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When Does an Emergency Police Power Constitute an Unconstitutional Taking of Property?

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I.

THE DOCTRINE OF NECESSITY – AN INTRODUCTION

As will be explored in this paper, there are uses of the government's police powers that take, damage or destroy property that are not compensable under the doctrine of eminent domain. Such uses may be compensable under tort law or other legal theories, but not as an exercise of the power of eminent domain. One category of such non-compensable actions is an exercise of a narrow set of governmental powers sometimes referred to as the "Doctrine of Necessity," which allows the government to damage or destroy property in extraordinary circumstances without the payment of compensation as a taking. The "Doctrine of Necessity" is a defense that can be raised in response to a takings claim for property damage resulting from responses to emergency events such as natural disasters like wildfires and floods, and for police tactics that destroy or damage property to apprehend suspected criminals. *See Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980).

While the Doctrine of Necessity is well established in many federal circuits and states, its application in Texas is not yet fully developed. This paper seeks to explore this takings defense and look at questions such as: What are the parameters of this defense? When the state acts pursuant to its police power, rather than the power of eminent domain, can those actions constitute a taking? When does a tort rise to the level to be considered a taking? When does the doctrine apply? What are the public policy implications of a broad reading and, conversely, a narrow reading of the doctrine.

II.

EMINENT DOMAIN AND ITS EXCEPTIONS

The use of eminent domain, and the determination of its proper reach, has been, is, and probably will always be, a controversial subject. Scholars have traced the history of eminent domain as far back as the Bible where "the prophet Samuel informs the people of Israel that the king 'will take your fields, and your vineyards, and your olive yards, even the best of them." Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 524 (2009) (quoting 1 *Samuel* 8:14 (King James)). English common law, as set forth in the Magna Carta (adopted in 1215) required that before agents of the King could seize chattels from a "free man," there needed to be a "legal judgment of his peers or by the law of the land," and crown officials had to immediately pay money for these seized chattels. *Id*. at 525 (quoting Magna Carta, chs. 28, 39 (1215), *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 11, 16, 17 (Richard L. Perry & John C. Cooper eds., 1959)). Similarly, the U.S. Constitution, through its the Fifth Amendment, requires that the government pay just compensation for a taking. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Takings Clause – Easy to State.

To properly frame the issue of "if" and "when" the Doctrine of Necessity (and related takings defenses) apply, we should first review, in general terms, the concept of eminent domain and the

obligation to compensate persons who property has been taken.

The "Takings Clause" of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in pertinent part, that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). "The 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." *Armstrong*, 364 U.S. at 49. When the government takes property for public use without the owner's consent, it is exercising its power of eminent domain. *See* 1 *Nichols on Eminent Domain* § 1.11 (2022).

Similarly, Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person…." Tex. Const. art. I, § 17. Given that the federal Takings Clause is substantially similar, the Texas Supreme Court many times relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See*, *e.g.*, *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 932 (Tex. 1998) ("[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").

B. The Takings Clause – Hard to Apply.

The U.S. Supreme Court has noted that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). The Texas Supreme Court has also indicated the same difficulty under the Texas Constitution. *See Sheffield Dev. Co., Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660, 671 (Tex. 2004) (describing the takings legal battlefield as a "sophistic Miltonian Serbonian Bog," for which "[t]here are small islands in the bog."

C. Recent U.S. Supreme Court Reiteration of the Reach, and Non-Reach, of the Takings Clause.

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court held that a California law that provided union organizers limited access to agricultural worksites was a *per se* taking based upon the proposition that any governmental grant of physical access, no matter how time-limited or functionally constrained, constitutes a *per se* taking unless one of the Court's articulated exceptions applies. Prior to this decision, the Supreme Court's tests for determining whether a case involved a regulatory or physical taking were somewhat unclear, which resulted in lower courts having to glean

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