

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

Robert F. Brown
Brown & Hofmeister, L.L.P.

The University of Texas School of
Law 27th Annual Land Use Planning
Conference

1

DOCTRINE OF NECESSITY

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.

2

DOCTRINE OF NECESSITY

- **Allows the government to damage or destroy property in extraordinary circumstances without the payment of compensation as a taking.**
- **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.**

3

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).

4

The Takings Clause – Hard to Apply

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.”

5

EXCEPTIONS TO TAKINGS

- **Discussed in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).**
- **“Isolated physical invasions, not undertaken pursuant to a granted right of access, [that] are properly assessed as individual torts rather than appropriations of a property right.”**

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

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

Also available as part of the eCourse

[2023 Land Use eConference](#)

First appeared as part of the conference materials for the
27th Annual Land Use Conference session

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