NECESSITY TAKINGS IN THE ERA OF CLIMATE CHANGE

The American West has been in the midst of a megadrought for the last two decades — the worst it has experienced in at least 1200 years.[1] The region's prognosis is not hopeful,[2] as researchers consider anthropogenic climate change a substantial cause of such megadroughts and predict similar widespread droughts in the future.[3] The result is a continuing water crisis in the region with huge implications for everything from electricity generation, to municipal uses, to habitat conservation.[4]

Like many environmental policies, water management solutions are often as complicated as they are divisive, not least because of the antiquated regime of property law that governs use rights in water.[5] While water itself is a public resource, there are property rights in the *use* of water that are protected by constitutional just compensation clauses.[6] As a result, management solutions that curtail or shift water rights can face serious "takings" challenges.[7] And as governments necessarily shift water rights to address critical public needs during climate change shortages, such takings challenges will likely increase.[8]

Yet water scarcity is only one example of the clash between private property and adaptive measures in the age of climate change.[9] Takings allegations have arisen from government responses to rising sea

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[1] Nathan Rott, *Study Finds Western Megadrought Is the Worst in 1,200 Years*, NPR (Feb. 14, 2022, 11:04 AM), https://www.npr.org/2022/02/14/1080302434/study-finds-western-megadrought-is-the-worst-in-1-200-years [https://perma.cc/ZD93-5PL9]. "[A] megadrought is a period of extreme dryness that lasts for decades." Henry Fountain, *What Is a Megadrought?*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/article/what-is-a-megadrought.html [https://perma.cc/YBW7-C8R4].

[2] Toby R. Ault et al., *Relative Impacts of Mitigation, Temperature, and Precipitation on 21st-Century Megadrought Risk in the American Southwest*, SCI. ADVANCES, Oct. 5, 2016, at 1, 6.

[3] *Id.*; Fountain, *supra* note 1; A. Park Williams et al., *Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020–2021*, 12 NATURE CLIMATE CHANGE 232, 234 (2022) (attributing forty-two percent of the 2000–2021 drought to climate change).

[4] Robert Glennon, *The West Needs a New Water Strategy for Cities and Farmers*, GOVERNING (July 3, 2022), https://www.governing.com/next/the-west-needs-a-new-water-strategy-for-cities-and-farmers [https://perma.cc/PY3E-MCDX].

[5] Brooks Jarosz, *San Francisco and Other Water Districts Sue California over Drought Restrictions*, FOX KTVU (Sept. 17, 2021), https://www.ktvu.com/news/san-francisco-and-other-water-districts-sue-california-over-drought-restrictions [https://perma.cc/35VR-6QCV] ("[T]here has been a long history of senior water rights holders challenging [California's water management] authority.").

[6] *See, e.g.*, Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 829–32 (Tex. 2012) (holding groundwater use rights are constitutionally protected).

[7] ROBERT MELTZ, CONG. RSCH. SERV., R42613, CLIMATE CHANGE AND EXISTING LAW: A SURVEY OF LEGAL ISSUES PAST, PRESENT, AND FUTURE 21–23 (2014).

[8] A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 732 (2012).

[9] *See* Robin Kundis Craig, *Becoming Landsick: Rethinking Sustainability in an Age of Continuous, Visible, and Irreversible Change*, 46 ENV'T L. REP. 10,141, 10,148 (2016); Shelley Ross Saxer & Carol M. Rose, *A Prospective Look at Property Rights*, 20 GEO. MASON L. REV. 721, 723 (2013).

levels,[10] loss of wetlands,[11] habitat degradation, and species endangerment,[12] to name a few. As Professor Robin Craig has recognized, takings liability — and the broader notion of private property rights as inviolable — can negatively affect governments' willingness to pursue adaptive measures.[13]

But property law is not so blind to the practical realities of a global emergency. Since the earliest days of the Republic, U.S. courts have sanctioned violations of private property rights without compensation under conditions of public necessity.[14] The quintessential application of this doctrine has been in the destruction of private property to create a firebreak against a spreading urban conflagration. But the principle is not limited to conflagration. Rather, "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."[15] And in an era of unprecedented ecological disruptions, the necessity exception can provide some legal flexibility to facilitate adaptive responses.[16]

The exception is not without opposition. After all, it allows the taking of private property from a few members of the community in order to prevent a greater tragedy from befalling the rest. And in this sense, it seems to squarely conflict with the fairness principle underlying modern takings law. It is unsurprising then that the exception has been critiqued by commentators[17] and obscured by case law, so much so that today, some consider it the most dormant exception to the just compensation requirement.[18]

But the literature on the necessity exception has so far failed to consider an important fact: that courts are not the only source of potential compensation for takings. If courts were the only potential source of relief for property redistributions, then the necessity exception could be

[10] Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENV'T L. 395, 398 (2011).

[11] *Id.* at 412.

[12] A. Kimberly Rockwell, *The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species (*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995))*, 11 J. LAND USE & ENV'T L. 573, 592 (1996).

[13] Robin Kundis Craig, *"Stationarity Is Dead" — Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9, 61 (2010).

[14] *See infra* p. 957.

[15] Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 394 (2015); *see also* TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1377 (Fed. Cir. 2013) (wildfire); Dudley v. Orange County, 137 So. 2d 859, 859 (Fla. Dist. Ct. App. 1962) (flooding); *In re* 14255 53rd Ave. S., 86 P.3d 222, 223 (Wash. Ct. App. 2004) (agricultural pest).

[16] Craig, *supra* note 9, at 10,148–49.

[17] Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 127–31 (2013); Lee, *supra* note 15, at 393–94; 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, 484 (2006).

[18] Craig, *supra* note 10, at 419.

an unfairly harsh doctrine. However, the fact is that the political process is often a source of partial, if not full, compensation for property owners in necessity takings. Even some of the doctrine's critics have conceded as much by recognizing that "[t]o ameliorate the harsh consequences of [the rule] . . . , most states have enacted statutes to compensate victims, at least under some circumstances."[19]

This Note proposes a reconceptualization of the necessity exception from a doctrine of noncompensation to a doctrine of deference. It argues that the necessity exception is best understood as a doctrine of deference to legislatures in circumstances where (1) there is a compelling government interest, (2) judges lack capacity relative to legislatures to determine a fair distribution of burdens and benefits arising from government actions, and (3) the likelihood of political process failures is low. Put differently, the necessity exception shifts the source, but not necessarily the fact, of compensation.

To support that argument, this Note first highlights existing political process– and competence-based theories that help justify the necessity exception. It then supplements this normative framework by showing its consistency with some of the earliest published cases on the necessity exception in U.S. legal history — those that arose in the aftermath of the Great New York Fire of 1835. Consistent with the process- and competence-based understanding of the necessity exception, these early cases did not reject the propriety of compensation for those whose property was sacrificed[20] but rather showed a sensitivity toward the political process as the appropriate — and *actual* — source of compensation.

A closer look at the necessity exception is interesting for several reasons. First, climate change is a predicament for property rights. Because necessity takings cases have typically arisen from natural disasters or public health emergencies, the necessity exception can be instructive for legal approaches to property conflicts in the age of climate change. Second, the Supreme Court's endorsement of the exception and of its continued validity strengthens the case for further exploring how the doctrine could apply in a contemporary context. Third, the doctrine "has garnered far less court and academic interest in the context of takings claims than either public nuisance or the public trust doctrines."[21] Put simply, a dormant but nonetheless valid doctrine that is likely to be of increasing relevance deserves a reexamination, particularly against the largely unfavorable attention it has received to date.

Part I of this Note offers a legal and conceptual background to modern takings law and to the necessity exception. Part II describes a theoretical framework for understanding the exception, relying on

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[19] Kuo, *supra* note 17, at 128; *see also id.* at 135 n.47 (listing statutes).

[20] *See* Stone v. Mayor of New-York, 25 Wend. 157, 164–65 (N.Y. 1840) (noting sympathy for the claimants but rejecting the claim on the merits).

[21] Craig, *supra* note 10, at 419.

process- and competence-based theories of the constitutional just compensation requirement. Part III provides historical context to the earliest published U.S. cases on the exception. And Part IV shows how these early cases and the disaster politics surrounding them comport with the deferential, process- and competence-based understanding advanced by this Note.

I. BACKGROUND

A. Modern Takings Clause Jurisprudence

The Fifth Amendment of the U.S. Constitution, incorporated against the states through the Fourteenth Amendment, requires the government to pay "just compensation" whenever it "takes" private property for "public use."[22] This just compensation requirement "places a condition on the exercise of" the sovereign's inherent power of eminent domain.[23] Justice Black's opinion in *Armstrong v. United States*[24] provides the dominant understanding of the purpose of this condition: "[T]o 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."[25]

Until the 1870s, takings law was primarily concerned with "direct condemnation."[26] In direct condemnations, the government initiates a formal proceeding to condemn — or "take" — private property, with any resulting dispute being over the proper amount of compensation due to the owner.[27] Over time, the Supreme Court began to increasingly recognize a kind of taking known as an "inverse condemnation."[28] In these cases, the dispute was not only over the amount due to the owner but also over the fact of the taking itself — the plaintiff alleged, and the government denied, that there was a taking to begin with.[29]

The result of this shift is a large body of law whose primary goal is to discern just what a "taking" is. One approach is the multifactored test of *Penn Central Transportation Co. v. New York City*,[30] which balances the government's interest against the investment-backed interests of the owner.[31] Another is the more categorical approach of *Lucas*

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[22] U.S. CONST. amend. V.

[23] First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987).

[24] 364 U.S. 40 (1960).

[25] *Id.* at 49. This conception is widely accepted by both supporters and opponents of a broad reading of the Takings Clause. William Michael Treanor, *The* Armstrong *Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153–54 (1997).

[26] Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 310 (2007).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 438 U.S. 104 (1978).

[31] *Id.* at 124.

v. South Carolina Coastal Council[32] and *Loretto v. Teleprompter Manhattan CATV Corp.*,[33] under which a government effects a taking when it physically occupies property or deprives property of all its viable economic uses.

Even when one has overcome the "taking" question, a caveat remains. A longstanding body of common law exempts certain takings from the just compensation requirement, most famously those that respond to an urgent public necessity or abate a nuisance. The issue in these cases is not whether a government action amounts to a taking, but whether other factors excuse the government from liability regardless of whether the action is constitutionally characterizable as a taking.[34]

This Note focuses on the public necessity exception to the just compensation requirement. The exception, which has been applied since the earliest days of the Republic,[35] was more recently affirmed in two important Supreme Court decisions. In its 1992 decision in *Lucas*, the Court recognized a per se takings rule for government regulations that effect a complete deprivation of a property's economic value.[36] The Court, however, provided an exception to its categorical rule where a regulation tracks "background principles of" the state's property law.[37] This category of "background principles" encompasses regulations to abate public nuisances as well as government actions arising from public necessity.[38] More recently, in *Cedar Point Nursery v. Hassid*,[39] the Court affirmed the applicability of both the nuisance and necessity exceptions in the context of physical invasion takings.[40] Although these cases were limited to two narrow issues in takings law, the "background principle" exceptions apply to all takings claims, as they have done historically.[41]

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[32] 505 U.S. 1003 (1992).

[33] 458 U.S. 419 (1982).

[34] However, in *Lucas*, the Court treated the nuisance and necessity exceptions as background limitations on an owner's property rights. *See Lucas*, 505 U.S. at 1029. Thus, there is no taking to excuse because the owner did not have an interest under state law to begin with. *Id.*

[35] *See* Respublica v. Sparhawk, 1 Dall. 357, 363 (Pa. 1788).

[36] *Lucas*, 505 U.S. at 1019.

[37] *Id.* at 1029.

[38] *Id.* at 1029 & n.16.

[39] 141 S. Ct. 2063 (2021).

[40] *Id.* at 2079.

[41] The *Lucas* Court's recognition of the necessity exception could be viewed as dicta. But the necessity exception was later affirmed in *Cedar Point Nursery*, *id.*, and commentators consider the exception to be firmly established at this point, *see, e.g.*, Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 361 (2005).

B. The Concept of Necessity Takings

The doctrine of necessity takings is a well-settled common law doctrine,[42] dating back to a "long line of English decisions, familiar to and followed by most American judges."[43] In its simplest form, the doctrine immunizes violations of private property rights in times of private or public necessity. The doctrine has two basic requirements: First, there must be a public necessity or emergency, such as a ravaging fire.[44] Second, the violation of property rights must be reasonably necessary to address that emergency.[45]

The necessity exception can be traced back to at least as early as the work of twelfth-century canonists.[46] Sixteenth- and seventeenth-century natural law philosophers like Grotius and Pufendorf continued this "long-standing tradition of thought according to which in extremis all goods are regarded as common."[47] Later, in the eighteenth and nineteenth centuries, American common law jurists applied a broader necessity principle, which they termed the law of "overruling necessity," to a wide variety of contexts involving public health and safety.[48] They also applied it in property disputes to sanction property violations that otherwise may have constituted takings without just compensation.[49] In this application, the doctrine is best known for immunizing the burning down of buildings to arrest an urban conflagration, but it was also used to resolve property disputes in other settings, such as situations arising from government responses to floods and infectious disease.[50]

Importantly, the necessity exception was — and remains — separate and distinct from the nuisance exception. As some writers explain, "a

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[42] SIR FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 446 (1885); *see also* United States v. Caltex, Inc., 344 U.S. 149, 154 (1952).

[43] William Weston Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776–1880, at 360 (Oct. 1, 1991) (Ph.D. dissertation, Harvard University) (on file with the Harvard Law School Library); *accord* WATERMAN L. WILLIAMS, THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT: TREATING FULLY MUNICIPAL LIABILITY FOR NEGLIGENCE 301 (1901) (describing the exception as "clear and well supported by authority").

[44] Robin Kundis Craig, *Adapting Water Law to Public Necessity: Reframing Climate Change Adaptation as Emergency Response and Preparedness*, 11 VT. J. ENV'T L. 709, 739 (2010).

[45] *Id.*

[46] *See* John Salter, *Grotius and Pufendorf on the Right of Necessity*, 26 HIST. POL. THOUGHT 284, 284 (2005).

[47] *Id.* The common law origins of the doctrine are often attributed to Sir Edward Coke's opinions in *Case of the King's Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294, 1294; 12 Co. Rep. 12, 12, and *Mouse's Case*, (1608) 77 Eng. Rep. 1341, 1342; 12 Co. Rep. 63, 63.

[48] *See* THEODORE W. DWIGHT, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY, BEING AN INTRODUCTION TO THE STUDY OF CONTRACTS 430 (Edward F. Dwight ed., 1894).

[49] *Id.* (finding that the doctrine allows "the sacrifice of private property for the public welfare, under such circumstances of overruling necessity that no compensation is required").

[50] *See, e.g.*, RODNEY L. MOTT, DUE PROCESS OF LAW 457–59 (1973); Henry C. Hall & John H. Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 504–05 (1907).

nuisance in the strictest sense implies some fault in the plaintiff."[51] But the necessity exception is not tied to the idea of individual fault at all. As Thomas Cooley explains, in necessity cases, "the individual is in no degree in fault, but his interest must yield to that 'necessity' which 'knows no law.'"[52] Given these differences, the nuisance exception would "not be enough . . . where by hypothesis the plaintiff is entirely innocent and appears as the victim of circumstances."[53]

How could the necessity exception comport with the *Armstrong* principle? After all, the exception appears to be a plainly redistributive doctrine based on a balancing of public interest and private harm.[54] Courts have similarly understood the exception as such. For example, in the 1840 case of *Stone v. Mayor of New-York*,[55] New York's highest state court explained that, under the doctrine, a person is justified in "inflict[ing] involuntary injury upon some to prevent a much greater calamity falling upon others."[56] In circumstances of necessity, "the protection of life or of property[] authorizes the sacrifice of other and less valuable property."[57] Understood in this way, the doctrine appears to sanction precisely what the *Armstrong* principle forbids — "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[58]

Necessity itself cannot resolve the dilemma, because necessity is also at the heart of the eminent domain power. The most practical use of eminent domain is in situations where a holdout owner is in control of unique property necessary for some governmental purpose, such as a particular piece of land that is suitable for the construction of a highway.[59] In these situations, the power of forced exchange overcomes the holdout problem.[60] If the asset were widely exchanged on the market, there would be no need for a forced exchange to begin with.[61] The government would simply enter into a consensual transaction with one of the many sellers willing to sell their property to the government at market value. Thus, the eminent domain power is most important when

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[51] Hall & Wigmore, *supra* note 50, at 504 n.10.

[52] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 594–95 (3d ed. 1874) (explaining that the necessity exception applies "where the owners themselves have fully observed all their duties to their fellows and to the State," *id.* at 594).

[53] Hall & Wigmore, *supra* note 50, at 504 n.10.

[54] John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 654 (2007) ("Under the necessity doctrine, there is a weighing of interests . . . .").

[55] 25 Wend. 157 (N.Y. 1840).

[56] *Id.* at 175.

[57] *Id.* at 174.

[58] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[59] DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 28–29 (2002).

[60] *Id.* at 29.

[61] *Id.* at 28.

the government is faced with the necessity of acquiring a particular asset from a holdout seller.

A similar holdout problem exists in necessity takings — at least as some courts have understood it. The 1853 case of *Surocco v. Geary*,[62] which arose out of the 1849 San Francisco fire,[63] affirmed the necessity exception because, "[w]ere it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed."[64] Of course, as Professor Brian Lee recognizes, the necessity of a taking is separate and distinct from the necessity of noncompensation for the taking.[65] Noncompensation can be deemed necessary when, for example, administrative or budgetary obstacles make compensation impracticable, but not simply because the taking was necessary.[66] Nonetheless, the point is that necessity itself is not sufficient to distinguish between a necessity taking and a compensable one.

If the dilemma cannot be resolved conceptually, then maybe it can be resolved pragmatically. Pragmatic justifications for the necessity exception range from law-and-economics theories focused on ex ante compensation[67] to arguments that the destroyed property was a nuisance. Some even inaccurately argue that the exception applies only in cases where destruction of property was inevitable due to other circumstances.[68]

Perhaps the most persuasive of these justifications — one that focuses on the necessity of noncompensation — has to do with efficient incentives: the exception is needed because, in its absence, government officials may refuse to engage in necessary action for fear of future liability. This argument is an especially attractive explanation for the early necessity cases, since for much of the nineteenth century, suing

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[62] 3 Cal. 69 (Cal. 1853).

[63] *Id.* at 72. The 1849 fire was the "first of the great fires which devastated San Francisco." *Early History of the San Francisco Fire Department*, MUSEUM CITY S.F., http://www.sfmuseum.net/hist1/fire.html [https://perma.cc/D7T9-4F8J] (quoting FRANK SOULÉ ET AL., THE ANNALS OF SAN FRANCISCO (1854)).

[64] *Surocco*, 3 Cal. at 73.

[65] Lee, *supra* note 15, at 395.

[66] *Id.*

[67] *See generally* Thomas W. Merrill, *Property and Fire*, *in* WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES (Karen M. Bradshaw & Dean Lueck eds., 2012).

[68] *See, e.g.*, Brief of the Cato Institute & Professor Ilya Somin as Amici Curiae Supporting Petitioners at 13, Lech v. Jackson, 141 S. Ct. 160 (2020) (No. 19-1123) (confusing *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844), which involved an issue of statutory interpretation, as involving a common law or constitutional interpretation in support of the inevitable-destruction formulation).

officials in their individual capacities was the only way to seek compensation for takings.[69]

However, the efficient-incentives justification fails to account for the doctrine's continuance to times when governments, not officials, are held liable for takings. The efficient-incentives justification also fails to entirely resolve the earlier applications of the doctrine, because it does not grapple with the extent to which nineteenth-century legislatures in fact indemnified officials for personal liabilities arising from official acts.[70]

For example, in April 1838, the New York state legislature created "The Fire Indemnity Stock of the city of New-York," which authorized the creation of a $600 thousand public fund, equal to about $19 million today,[71] to pay for court damages resulting from the "blowing up and destruction of sundry buildings . . . during . . . the great fire . . . ."[72] Against such legislative indemnifications, the prospect of official liability was much less problematic than it would otherwise appear.[73]

II. A PROCESS- AND COMPETENCE-BASED FRAMEWORK FOR THE NECESSITY EXCEPTION

A. Political Process and Judicial Interference

The process-based theory for the just compensation requirement justifies the requirement based on its ability to "overcome certain failures of the political process."[74] Under this theory, the requirement ensures that the government's practice of compensation is uniformly administered through the courts without regard to an individual's ability to obtain a similar result through the political process.[75]

But the process-based conception can just as easily counsel against an inflexible just compensation requirement. As many scholars argue, landowners often form not a vulnerable but a rather powerful contingent in the political process, and this political power can obviate the

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[69] Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 77–78 (1999); Lee, *supra* note 15, at 450–51.

[70] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 40 (1997).

[71] *$600,000 in 1838 Is Worth $19,148,903.23 Today*, CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1838?amount=600000 [https://perma.cc/W9P4-TQKM].

[72] An Act Authorizing the Mayor, Aldermen and Commonalty of the City of New-York to Raise Money by Loan, and to Create a Public Fund or Stock to Be Called "The Fire Indemnity Stock of the City of New-York," ch. 221, 1838 N.Y. Laws 191.

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

[74] DANA & MERRILL, *supra* note 59, at 46.

[75] Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 306 (1992).

need for judicial intervention in some cases.[76] Historians affirm this theory by documenting how "landowners were routinely awarded compensation before it became a constitutional requirement."[77] Professor William Treanor, for example, describes the early legislative provision of compensation before the passage of constitutional just compensation requirements, arguing that this history "shows that the political process generally protects landowners from the risk of uncompensated confiscation."[78]

When the political process is well functioning, judicial remedies can create the risk of duplicative and inefficient recovery. This is not to say that every takings claim should be left to the political process. To the contrary, courts may be justified in showing greater sensitivity in other takings scenarios where the public interest is not as grave and the likelihood of process failure is greater.[79]

But the risk of process failure in necessity cases is not the same as that in a typical taking, because the means-ends test of the necessity exception is an additional safeguard against improper government motives that is absent in the typical taking analysis. First, the doctrine requires a public necessity, which is often due to external factors beyond the government's immediate control. This public necessity requirement is a proxy for testing the severity of the public interest in the taking, and the more severe the necessity, the less likely that the taking is due to a political process failure. Second, the doctrine requires that the taking be at least reasonably necessary to address the public necessity, though in some jurisdictions this requirement is stricter.[80] This means-ends analysis is, like many other tests, employed in constitutional law to excavate improper government motives arising from process failures.[81]

Moreover, recognizing the political process as the primary source of compensation need not entirely exclude judicial review. The role of the judiciary and the legislature in these issues can be sequential even if not exclusive.[82] "The real question is who is going to take the first shot at the problem. There is no question about who gets the last shot, at least

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[76] *Id.* at 280; *see also* DANA & MERRILL, *supra* note 59, at 48 (describing the argument by William Fischel in WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 100–40, 341–42 (1995)).

[77] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 864 (1995).

[78] *Id.*

[79] *See generally* Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447 (2009).

[80] *See* TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (requiring actual necessity for destruction of timber as part of United States Forest Service fire management effort).

[81] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 453 (1996).

[82] See generally Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787 (1997), for a helpful exposition of this idea.

in the American constitutional system — the judiciary does."[83] Given the complexities and the significant public interests involved in disaster tradeoffs, judicial deference can simply mean giving the legislature the first shot at resolving such disputes.

B. Judicial Competence and Administrability

Related to, but distinct from, process-based considerations is the difficulty of determining what and how much relief is required to reach a fair distribution in necessity cases. The fair determination of the burdens and benefits in environmental emergencies is an intricate and uncertain inquiry, and all the more so when considered alongside background political processes. For example, it can be difficult for a court to determine how much the government's conduct actually contributed to a claimant's injury, as compared to other factors.[84] It can also be difficult to determine whether judicial relief is duplicative of recovery gained elsewhere through the political process.

While determining a fair distribution of burdens is a difficult task for anyone, courts' lack of access to systemic information puts them at a further disadvantage. In comparing the relative fitness of the legislative and judicial branches in addressing compensation claims, Professor Frank Michelman points out that, while judges have the benefit of political detachment — which supports judicial interference under a process-based theory — they have the disadvantage of lacking information to which a legislature may have access.[85] This lack of information can prevent a court from systemically analyzing the fairness of a government action where a systemic analysis is the fairest way to do so.

Moreover, a constitutional claim for judicial relief is even more complicated when brought against preexisting statutory compensation schemes. Such a claim for compensation, though made to a court, is tied to political bargaining and processes that take place outside of the courtroom. Courts in these situations cannot determine a fair distribution without knowledge of "what vote trades, explicit and implicit, concerning past and future measures have been connected with" such statutory schemes.[86] And to the extent that the Court's recent trend toward categorical takings rules is sensitive to difficult line-drawing problems and problems of proof, the very same line-drawing problems

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[83] *Id.* at 809.

[84] Andrew S. Flynn, *Climate Change, Takings, and* Armstrong, 46 ECOLOGY L.Q. 671, 671 (2019) ("[C]limate change presents tough causation issues. Externalities and effects may not develop for years or decades and often are borne by individuals and communities far away from where the causal action took place.").

[85] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1248 (1967).

[86] *Id.*

counsel judicial deference to legislative processes in complex policy areas involving climate issues.[87]

Finally, a judicial requirement for compensation can hinder the development of alternative and more efficient relief processes. It can also add unnecessary and potentially harmful complexities to preexisting schemes that have been deliberately and expertly developed outside of the courts. All of these concerns are especially acute in situations involving systemic and interconnected emergencies caused by climate change. Environmental issues are often multijurisdictional, involving complex webs of international, federal, state, and private regulatory and relief measures, unlike the more isolated and discrete disputes between an individual landowner and a government seeking to build a highway.[88] Attention to these systemic complexities is important in deciding whether judicial relief is efficient and administrable.

III. HISTORICAL BACKGROUND TO THE EARLY NECESSITY CASES

A. Necessity Takings and the Revolutionary War

The first recorded American case on the necessity exception is *Respublica v. Sparhawk*,[89] which arose in the context of the Revolutionary War. The Pennsylvania Board of War, acting at the recommendation of Congress, had taken 227 barrels of Sparhawk's flour, among other goods, to prevent their falling into the hands of the approaching British army.[90] The taking was meant to be temporary, as the government had promised to return the goods once the threat passed.[91] But the goods were permanently lost when they were captured by the British army at their storage place, and Sparhawk subsequently filed a claim for compensation for his captured property.[92]

At the time, military seizures were a common occurrence, as "the exigencies of war often dictated the seizure of private property for military purposes."[93] The government's argument in *Sparhawk* was that requiring compensation for wartime seizures was impracticable. The government's counsel argued thus:

> If the Appellant is entitled to relief . . . every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice,

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[87] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436–37 (1982).

[88] JOSH EAGLE ET AL., NATURAL RESOURCE LAW AND POLICY 37–38 (2017).

[89] 1 Dall. 357 (Pa. 1788).

[90] *Id.* at 358.

[91] *Id.*

[92] *Id.*

[93] James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 12–13 (1992).

> be effectually indemnified. — What nation could sustain the enormous load of debt which so ruinous a doctrine would create![94]

The Pennsylvania Supreme Court was convinced. It held that no compensation was required because the taking was pursuant to over-ruling necessity.[95] But the principle was not limited to wartime. Rather, the law of necessity had "many striking illustrations," the court explained:

> If a road be out of repair, a passenger may lawfully go through a private enclosure. . . . In time of war, bulwarks may be built on private ground . . . for *the public safety*. . . . And, as the safety of the people is a law above all others . . . [h]ouses may be razed to prevent the spreading of fire, because for the public good.[96]

To highlight the practical concerns at issue, the court referenced "a memorable instance of folly" when the Mayor of London refused to order the pulling down of forty wooden houses to stop the spread of the Great Fire of 1666 for fear that he would be held liable for the destruction, "and in consequence of this conduct half that great city was burnt."[97] The court declared: "It is a rule . . . that it is better to suffer a private mischief, than a public inconvenience; and *the rights of necessity*, form a part of our law."[98]

The routine practice of uncompensated military seizures during the Revolutionary War led to "a wholesale interference with economic arrangements."[99] Indeed, some commentators trace the later adoption of the Fifth Amendment to widespread dissatisfaction with wartime seizures.[100] For example, St. George Tucker, the first scholar to interpret the Fifth Amendment's Takings Clause,[101] believed that the clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."[102]

B. Necessity Takings and the Great New York Fire of 1835

However great the frequency of necessity takings during the Revolutionary War, the first litany of published case law on the necessity exception came almost half a century later in the aftermath of the Great

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94 *Sparhawk*, 1 Dall. at 362 (syllabus).

95 *Id.*

96 *Id.* at 363 (majority opinion).

97 *Id.*

98 *Id.* at 362 (emphasis added).

99 Ely, *supra* note 93, at 13.

100 DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR 15 (2007).

101 Treanor, *supra* note 77, at 791.

102 *Id.* at 791–92 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (St. George Tucker ed., 1803)).

New York Fire of 1835.[103] By then, Americans were no strangers to devastating fires. The first recorded fire in U.S. history was the 1608 Jamestown fire, which "destroyed nearly every building" in the town.[104] About half a century later, "[o]ne third of Boston was lost to fire in 1653."[105] And in the late eighteenth century, "New Orleans was gutted by fire twice in seven years."[106]

But the nineteenth century was "an era of extraordinary transformation."[107] Urbanization and the emergence of populous cities created conditions in which conflagrations were increasingly frequent and devastating.[108] City services, including firefighting, were unable to keep pace with the dramatic increase in population and the heightened risk of widespread fires.[109] It was against this background that "the most destructive non-military fire the world had known since London was turned to ashes in 1666" took place.[110]

The New York fire broke out on the night of December 16, 1835, in a warehouse in the Financial District.[111] The fire quickly spread across lower Manhattan, but "[a]n antiquated water system, coupled with sub-zero temperatures that froze the fire hoses, hindered efforts to extinguish it."[112] Faced with the futility of firefighters' efforts and the massive destruction left behind by a spreading conflagration, some urged the Mayor to blow up private property to prevent the fire's further damage.[113] The Mayor of New York was reluctant at first. By the time the first powder kegs had been set up, neither he nor the fire chief was willing to light the fuse, leaving it to Alexander Hamilton's son, James Hamilton, to set off the explosion.[114] Ultimately, the conflagration was

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[103] This conclusion is based on a review of relevant pre-1835 case law and secondary literature on the topic, such as nineteenth-century treatises.

[104] Fred S. McChesney, *Government Prohibitions on Volunteer Fire Fighting in Nineteenth-Century America: A Property Rights Perspective*, 15 J. LEGAL STUD. 69, 71 (1986).

[105] *Id.*

[106] *Id.*

[107] Donald J. Cannon, The Fire Department of the City of New York, 1835–1898: A Study in Institutional Adaptability 1 (1976) (Ph.D. dissertation, Fordham University) (ProQuest).

[108] *See id.* at 6–7.

[109] Genoa Shepley, *By Which Melancholy Occurrence: The Disaster Prints of Nathaniel Currier, 1835–1840*, 2 PANORAMA 1, 4 (2015), https://journalpanorama.org/wp-content/uploads/2014/11/By-Which-Melancholy-Occurrence-The-Disaster-Prints-of-Nathaniel-Currier-1835%E2%80%931840.pdf [https://perma.cc/PJ63-3RVM].

[110] McChesney, *supra* note 104, at 71 (quoting DENNIS SMITH, HISTORY OF FIREFIGHTING IN AMERICA: 300 YEARS OF COURAGE 41 (1978)).

[111] Robert McNamara, *New York's Great Fire of 1835*, THOUGHTCO. (Aug. 31, 2019), https://www.thoughtco.com/new-yorks-great-fire-of-1835-1773780 [https://perma.cc/GK3V-5JAA].

[112] Shepley, *supra* note 109, at 4.

[113] Daniel S. Levy, *The Great Fire of 1835 Helped Create Modern New York City*, TIME (Mar. 11, 2022, 7:00 AM), https://time.com/6155326/great-fire-new-york-city-manhattan-history [https://perma.cc/VQF6-TYGF]; *The Great Fire of 1835: The Great Fire Begins*, N.Y. FIRE, https://virtualny.ashp.cuny.edu/FIRE/greatfirebegins.html [https://perma.cc/377N-DAE2].

[114] *The Great Fire of 1835: Damages*, N.Y. FIRE, https://virtualny.ashp.cuny.edu/FIRE/damages.html [https://perma.cc/ED62-JPAB]; Levy, *supra* note 113.

contained when several more buildings were blown up, though by then it had already "decimated the Financial District."[115] Among the casualties were the Merchant's Exchange and most of the district's warehouses, all of which were reduced to rubble.[116]

The estimated damages were $20 million or $600 million in today's dollars.[117] The fire also drove twenty-three of the city's twenty-six fire insurance companies to bankruptcy.[118] The consequences were considered to be of national proportions, as the fire left the heart of the nation's "commercial emporium" in ruins.[119] The most affected, however, was New York's merchant class, then the source of more than half of the nation's imports and about two-thirds of its import revenue.[120] As one newspaper dispatch remarked: "Many of our fellow citizens, who retired to their pillows in affluence, were bankrupt on awaking."[121]

As devastating as the fire was, New York City was not the only nineteenth-century city to fall victim to a conflagration. The Great Chicago Fire of 1871, for example, resulted in losses amounting to almost $200 million and the bankruptcy of many of Chicago's insurance companies.[122] Against the backdrop of an insufficient firefighting infrastructure, the destruction of buildings to create firebreaks became an important mechanism for preventing the spread of fires in the nineteenth century.[123] The question was what, if anything, courts would do to compensate owners whose property was destroyed in this fashion.

IV. THE NECESSITY EXCEPTION AS A DOCTRINE OF DEFERENCE

So far, this Note has described the core objections to the necessity exception, a process- and competence-based framework for understanding the exception, and the background against which the first necessity cases arose. This Part moves on to make two descriptive claims: First, it shows how the earliest published U.S. cases on the necessity exception relied on process- and competence-based reasoning to deny judicial relief to claimants. A closer look at these early cases suggests that the necessity exception was more a doctrine of judicial deference than a doctrine of ad hoc judicial balancing. The cases show a judicial commitment to the legislative process as the primary source of redress

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[115] Shepley, *supra* note 109, at 4; *see also* Levy, *supra* note 113.

[116] Shepley, *supra* note 109, at 4–5.

[117] Levy, *supra* note 113.

[118] *The Great Fire of 1835: Damages*, *supra* note 114.

[119] 24 REG. DEB. 2548 (1836).

[120] *Id.* at 2549.

[121] McNamara, *supra* note 111.

[122] McChesney, *supra* note 104, at 71. Only $50 million was repaid by insurance companies, "many of which became insolvent as a result of the blaze." *Id.*

[123] Lee, *supra* note 15, at 397 ("Demolition of buildings to create firebreaks was a common tactic for fighting the vast urban fires of the nineteenth century.").

where significant public interests combine with a difficulty of obtaining a fair distribution of burdens by judicial means.

Second, this Part shows how the early judges' trust in the political process was in fact borne out by a system of federal and state statutory relief measures. In doing so, this Part challenges the assumption underlying much of the criticism of the necessity exception — that the exception necessarily leads to noncompensation. To the contrary, the doctrine's main function is not to foreclose all compensation but to shift the source to the legislature when legislative relief is likely.

A. The Necessity Exception in the New York Fire Cases

As noted above, the Great New York Fire of 1835 led to the first series of cases that expounded on the necessity exception outside the context of the Revolutionary War.[124] But, unlike the revolutionary seizures of *Sparhawk*, the fire cases were brought at a time when the federal and New York constitutions included just compensation clauses for takings of private property for public use.[125] Thus, the fire cases raised the issue of whether these just compensation clauses had abrogated the longstanding necessity exception to compensable takings.[126]

Those whose property was destroyed to stop the spread of a fire had two potential avenues for legal recourse: (1) they could claim statutory remedies where available, as was the case in New York,[127] or (2) they could sue the city or the responsible officials in their personal capacities for an uncompensated taking.[128] The necessity exception was relevant to the second path, that is, to a claim based on a taking without just compensation. But if applicable, the exception would foreclose just compensation and leave the statutory path as the only avenue for relief.

The first appellate case arising from the fire was *Mayor of New-York v. Lord*.[129] Plaintiffs sought compensation pursuant to a New York statute that (1) authorized certain officials to destroy property to arrest the spread of a fire and (2) provided for compensation to those whose property was destroyed in such way.[130] The statute specifically provided for compensation for the destruction of a "building" to stop the progression of a fire.[131] The issue in the case was whether the term "building" also encompassed the belongings that had been stored in the building.[132]

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[124] DWIGHT, *supra* note 48, at 430.
[125] *See* Mayor of New-York v. Lord, 18 Wend. 126, 128 (N.Y. 1837).
[126] *See, e.g.*, Russell v. Mayor of New-York, 2 Denio 461, 471, 483 (N.Y. 1845).
[127] *Lord*, 18 Wend. at 126.
[128] *Russell*, 2 Denio at 466.
[129] 18 Wend. 126 (N.Y. 1837).
[130] *Id.* at 126.
[131] *Id.*
[132] *Id.*

Because the claim was based on a statute, the court had no need to directly consider any constitutional or common law issues.[133] But in construing the statute, the New York Court for the Correction of Errors, the highest state court at the time, found it helpful to consider the "defects . . . in the common law" that the statute sought to remedy.[134] The court found two such common law defects: First, the common law did not provide compensation to a plaintiff whose private property was sacrificed for the benefit of the public in cases of emergency.[135] Second, defendants who destroyed property out of necessity had the burden of showing the existence of an actual necessity and failing that, were held personally liable for any injudicious or mistaken exercise of the power.[136] The statute remedied both of these common law defects in that it protected officials from personal liability and compensated property owners for their losses.[137] Against this purposive understanding of the statute,[138] the court ultimately upheld the application of the statute to claims for compensation for destruction of personal property.[139]

The next case to reach the high court was *Stone v. Mayor of New-York*,[140] which involved yet another statutory claim. The issue in *Stone* was whether the statute provided compensation to the lessees of a blown-up building for merchandise stored in the building but not belonging to them.[141] This time, the court backtracked from its expansive reading of the statute in *Lord* and held that the plaintiffs had no remedy under the statute.[142] Two out of the three opinions in the case also touched on the necessity exception and its status as valid law.[143]

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[133] *See id.* at 129 (noting that the "only real question in this case is" one of statutory construction).
[134] *Id.* at 132.
[135] *Id.*
[136] *Id.* at 132–33.
[137] *Id.* at 133.
[138] *Id.* at 131 (considering legislative intent to resolve statutory ambiguity).
[139] *Id.* at 135.
[140] 25 Wend. 157 (N.Y. 1840).
[141] *Id.* at 157.
[142] *Id.* at 186.
[143] *Id.* at 162, 173. In nineteenth-century necessity cases, some judges found the necessity exception to be an inherent aspect of sovereignty and police power. *See, e.g.*, Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 194 (1873) (describing law of overruling necessity as "that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society"). Others found it to be an extension of an individual's "natural right" to violate private property rights under conditions of necessity. *See* Russell v. Mayor of New-York, 2 Denio 461, 473–74 (N.Y. 1845); Am. Print Works v. Lawrence, 21 N.J.L. 248, 257 (N.J. Sup. Ct. 1851). The substance of this "natural right" was the right of self-defense or self-preservation. *Russell*, 2 Denio at 473–74; *Lawrence*, 21 N.J.L. at 257.

Framing the necessity power as a private right was not unthinkable, since for much of the nineteenth century, firefighting was as much a private endeavor as it was a public one. Merrill, *supra* note 67, at 39. Even "[i]n 1852 not one city in the United States paid its firemen; they were all volunteers." Annelise Graebner Anderson, *The Development of Municipal Fire Departments in the United States*, 3 J. LIBERTARIAN STUD. 331, 331 (2019).

The judicial deference displayed by the opinions in *Stone* is noteworthy. If the plaintiffs' property was taken in violation of the constitutional principle "that private property cannot be taken for public use without just compensation,"[144] said one of the opinions in the case, "their remedy is by application to the legislature for the passage of an act providing for their compensation."[145] "[T]he individuals who are . . . the unhappy subjects of the law of necessity for the safety of the public," said another opinion, "may resort to the public for satisfaction of the damages they sustain."[146]

A third opinion, by Senator Verplanck, addressed the competence-based reasoning for judicial noninterference. The necessity exception, he explained, arose from "the impossibility or extreme difficulty of ascertaining the parties benefitted or protected from loss, and of settling the average proportions of the loss amongst them."[147] The issue was thus also one of judicial competence, as the task at hand was too complex, if not completely legislative.

Finally, in *Russell v. Mayor of New-York*,[148] a plaintiff who was barred from recovery under the court's statutory interpretation in *Stone* brought a purely constitutional claim for just compensation.[149] As noted above, at the time, both the federal and the New York constitutions required compensation when an individual's property was taken for public use.[150] Furthermore, the New York Constitution explicitly abrogated those aspects of the common law that conflicted with it.[151] The question was whether the common law exception for necessity takings survived the passage of this constitutional provision or was abrogated by it.[152]

Once again, the court upheld the necessity exception to takings.[153] "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it," said one opinion.[154] The Act authorizing necessity destructions regulated the exercise of state police power — and it cultivated a "most salutary, provident and truly commendable exercise" as it prevented both "inaction and . . . reckless exertions" by leaving it to government

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[144] *Stone*, 25 Wend. at 165–66.
[145] *Id.* at 166.
[146] *Id.* at 162.
[147] *Id.* at 175.
[148] 2 Denio 461 (N.Y. 1845).
[149] *Id.* at 464.
[150] *Id.*; *see supra* p. 967.
[151] N.Y. CONST. art. VII, § 13 (1821).
[152] *Russell*, 2 Denio at 484.
[153] *Id.* at 484–85.
[154] *Id.* at 474.

officials — rather than to private individuals — to exercise expert and deliberate authority without fear of personal liability.[155]

The process-based understanding of the judicial role was again endorsed in *Russell*. In response to the plaintiff's constitutional claim that the statute provided an inadequate remedy, one opinion responded that the court was "bound to presume" that "an appeal to the sovereign power, the Legislature of the State . . . cannot fail to afford him redress."[156] The legislature, not the court, had "the power to direct the proper compensation to be made."[157]

The opinion made clear, however, that an individual is not "in any case bound to trust the government to make provision for such compensation by future legislation."[158] In fact, the New York court did not shy away from requiring a remedy in cases not involving a necessity taking.[159] But in *Russell*, the court not only presumed legislative good faith but also felt itself unfit to ensure a fair distribution of benefits and losses among those affected by the fire.

A similar approach was taken by later courts even in cases where the state had not provided statutory relief. *Surocco* is illustrative, as it explicitly shows a court's sensitivity to legislative prerogatives. After rejecting the plaintiff's claim for compensation, the court noted that "[t]he legislature of the State possess [sic] the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty" experienced by those whose property is destroyed in this way.[160] Thus, the court left it to the legislature while recommending that it provide a statutory remedy for persons whose property was destroyed to suppress a fire.

B. The Legislative Process in the Aftermath of the New York Fire

Before delving into the details of some of the legislative relief provided to those affected by the New York fire, it is important to note that the groups most affected were not politically vulnerable communities but New York's monied interests as well as some of the country's most important merchants.[161] Thus, the courts had no obvious reason to

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[155] *Id.* at 476. Interestingly, the court read the statute not as an authorization for officials to destroy property as necessary to contain the spread of a fire but as imposing a *duty* to do so. *Id.* at 474. Failure to act would have "rendered [the officials] amenable to . . . courts for a criminal neglect of their duty as public officers." *Id.* at 467.

[156] *Id.* at 469 (quoting Lyon v. Jerome, 15 Wend. 569, 575 (N.Y. Sup. Ct. 1836)).

[157] *Id.*

[158] *Id.* at 470.

[159] *See, e.g.*, Lyon v. Jerome, 26 Wend. 485 (N.Y. 1841).

[160] Surocco v. Geary, 3 Cal. 69, 74 (1853).

[161] Jane Caroline Manners, Congress and the Problem of Legislative Discretion, 1790–1870, at 2 (Nov. 2018) (Ph.D. dissertation, Princeton University) (on file with the Harvard Law School Library). "As importing merchants, they were the nation's de facto tax farmers . . . [;] remitting taxes on the burnt goods was the least Congress could do for such useful federal agents." *Id.* at 3–4.

exercise greater caution and scrutiny to remedy a potential political process failure. And, as it turns out, the New York court's presumption of legislative good faith was borne out by state and federal legislative relief appropriations for the disaster-stricken.

1. State Relief. — As discussed above, the initial New York cases dealing with the necessity exception were brought under a statutory provision for relief, which was passed in 1806, years before the 1835 fire.[162] The issue in those cases was whether certain types of destructions fell under the statutory language, questions that the court assumed arose from a lack of legislative foresight rather than bad faith.[163] Moreover, New York was not the only state providing legislative relief for necessity destructions at the time. Such provisions were made in other states,[164] suggesting that it was not uncommon for a state legislature to afford compensation in the wake of an environmental disaster.

But such statutory relief provisions were not the sole means of relief provided by the state. After the fire, New York authorized a $6 million loan, approximately $180 million today, to help rebuild the city.[165] Separately, the state legislature created "The Fire Indemnity Stock of the city of New York," which authorized the creation of a $600 thousand public fund, equal to about $19 million today,[166] to pay damages and claims arising from the blowing up and destruction of buildings during the fire.[167] The statutory provision for relief, the appropriation of funds for damages, and the loan for the rebuilding of the city all show a political process apt to provide compensation and relief even in the absence of judicial mandates.

2. Federal Relief. — In the aftermath of the fire, many of the city's wealthiest men and prominent politicians created a committee and together prepared and submitted an application to Congress seeking several forms of federal relief.[168] In the end, they received some of the direct relief they had sought from Congress,[169] and importantly, this congressional relief was all but unsurprising.

As Professor Michele Landis Dauber extensively shows through her scholarship, the New York merchants' demand for federal relief came against the backdrop of forty years of congressional relief appropriations even in situations where government takings were clearly not an

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[162] *Russell*, 2 Denio at 477–78.

[163] Mayor of New-York v. Lord, 18 Wend. 126, 131 (N.Y. 1837) (explaining uncertainties that arise from "imperfections of human language").

[164] *See, e.g.*, Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Met.) 462, 464 (1844).

[165] DANIEL S. LEVY, MANHATTAN PHOENIX: THE GREAT FIRE OF 1835 AND THE EMERGENCE OF MODERN NEW YORK 43 (2022).

[166] *$600,000 in 1838 Is Worth $19,148,903.23 Today*, *supra* note 71.

[167] An Act Authorizing the Mayor, Aldermen and Commonalty of the City of New-York to Raise Money, *supra* note 72; *see $1 in 1838 Is Worth $31.91 Today*, CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1838?amount=1 [https://perma.cc/BU5R-WZKS].

[168] Manners, *supra* note 161, at 51–54; 24 REG. DEB. 2205 (1836).

[169] Manners, *supra* note 161, at 55.

issue.[170] By then, the principle requiring federal fire relief in emergency situations "ha[d] been settled by repeated legislative acts."[171] Moreover, at that time, the Financial District was considered the heart of the country's commercial emporium, and a failure to contribute to its rehabilitation would have had national consequences.[172] The New York merchants were also significant contributors to the national treasury, as they provided more than half of the treasury's income from duties,[173] which in turn formed a substantial part of the country's revenue.

Interestingly, congressional debates over the propriety of relief often took on a peculiarly judicial tone, animated by concerns over precedent and equal treatment — a point that further strengthens the political process justification for judicial deference in these cases. Once Congress had provided relief to some groups, concerns over equal treatment of the disaster-stricken became an important factor in the provision of congressional relief appropriations to future victims as well. During congressional debates over relief measures, "concern that all persons receive equal treatment dispensed according to equitable principles pervaded virtually every discussion of relief."[174] The importance of equal treatment also affected the administrative processes through which relief was dispensed. By the late eighteenth and early nineteenth centuries, congressional relief had shifted toward class-wide appropriations.[175] Anyone who fit the eligibility criteria for a class — for example, those who lost property in the New York fire — would receive direct relief through an administrative scheme created by Congress.[176]

CONCLUSION

What would a necessity taking look like in today's world? The case of the Western megadrought is once again instructive. In September 2021, in response to the unprecedented drought, the California State Water Resources Control Board ordered approximately 4500 water-rights holders, many of whom were farmers, to stop withdrawing from the Sacramento–San Joaquin River Delta watershed.[177] But, since those water rights amounted to property for constitutional purposes, the

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[170] MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE 23 (2013).
[171] *Id.* (quoting 24 REG. DEB. 2581 (1836)).
[172] *Id.* at 2548.
[173] Manners, *supra* note 161, at 50.
[174] DAUBER, *supra* note 170, at 21.
[175] *Id.* at 18.
[176] *Id.*
[177] *See* Nick Cahill, *California Water Suppliers Cast 1st Challenge to Strict Drought Rules*, COURTHOUSE NEWS SERV. (Sept. 1, 2021), https://www.courthousenews.com/california-water-suppliers-cast-1st-challenge-to-strict-drought-rules [https://perma.cc/7V76-MQHW].

decision was soon challenged by a lawsuit alleging, among other things, an unconstitutional taking of water rights.[178]

Because eighty percent of California's water withdrawal is used for agricultural production,[179] any changes to the current property regime are likely to disproportionately affect farmers. Yet the necessity exception can serve as a doctrine of judicial deference to state regulators' decision to shift water allocations in the context of an urgent water crisis. Like the New York merchants, California's farmers occupy a central position in the U.S. economy — they alone provide about one-third of the country's vegetables and two-thirds of its fruits and nuts.[180] And, like the New York merchants, California's farmers are not strangers to the political process but a formidable faction in the history of California water policy.[181] Their political power is evident in recent drought-inspired proposals at the state legislature to purchase farmers' water rights or the land associated with those rights.[182]

Finally, water management specifically, and environmental policy generally, is an extremely complicated area of government policy full of trade-offs and balancings that should be entrusted to the expert branches of government. As a drought-plagued region struggling with water shortages, California is poised to continue curtailing water-use rights for many groups, including its farmers. Other such curtailments may happen in other parts of the country, and different climate change–fueled challenges apart from water shortages may challenge our existing property rights regimes. When such challenges arrive, the necessity exception can play an important role in allowing legislatures to take the lead in addressing these challenges.

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[178] San Joaquin Tributaries Auth.'s Petition for Writ of Mandate & Verified Complaint for Declaratory & Injunctive Relief at 30, San Joaquin Tributaries Auth. v. Cal. State Water Res. Control Bd., No. 21CECG02632 (Cal. Super. Ct. Sept. 2, 2021).

[179] *See* Brad Plumer, *These Maps of Water Use Show Why the Western U.S. Is in Trouble*, VOX (Oct. 17, 2014, 2:49 PM), https://www.vox.com/2014/10/17/6994811/map-household-water-use-american-west-drought [https://perma.cc/DQ7Y-KGWL]. Irrigation of agricultural crops accounts for eighty percent of the nation's water consumption more generally. *See* Glenn Schaible, *Understanding Irrigated Agriculture,* USDA (June 5, 2017), https://www.ers.usda.gov/amber-waves/2017/june/understanding-irrigated-agriculture [https://perma.cc/4WWJ-68UJ].

[180] *See* Plumer, *supra* note 179. Farming has additional downstream effects beyond just agricultural production, as "numerous upstream sectors supply goods and services to agriculture." Alvar Escriva-Bou et al., *Policy Brief: Drought and California's Agriculture*, PUB. POL'Y INST. CAL. (Apr. 2022), https://www.ppic.org/publication/policy-brief-drought-and-californias-agriculture [https://perma.cc/XT8C-E8XD]. For example, by one 2021 estimate, the drought's economic impact alone is at $1.7 billion in revenue losses and 14,600 lost jobs. *Id.*

[181] *See* Bryan Fried, *Technology Can Help Farmers Survive the Water Crisis in the West*, FORBES (Aug. 15, 2022, 8:15 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2022/08/15/technology-can-help-farmers-survive-the-water-crisis-in-the-west [https://perma.cc/3UDP-GX8A] ("Farmers have a lengthy history with droughts and are well versed in dealing with water authorities that need to balance water access among multiple use cases.").

[182] *See* Adam Beam, *California Lawmakers Mull Buying Out Farmers to Save Water*, AP NEWS (Jun. 6, 2022, 12:07 AM), https://apnews.com/article/california-education-droughts-government-and-politics-76f37ee82207f64f2a051f3dd4438856 [https://perma.cc/HN57-RMK8].