.

A second, more general problem is that the argument proves too much. For example, taking land to build a water purification plant may be just as useful as prohibiting a factory from polluting a lake. Since it is uncontroversial that the government may prohibit that pollution without paying compensation (in an ordinary exercise of its police power), the comparable-usefulness argument would imply that therefore the government does not owe compensation for the land taken to build the purification plant. But of course that sort of confiscation is a paradigm of ordinary eminent domain, for which just compensation is required.

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appropriated for subsequent use," it has long been established that the government owes compensation for property that it destroys under ordinary circumstances no less than property that it expropriates to use under those circumstances. *See, e.g.,* *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *United States v. Causby*, 328 U.S. 256, 261–62 (1946). Hence, the Court's observation is irrelevant as a general analysis of takings. If, alternatively, it was intended to suggest that the difference between destruction and use has a distinct, special significance in emergency situations, then it is question-begging. Whether emergency confiscations for use and emergency destruction should be treated differently with respect to compensation is the very question to be answered, and noting that those two situations are not the same, while obviously true, equally obviously merely raises the question rather than answering it.

188. *See supra* Section II.B.

189. President Ulysses S. Grant, Veto Message (Feb. 11, 1873), *in* 7 MESSAGES OF THE PRESIDENTS, *supra* note 184, at 216, 217.

190. *See, e.g.,* *United States v. Miller*, 317 U.S. 369, 375 (1943) ("Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.").

The *Caltex* Court's other main argument echoes Grant's assertion that because the government would not have owed compensation for destroying property controlled by the enemy, therefore it must not owe compensation for destroying property that was not yet controlled by the enemy but eventually would be. Even if this argument is convincing, its scope is inherently limited to situations in which capture by the enemy was inevitable. Although that happened to be true when U.S. forces retreated from Manila in 1941, in other situations, in which capture by the enemy was only probable or possible, it is not obvious that the argument would still apply.<sup>191</sup>

Nor does the *Caltex* Court's invocation of the "fortunes of war" help advance its conclusion. No doubt it was *Caltex*'s bad luck that its facilities would be useful to an enemy army in wartime and that an enemy army was nearby. It was also *Caltex*'s bad luck that destroying the facility was necessary to slow that army's advance. As noted in Section II.B, however, the question whether destruction is permissible is distinct from the question whether compensation is owed for such destruction. As a result, the assertion that it is *Caltex*'s "bad luck" that the government needed to destroy the Manila facility, even if accepted, would not by itself justify refusing to compensate for the destruction of that facility: one could just as easily say that it is the *public's* bad luck that to slow an advancing army it needs to destroy an American's property, and thus it is the public's bad luck that it will have to pay compensation to that owner.

Moreover, bad luck is hardly unique to the emergency-destruction situation. Indeed, it is characteristic even of ordinary eminent-domain cases, for which compensation uncontroversially is required: although it is Jones's bad luck that her house is right in the path of the best route on which to build a new highway, the Fifth Amendment still requires compensating Jones for her house if the government condemns it to build the highway. Ultimately, these sorts of invocations of luck are unilluminating because they are inherently symmetric: if one can say that someone is unlucky that the public needs to destroy or confiscate that person's property, then one could equally well say that the public is unlucky that circumstances will force it to destroy or confiscate property for which it must pay compensation.

The same flaw lies at the heart of the Pennsylvania Supreme Court's influential assertion, in dicta in *Respublica v. Sparhawk*, that no compensation is owed for emergency destruction because "[i]t is a rule . . . that it is better to suffer a private mischief, than a public inconvenience."<sup>192</sup> (The particular claim at issue in *Sparhawk* was for the loss of goods during the

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191. This would especially be true when the government's actions made the capture more likely. The history of the wartime-noncompensation principle offers some prominent examples sharing a basic ironic form: the government had collected and relocated portable property to avoid its capture by an advancing enemy, only to see that enemy later capture the location where all of that property had conveniently been concentrated, thereby insuring that none of it would escape the enemy's grasp. See *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (addressing loss of property in the Mexican-American War); *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (addressing loss of property in the American War for Independence).

192. 1 Dall. at 362.

American War for Independence, caused by the government's attempt to prevent the goods' capture by British forces.) One could just as easily say that being obliged to contribute, via taxes, to compensating the owner of the destroyed property is a "private mischief" that is better to suffer than the "public inconvenience" of leaving members of the community at risk of being made destitute for the benefit of others. Alternatively, if what the *Sparhawk* court really meant was that it was better for one person to suffer an injury than for the public to suffer from losing the war, then the court conflated destruction necessity with noncompensation necessity. It is a false dichotomy to assert that the state must choose between, on the one hand, paying compensation to mitigate the "private mischief" of suffering lost property and, on the other hand, avoiding the "public inconvenience" of allowing the enemy to capture useful goods. The state could both take the property and pay compensation.<sup>193</sup>

The symmetry problem is not limited to luck-based justifications of the noncompensation principle. It applies equally to the battle-damage exception in general. Accepting the assertion that battle damage and wartime emergency destruction are relevantly similar does not automatically lead to the conclusion that compensation is owed for neither, as Grant and the *Caltex* Court assume. Logically, an equally possible alternative is that compensation should be paid for both. Determining which of those two conclusions makes more sense, or whether the two situations are in fact relevantly disanalogous (despite having some similarities), requires considering what the battle-damage exception's fundamental justification is in the first place. This question has drawn surprisingly little attention. Those who invoke the exception typically seem content to take its existence as a given.<sup>194</sup>

The most plausible justification rests on the practical difficulty of requiring compensation—that is, using the terminology introduced in Section II.B, it rests on the presence of administrative-noncompensation necessity.<sup>195</sup> Soldiers cannot afford to spend time in the midst of battle recording which property damage was caused by which side. Indeed, it often will be difficult to know which side was responsible for specific damage suffered by property caught in a battle's crossfire, and there is no guarantee that those who do happen to know will survive the conflict. Even if everyone acts fully in good

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193. It is possible that the *Sparhawk* court in fact was tacitly motivated by concerns about noncompensation necessity and simply failed to articulate them. Although the court did not address the question of financial exigency, Pennsylvania's attorney general had explicitly raised the issue. After listing several different types of emergency destruction that had occurred during the war, he asserted that if the property owner won in this case, those other owners would be entitled to compensation as well, and then asked rhetorically, "What nation could sustain the enormous load of debt which so ruinous a doctrine would create?" *Id.* at 362.

194. See, e.g., *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887); *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 396 F.2d 467, 470 (Ct. Cl. 1968).

195. Another possible justification for the battle-damage exception is that the owner of property destroyed in battle has already received nonmonetary compensation in the form of the sacrifices that his fellow nationals have themselves made for the war effort. But this attempted justification is implausible for the same basic reasons that reciprocal advantage arguments in these circumstances generally are implausible. See *supra* Section III.C.1.

faith, these facts would make any accurate allocation of compensation impossible, and the temptation of opportunism would multiply the difficulties. At least some self-interested property owners might be expected to present claims for damage caused by the other side or that had already existed when the battle began. Thus, destruction necessity is not the only form of necessity present in battles. The practical infeasibility of administering a compensation program for battle damage gives rise to administrative-noncompensation necessity as well.

Moreover, fiscal-noncompensation necessity likely would also be present. The amount of battle damage in modern warfare is so great that the costs of fully compensating everyone who lost property as a result of the conflict, even if limited to those whose losses were caused by allied militaries, would potentially be astronomical.<sup>196</sup> As a result, the government simply could not function properly if it were compelled to pay full compensation, nor could the country bear the economic dislocation caused by compounding the effects of war with a huge tax levy to raise the revenue necessary to make the relevant owners whole. These fiscal concerns explicitly motivated Grant's unwillingness to allow Congress to open the political door to broader claims for compensation, and they presumably have loomed large in the aftermath of many wars.<sup>197</sup> For example, in addressing the issue of compensation for property destroyed during the Civil War, the Supreme Court approvingly quoted Emmerich de Vattel's assertion that property losses suffered as a result of "inevitable necessity," such as "destruction caused by the artillery in retaking a town from the enemy," did not require compensation because "[w]ere the state strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion, a thing utterly impracticable."<sup>198</sup>

If this in fact is the justification for the battle-damage exception, or at least a reasonable approximation of that justification, then battle-damage losses are noncompensable not because those losses have some inherent characteristic that deprives their victims of any just claim for assistance from the community that benefited from the imposition of those losses, but rather because battle-damage losses typically occur in situations in which destruction necessity is accompanied by noncompensation necessity. In a more ideal world, compensation for battle damage would be feasible, and

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196. One estimate suggests that the financial and economic cost of the Second World War to the United States alone was approximately \$350 billion (unadjusted for inflation), while the total costs for all participants were estimated to be five times greater than those of the First World War. See R. ERNEST DUPUY & TREVOR N. DUPUY, *THE HARPER ENCYCLOPEDIA OF MILITARY HISTORY* 1309 (4th ed. 1993). Adjusting for inflation, \$350 billion in 1945 dollars is approximately equal to \$4.6 trillion today. See MEASURINGWORTH.COM, <http://www.measuringworth.com/uscompare> (last visited Aug. 26, 2015) (calculating inflation adjustments based on the purchasing power of dollars in 1945 and today).

197. See *infra* Part IV.

198. *Pac. R.R.*, 120 U.S. at 234–35 (quoting 2 E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* bk. III, ch. 15, § 232 (1758)).

then it would be owed. Thus, the presence of noncompensation necessity is the key to the existence of the battle-damage exception.

As a result, whether the battle-damage exception's scope plausibly extends to wartime emergency destruction depends ultimately on whether the two sources of noncompensation necessity arise in conjunction with emergency destruction as much as they do in conjunction with ordinary battle damage.

Administrative-noncompensation necessity clearly does not. The sorts of practical difficulties that constitute an insuperable obstacle to administering a compensation system for battle damage are much less likely to arise in the emergency-destruction context. One reason is that the necessary information is likely to be much more easily available in the emergency-destruction case. When the U.S. Army destroyed Caltex's petroleum facility in Manila, its personnel knew exactly what they were destroying, and that they were the ones who were destroying it. Concerns about the confusion imposed by battle obviously do not arise when the destruction occurs before a battle takes place.<sup>199</sup> Likewise, the risk of opportunistic dishonesty is much less, since the government can easily determine whether the property that it is about to demolish had in fact already been demolished. To be sure, there still could be a risk that the property's owner would overstate the property's predestruction material condition in an effort to inflate the amount of compensation received, knowing that the government did not have time to thoroughly inspect the premises before the demolition. Although that problem seems inescapable, it is unlikely to be large, because government officials who are scrambling to deal with an emergency are unlikely to spend precious time and resources demolishing property that seemed unlikely to be in good enough condition for the enemy to find it useful. Thus, a natural limit exists to the amount of value-inflation that even an unscrupulous owner could attempt to create.

Since administrative noncompensation necessity is unlikely to be a significant concern in practice, only when the second, fiscal variety of noncompensation necessity is present would compensation for emergency destruction not be required. Although that necessity might sometimes characterize wartime emergency destruction, it would not do so in all cases. For example, while it might justify not paying full compensation in the aftermath of major wars such as the Civil War or the Second World War, it would not plausibly apply to much smaller military conflicts such as the 1983 U.S. raid on Grenada or the 1989 U.S. invasion of Panama.<sup>200</sup>

Moreover, even within a large war, the frequency of emergency destruction is likely to be quite low. Militaries focus on destroying enemy forces and property, not on destroying their own nationals' property. The number of

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199. This point should not be overstated, however. Administrative-noncompensation necessity potentially could arise in disaster contexts, especially with respect to demolition of property that is less prominent than a huge petroleum facility. *See supra* note 68.

200. For brief summaries of the Grenada and Panama operations, see 2 *CTR. OF MILITARY HISTORY, U.S. ARMY, AMERICAN MILITARY HISTORY* 395–402 (Richard W. Stewart ed., 2005).

occasions on which emergency destruction would be militarily useful will almost certainly be dwarfed by the amount of ordinary battle damage that occurs in a conflict. Since emergency destruction is likely to be much more rare than ordinary battle damage, there would be much less of a burden placed on the public treasury by paying full compensation for emergency destruction. Therefore, a categorical denial of such compensation would rest on an unwarranted assumption about the ubiquity of noncompensation necessity. In situations where noncompensation necessity genuinely is present, however, either because the necessary demolitions themselves were so destructive or, more likely, because the destruction occurred in the context of a widespread conflict or catastrophe that placed severe constraints on public finances, merely partial compensation might be all that is required. Whether those circumstances exist in a given case will depend on the specific facts of that case and therefore cannot reliably be predicted in advance.

Some might worry about the equity of granting even partial compensation to owners of property lost through emergency destruction while categorically denying compensation to owners of property lost through ordinary battle damage. Such a concern would not be justified. As noted earlier, in an ideal world it would be possible to compensate even those who suffered battle damage, but unfortunately practical obstacles stand in the way of such compensation, obstacles that do not typically exist for emergency destruction. The fact that it is impossible to treat everyone fairly does not give the government license not to treat fairly those it can.

#### IV. HISTORY IN CONTEXT

It should now be evident that the noncompensation principle is, strictly speaking, incorrect. When the government destroys property to address an emergency, it in fact does owe compensation to the owner of the destroyed property. Nevertheless, the principle does contain a grain of truth, because when noncompensation necessity is present in the aftermath of an emergency, the required amount of compensation may be merely partial compensation.

Today, however, it is common to assert not only that the opposite is true—that is, that no compensation is owed for emergency takings—but also that this noncompensation principle has been well-established law for centuries. If, as one court said, “[t]he emergency exception has had a long and consistent history in both state and federal courts,” the natural question that follows is why so many courts in so many contexts have embraced a conclusion that this Article argues is incorrect.<sup>201</sup>

The answer is that, in fact, this supposed history of the noncompensation principle is inaccurate. Although space does not permit a detailed examination of the principle’s historical development, it is possible briefly to note three key themes that emerge from examining that history in context. Taken together, they indicate both that the doctrine’s history does not

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201. *Customer Co. v. City of Sacramento*, 895 P.2d 900, 909 (Cal. 1995) (en banc).

straightforwardly lead to today's noncompensation principle, and that the distinctions drawn in this Article are not only conceptually important but also practically significant.

First, case history displays marked ambivalence about the requirement to compensate. As the discussion so far has made evident, many cases have said that compensation is not owed. Historically, however, not every court has agreed. Although their justification for suggesting that compensation is owed has rarely risen above appeals to intuitive fairness, some courts have in fact stated (albeit sometimes in dicta) that they found the noncompensation principle implausible.

For example, in *Mitchell v. Harmony*, a case arising out of the Mexican-American War, the Supreme Court asserted that sometimes "private property may lawfully be . . . destroyed to prevent it from falling into the hands of the public enemy," but added that "[u]nquestionably, in such cases, the government is bound to make full compensation to the owner."<sup>202</sup> Similarly, in *Mayor of New York v. Lord*, a prominent case arising out of the Great New York Fire of 1835, a New York court asserted that

houses may be pulled down, or bulwarks raised for the preservation and defense of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle.<sup>203</sup>

Thus, the assertion that the noncompensation principle has a "long and consistent" history is only half right. Although the history is long, it has not been consistent. In light of that inconsistency, one can sympathize with the *Caltex* Court's assertion that "[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts."<sup>204</sup>

Second, as the passage quoted from *Lord* suggests, many of the seminal nineteenth-century cases endorsing the noncompensation principle addressed the question whether a public official could personally be held liable to pay compensation out of his own pocket, rather than whether the government would owe compensation.<sup>205</sup> This was not a coincidence. As Robert Brauneis notes, until the late nineteenth century, lawsuits against individual

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202. 54 U.S. (13 How.) 115, 134 (1851) (dictum).

203. *Mayor of New York v. Lord*, 17 Wend. 285, 291 (N.Y. Sup. Ct.), *aff'd*, 18 Wend. 126 (N.Y. 1837). Even the dissent in the case agreed that "[t]he destruction of individual property, for the public safety, bears a strong analogy to the case of taking private property for the public use." *Id.* at 303 (Bronson, J., dissenting). Further examples of judicial skepticism about the noncompensation principle are, of course, available in opinions dissenting from judgments that endorsed that principle. *See, e.g., United States v. Caltex, Inc.*, 344 U.S. 149, 156–57 (1952) (Douglas, J., dissenting).

204. *Caltex*, 344 U.S. at 156 (majority opinion).

205. *See, e.g., Mitchell*, 54 U.S. (13 How.) 115; *Am. Print Works v. Lawrence*, 23 N.J.L. 590, 609 (N.J. 1851) (addressing the personal liability of New York's mayor for property lost in the creation of a firebreak); *Lord*, 17 Wend. at 285.

persons were the standard vehicle for claims seeking compensation under state law for property taken through eminent domain. (Suing the government directly for compensation was, at the time, thought not to be possible.)<sup>206</sup>

As noted earlier, concerns about inefficient incentives, public officials' inability to afford payment, and the basic unfairness of forcing an official to bear personally the costs of actions taken to benefit others all are good reasons not to impose personal liability on public officials for emergency destruction.<sup>207</sup> Those reasons lose their relevance, however, when the issue changes from individual liability to government liability, since governments have the ability to raise tax revenue and can internalize the benefits of the destruction as well as the costs.<sup>208</sup> The holdings in those earlier cases cannot simply be plucked out of their original context of concerns about individual liability and dropped into the very different modern context of governmental obligations to pay compensation.

Third, many of the key cases holding that no compensation is owed were decided in circumstances characterized by a high degree of noncompensation necessity. For example, in *United States v. Pacific Railroad*, an 1887 case that the *Caltex* court would later rely on, the Supreme Court declared that compensation was not required for property lost as a result of emergency destruction during the Civil War.<sup>209</sup> It is noteworthy that the Court's language explicitly limited this assertion to that particular war: "The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible is thus considered established."<sup>210</sup> That the Court would be particularly concerned about Civil War claims is easily understandable in context, because concerns about fiscal-noncompensation necessity in the war's aftermath had been quite prominent. A large portion of the Court's discussion focused on a detailed history of a message, "much discussed in the Senate," that had accompanied President Grant's veto of a bill that would have provided compensation to one specific individual, J. Milton Best, whose home the Union Army had destroyed to prevent its capture by Confederate forces.<sup>211</sup> Grant's message explicitly stated that fiscal concerns had motivated his veto:

It can not be denied that the payment of this claim would invite the presentation of demands for very large sums of money; and such is the supposed magnitude of the claims that may be made against the Government

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206. See Brauneis, *supra* note 71, at 67–68. Brauneis observes that this approach made some intuitive sense at the time, because a "large portion of nineteenth-century just compensation litigation . . . involved corporate defendants. Everyone expected that turnpike, canal, and railroad corporations, and usually municipal corporations as well, would bear the costs of property acquired for their benefit." *Id.* at 107.

207. See *supra* Section III.A.

208. See *supra* Section III.A.

209. 120 U.S. 227, 239 (1887).

210. *Pac. R.R.*, 120 U.S. at 239.

211. *Id.* at 236–39.

for necessary and unavoidable destruction of property by the Army that I deem it proper to return this bill for reconsideration.<sup>212</sup>

Grant made his concerns about unsustainable fiscal burdens even clearer a few months after that message, when he vetoed a similar bill that would have compensated a very sympathetic petitioner:

If the precedent is once established that the Government is liable for the ravages of war, the end of demands upon the public Treasury can not be forecast. . . . [N]othing but regard for my duty to the whole people, in opposing a principle which, if allowed, will entail greater burdens upon the whole than the relief which will be afforded to a part, by allowing this bill to become a law, could induce me to return it with objections.<sup>213</sup>

The *Pacific Railroad* Court's discussion, with its specific focus on the remarkable circumstances of the Civil War, thus left open the question whether compensation might still be owed in contexts in which noncompensation necessity was not as severe. Indeed, the Court itself quoted, with apparent approbation, Vattel's general assertion that compensation in fact is owed for property destruction "done by the state deliberately and by way of precaution."<sup>214</sup> Thus, *Pacific Railroad* is properly understood not as stating a universal principle of noncompensation, but rather only a judgment tailored to the particular circumstances of the nation as it pieced itself back together after the Civil War.

Likewise, the Court decided *Caltex* against a backdrop not only of the extraordinary devastation of the Second World War, but also of the start of the Cold War and the continuation of the quite hot war in Korea, a war that by 1952 had already involved two desperate retreats by U.S. forces and had no end in sight.<sup>215</sup> Indeed, just six months before Justice Vinson issued his majority opinion in *Caltex*, his dissent in *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case) had openly reflected anxiety about the onset of the Cold War: "Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict."<sup>216</sup>

In such a context, not requiring the government to pay full compensation was understandable, since at the time it was tacitly but universally assumed that the only alternative to full compensation was zero

212. President Ulysses S. Grant, Veto Message (June 1, 1872), in 7 MESSAGES OF THE PRESIDENTS, *supra* note 184, at 172, 172–73.

213. President Ulysses S. Grant, Veto Message (Jan. 29, 1873), in 7 MESSAGES OF THE PRESIDENTS, *supra* note 184, at 215, 215; *see also* President Ulysses S. Grant, Veto Message (Feb. 11, 1873), in 7 MESSAGES OF THE PRESIDENTS, *supra* note 184, at 216, 216–17 (reiterating these concerns).

214. *Pac. R.R.*, 120 U.S. at 234.

215. *See generally* T.R. FEHRENBACH, THIS KIND OF WAR 147–56 (1963).

216. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 668 (1952) (Vinson, C.J., dissenting). Justices Reed and Minton joined that dissent; both joined Vinson in the majority in *Caltex*.

compensation. Faced with circumstances compelling the state to take destructive actions for which practical necessity precluded paying full compensation, such courts understandably chose the only alternative that existing doctrine seemed to allow them, namely denying compensation altogether. As a result, the fact that many courts confronting questions having grave fiscal implications found it plausible to exempt the government from an obligation to pay full compensation ultimately reveals little about the plausibility of an alternative rule that acknowledges that when noncompensation necessity accompanies destruction necessity, merely partial compensation may be all that justice requires for emergency takings.

#### CONCLUSION

The Article began by arguing that three commonly overlooked distinctions are crucial for understanding what compensation is owed when the government destroys property out of “necessity” to address an emergency. The first distinction points out that there are several different roles that compensation may play in any given interaction. The second distinction identifies two different types of “necessity,” each with distinct normative implications. Destruction necessity permits the destruction of private property even over the objections of its owner, while noncompensation necessity permits not making the owner of the destroyed property whole. And the third distinction moves beyond the standard all-or-nothing dichotomy between awarding full compensation and zero compensation, developing the alternative possibility that sometimes the proper amount of compensation lies somewhere between those two extremes.

These three distinctions prove illuminating in examining the wide range of arguments that have been offered to support the assertion that owners of property destroyed by the government in emergencies are owed no compensation at all. That examination reveals that those arguments, and the conclusion that they sought to support, lack persuasive force.

Moreover, the significance of these three distinctions extends beyond revealing critical weaknesses in justifications of the noncompensation principle. The distinctions also point to a more plausible account, one that best makes sense of the law in light of considerations of justice: when necessity compels the government to demolish property to address an emergency, the demolition does not wrong the demolished property’s owner unless compensation is not paid. Compensation’s role in takings cases thus is not to rectify a wrong, but rather to prevent a wrong from occurring in the first place. Hence the mere presence of destruction necessity is insufficient to eliminate the government’s general obligation to compensate the owners of property that it destroys. But when inescapable fiscal or administrative constraints make full compensation infeasible—that is, when noncompensation necessity is also present—then although the obligation to pay just compensation remains, the amount of that compensation changes. Under such circumstances, what justice requires for emergency takings is partial compensation.

