St. Mary's Law Journal

Volume 36 | Number 2 Article 2

1-1-2005

Mind the Gap: Expansion of Texas Governmental Immunity between Takings and Tort.

Jadd F. Masso

MIND THE GAP: EXPANSION OF TEXAS GOVERNMENTAL IMMUNITY BETWEEN TAKINGS AND TORT

JADD F. MASSO*

* Associate, Strasburger & Price, LLP, Dallas, Texas. B.A., B.B.A., Southern Methodist University; J.D., University of Texas. The author would like to thank Strasburger partner David LaBrec and Austin attorney Renea Hicks for their comments and advice during the preparation of this Article.

I. INTRODUCTION

A. Jennings v. City of Dallas[1]

Early in the morning on December 27, 1993, a maintenance crew from the City of Dallas's wastewater collection division was dispatched to unstop a clogged sewer main near the home of James and Charlotte Jennings and their family.[2] Upon removal of the stoppage, grease and backed-up sewage rushed down the pipeline at high speed and created a second blockage.[3] The force of the second blockage caused sewage to spew into the Jennings' home with dramatic force, causing extensive damage.[4] One of the city's wastewater supervisors later testified that, in his entire career, "he had never seen a home flooded with more raw sewage."[5] The Jennings subsequently filed suit against the city, alleging, *inter alia*, that the city's actions constituted an unconstitutional taking, damaging, or destruction of their property for public use without adequate compensation in violation of Article I, Section 17 of the Texas Constitution.[6] The trial court granted the city's motion for summary judgment,[7] holding simply that the Jennings' claims were barred by the Texas Supreme Court's holding in *City of Tyler v. Likes*.[8] The Dallas Court of Appeals, in an unpublished opinion, reversed the trial court's grant of summary judgment for the city and rendered partial summary judgment for the Jennings on the issue of whether sewage in their home constituted a "nuisance per se."[9] The appellate court held that the city was not entitled to summary judgment on the takings claim because it had not controverted the Jennings' evidence that, because sewage backups and

1. 138 S.W.3d 366 (Tex. App.—Dallas 2001), *rev'd*, 142 S.W.3d 310 (Tex. 2004).

2. Respondents' Brief on the Merits at 3, City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004) (No. 01-1012).

3. Jennings v. City of Dallas, 138 S.W.3d 366, 369 (Tex. App.—Dallas 2001), *rev'd*, 142 S.W.3d 310 (Tex. 2004).

4. Respondents' Brief at 3, *Jennings* (No. 01-1012); Jennings v. City of Dallas, 138 S.W.3d 366, 369 (Tex. App.—Dallas 2001), *rev'd*, 142 S.W.3d 310 (Tex. 2004).

5. Respondents' Brief at 3, *Jennings* (No. 01-1012).

6. *Jennings*, 138 S.W.3d at 372.

7. *Id.* at 368.

8. 962 S.W.2d 489 (Tex. 1997). The City of Tyler was entitled to summary judgment because, while the City did not present "clear, direct, and positive evidence that it committed no intentional acts that created a taking," Likes offered no controverting evidence. City of Tyler v. Likes, 962 S.W.2d 489, 504-05 (Tex. 1997).

9. *Jennings*, 138 S.W.3d at 373.

floodings are "inherent" in the operation of a sewer, the city acted intentionally in damaging their home.[10]

On April 25, 2002, the Texas Supreme Court granted the City of Dallas's petition for review, and heard oral arguments on September 11, 2002.[11] The court took nearly two years to make its decision, with a majority opinion by Justice Schneider issued on June 25, 2004.[12] Although the court reversed the decision of the Dallas Court of Appeals, the broader issues raised by the *Jennings* case remain unresolved.

B. *Texas Law and* Jennings

In *Jennings*, the plaintiffs sought compensation for damage to their home resulting from sewage flooding.[13] The flooding resulted, as the Jennings argued, from the mere existence of the sewer system, because occasional backups and floodings are inherent in any sewer.[14] The Jennings did not allege that the maintenance being performed on the sewer near their house was in any way related to the damage. In support of their allegation that a taking occurred, the Jennings alleged that the sewage in their home constituted a public nuisance.[15] In Texas, a nuisance created by a municipality in the non-negligent performance of a governmental function constitutes a taking.[16] No negligence was alleged to have

---

10. *See id.* at 372-73 (stating that the Jennings had presented deposition testimony from a City of Dallas wastewater supervisor and a civil engineer in which both testified that occasional backups and floodings are inherent in the operation of any sewer system).

11. City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004).

12. *See generally id.* (deciding that "the court of appeals erred in reversing the trial court's grant of summary judgment in favor of the City" and rendering a take nothing judgment for the Jennings). The Texas Supreme Court's decision is discussed further in Section V of this Article.

13. *Id.* at 311.

14. *See* Respondents' Brief at 14, *Jennings* (No. 01-1012) (citing the testimony of Raymond Helmet, an expert witness, and city employee Gary Morgan that occasional floodings like the one at issue "are 'inherent' in the operation of sanitary sewers").

15. *Id.* at 5.

16. *See, e.g.*, Gotcher v. City of Farmersville, 137 Tex. 12, 14, 151 S.W.2d 565, 566 (1941) (affirming that the intentional creation of a nuisance is a "taking" by explaining that the plaintiff relied on Texas Supreme Court precedent that identifies damages caused by the "improper construction of storm sewer," rather than a sanitary sewer, as a taking for which municipalities are liable); Shade v. City of Dallas, 819 S.W.2d 578, 581 (Tex. App.—Dallas 1991, no writ) (concluding that municipalities are liable for "the creation or maintenance" of nuisances that result from the performance of governmental functions); City of Uvalde v. Crow, 713 S.W.2d 154, 156 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (hold-

taken place in the sewer's design, construction, or subsequent maintenance. The Jennings simply argued that, because the city was aware that sewers, even when properly constructed and maintained, occasionally flood property connected to them, and because the city obviously intended to build the sewer in spite of that knowledge, it therefore intended to occasionally flood homes.[17]

The city argued that it did not intend the resultant harm, and that case law requires an intent to harm in order to constitute a taking.[18] Further, the city argued that because it clearly did not intend to harm the Jennings' property, the harm could have only been the result of negligence.[19] Municipalities are immune from tort liability in performing governmental functions, such as constructing and operating a sewer, except to the extent that the Texas Tort Claims Act[20] waives immunity.[21] Texas municipalities, in the performance of governmental functions, are liable for:

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.[22]

Thus, by casting the Jennings' claim as one of negligence, the city attempted to avail itself of sovereign immunity as a defense.

---

ing that the creation of a nuisance necessarily entails "an unlawful invasion of the property or rights of others . . . beyond that arising" from mere "negligent or improper use").

17. *Jennings*, 142 S.W.3d at 313.

18. Petitioner's Brief on the Merits at 14, City of Dallas v. Jennings, 142 S.W.3d 310, 313 (Tex. 2004) (No. 01-1012).

19. *Id.*

20. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 (Vernon 1997).

21. City of Tyler v. Likes, 962 S.W.2d 489, 493 (Tex. 1997); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 (Vernon Supp. 2002) (listing "sanitary and storm sewers" as a governmental function of a municipality).

22. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).

C. *The Takings-to-Tort Gap*

Texas courts have consistently held that a governmental entity is liable for damage or destruction of property when it acts intentionally.[23] Liability for negligent acts committed by the government is generally precluded by sovereign immunity, except where immunity is waived by statute.[24] Citizens lie seemingly unprotected in the area where the constitutional doctrine of "takings" and the tort remedies allowed by statute fail to meet or overlap. There is, as a consequence, a gap in the liability scheme designed to protect citizens from the government's use, damage, or destruction of their property. *Jennings*-like situations arise when a governmental entity seeks to avoid liability when, from an equitable standpoint, it is undeniable that an undue liability would be put upon a citizen. Such a result is particularly possible in a jurisdiction such as Texas, in which the sovereign's waiver of immunity is strictly limited to certain factual scenarios.[25]

Compensation may be unattainable for acts that are, perhaps, "not intentional enough" to meet Texas's intentional taking standard and, at the same time, do not fit within the limited waiver of immunity for tort actions. The gap in the liability scheme can be easily depicted in a graph:

---

23. State v. Hale, 136 Tex. 29, 36, 146 S.W.2d 731, 736 (1941) (holding that the "true test" of "liability for adequate compensation for private property taken or damaged for public use" is whether "the State intentionally" performed "certain acts in the exercise of its lawful authority"); Kerr v. Tex. Dep't of Transp., 45 S.W.3d 248, 251 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (holding that the plaintiff in takings suits must show that the government intended "the act that caused the harm"); Green Int'l, Inc. v. State, 877 S.W.2d 428, 434 (Tex. App.—Austin 1994, writ dism'd by agr.) (holding that the plaintiff in a takings suit must establish that "the State intentionally performed certain acts" that resulted in a taking); Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 830 (Tex. App.—Waco 1993, writ denied) (stating that the test for establishing a "taking" is whether the state intentionally performed acts "which resulted in the taking or damaging of plaintiff's property").

24. Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994).

25. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997) (delineating the extent to which Texas has waived its immunity).

Other Non-Intentional Damage: suits are barred by sovereign immunity	Certain Negligent Damage: suits are allowed by statute	Other Negligent Damage: suits are barred by sovereign immunity	Intentional Damage: suits are allowed by a "takings" provision

Accidental (No Mens Rea) <——— "Mens Rea" of the Act ———> Specific Intent

It is these cases, in which property is taken, damaged, or destroyed as a result of government action, but are nonetheless uncompensable, that are the focus of this discussion. The question asked is simply this: By what rationale may governmental entities avoid the language of a constitutional provision that simply states, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ."[26]

II. TAKINGS

A. *Origins and Development of the Doctrine*

The origin and intended meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution are topics on which there is little history. The state ratifying conventions that debated the Constitution "sought as amendments to the Constitution every provision in the Bill of Rights except the Takings Clause."[27] The clause did not find its way into history because of a demand for such protection, but merely because James Madison, the author of the Bill of Rights, included it at the last minute.[28] He did not explain the meaning of the clause when he submitted it to Congress, nor did Congress debate its meaning.[29]

The protection provided by the Taking Clause was a first in our legal heritage. No colonial charter had such a provision, except for the Massachusetts Body of Liberty, adopted in 1641, which required compensation when personal property was taken.[30] The principle that the government should compensate individuals for

26. TEX. CONST. art. I, § 17.

27. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

28. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709-10 (1985).

29. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

30. *Id.* at 785.

property taken for public use was not widely established in early America. American colonists inherited a concept of property that allowed the sovereign extensive power over private property for the public benefit; regulation could even go so far as to deny all productive use of property, so long as the regulation was for the public benefit.[31]

Early state constitutions did not require compensation when the government seized property.[32] In 1796, South Carolina's attorney general successfully argued that the uncompensated taking of land for public use was "one of the inherent prerogatives of the majesty of the people."[33] Another court similarly held that citizens were "bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience."[34] Vermont, in 1777, was the first state to require compensation "whenever any particular man's property is taken for the use of the public."[35] Massachusetts was the next, adopting a similar provision in its 1780 Constitution.[36] In any event, most states felt free to take property for roads or other projects without compensation well into the nineteenth century.[37] In fact, as late as 1868, five of the original thirteen states still had no just compensation clauses in their constitutions.[38]

The federal constitutional guarantee against uncompensated takings of private property for public use applies to the states through the Fourteenth Amendment.[39] In modern times, nearly all states adopted constitutional provisions requiring compensation when property is taken for public use. Those states that do not have ex-

---

31. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1054 (1992) (Blackmun, J., dissenting).

32. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 789 (1995).

33. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 715 n.121 (1985) (citing Lindsay v. E. Bay St. Comm'rs, 2 S.C.L. (2 Bay) 38 (S.C. 1796)).

34. M'Clenachan v. Curwin, 3 Yeates 362, 373 (Pa. 1802).

35. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790 (1995).

36. William Michael Treanor, *The Origins and Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701 (1985).

37. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting).

38. *Id.* at 1057 n.22 (Blackmun, J., dissenting).

39. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

press provisions interpret their constitutions to include such a requirement.[40] As a result, a cause of action for inverse condemnation is generally available in both state and federal courts to remedy uncompensated takings by federal, state, and local government agencies.[41] Generally, takings claims against state and local governments are initially brought in state court under state constitutional provisions. A federal claim for just compensation under the Fifth Amendment or Section 1983[42] is ordinarily not ripe until applicable state law remedies have been pursued and exhausted.[43]

B. *Origins of the Texas Provision*

Altogether, Texas has been governed by nine constitutions.[44] Three were written while Texas was under Mexican rule, six while Texas was an independent republic and then a state.[45] The current constitution, approved by voters in 1876, was written immediately after Reconstruction. The Bill of Rights of the 1876 Constitution, which includes the takings prohibition in Section 17, is modeled after the Declaration of Rights contained in the 1836 Constitution of the Republic of Texas.[46] The drafters of the 1836 document relied on a variety of sources in constructing its rights scheme, including the customs of common-law Britain and civil-law Spain, the Magna Carta, equivalent documents from several states, and the U.S. Declaration of Independence.[47] Unlike the post-reconstruction reform efforts in many southern states, the Constitutional Convention in Texas in 1875 was not entirely a revolt against the ways of the reconstruction government.[48] Rather, it was more an

---

40. KEITH W. BRICKLEMEYER & DAVID SMOLKER, INVERSE CONDEMNATION, IN CURRENT CONDEMNATION LAW 54 (Alan T. Ackerman ed., 1994).

41. *Id.*

42. U.S. CONST. amend. V.

43. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (emphasizing that, because the Fifth Amendment "does not proscribe the taking of property," but rather only the "taking without just compensation," enforcing the constitutional limitation requires property owners to exhaust their remedies under state law).

44. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 17 (Butterworth Legal Publishers 1987).

45. *Id.*

46. *Id.* at 18.

47. *Id.*

48. *Id.* at 19.

intentional and thoughtful movement away from the liberal, fully-empowered model of government exemplified in the federal constitution.[49] The framers sought a "hands-off" form of government.[50]

The differences in language between the federal and the Texas Bill of Rights are anything but happenstance. The drafters of the 1876 Texas Constitution specifically refused to follow the federal Bill of Rights as a model.[51] The framers carefully drew and debated each section of Article 1.[52] Contrary to the federal Bill of Rights, the Texas provisions are cast as affirmative guarantees of protection, instead of limitations on the power of government.[53] The final provision of the original Texas Bill of Rights, Section 29, states: "[E]verything in this 'Bill of Rights is excepted out of the general powers of the government . . . shall be void."[54] The Texas Supreme Court has held Section 29 to be an express limitation on the police power of the state—a limitation not present in the federal scheme.[55] As a result, the court has held that even when provisions are identical in the state and federal constitutions, the Texas provision may result in a different outcome due to the broader protections afforded by the Texas Bill of Rights as a whole.[56]

The specific intended meaning of Article I, Section 17[57] is not clear from historical records, though the courts have developed a relatively independent body of law interpreting it.[58] Federal im-

---

49. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 19 (Butterworth Legal Publishers 1987).

50. *Id.*

51. *Id.* at 22.

52. *See id.* (explaining that the drafters of the Constitution of 1876 "carefully drew and debated [A]rticle I's sections" throughout the entire writing process).

53. *Id.*

54. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 22 (Butterworth Legal Publishers 1987).

55. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 1011 (1934).

56. *Id.* at 1011; *see also* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 23-24 (Butterworth Legal Publishers 1987) (explaining that the Texas Supreme Court's holding "that section 29 is an express limitation on the state's police power which does not appear in the federal constitution," results in the court assigning different meanings "to nearly identical language of the federal and state constitutions with respect to a legislative moratorium on the collection of certain business obligations").

57. TEX. CONST. art. XVII.

58. *See generally* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 (Seth Shepard McKay ed., The University of Texas 1930); SETH SHEPARD MCKAY, SEVEN

pact on Texas eminent domain law "has not been extensive."[59] Two major differences exist between the Texas and federal provisions: (1) the Texas provision requires "adequate" compensation instead of "just compensation" and (2) the Texas provision extends protection to owners of property that is damaged or destroyed.[60] It is thought that the addition of "damaged" and "destroyed" was intended to eliminate any requirement that property be physically invaded or taken away for compensation.[61] Most early cases dealt with the meaning of "public use," and came to the conclusion that "public benefit" was an equivalent.[62] Texas courts have also recognized that property may be taken without compensation in a valid exercise of the state's police power.[63]

C. *Elements of a Takings Claim*

The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[64] Thus, the essential elements of a cause of action for inverse condemnation are: (1) private property (2) that has been taken (3) for public use (4) without just compensation. State constitutional provisions are generally similar, including the Texas Constitution, in providing protection to cover situations in which property is "taken, damaged, or destroyed."[65] Notwithstanding variances in state constitu-

---

DECADES OF THE TEXAS CONSTITUTION OF 1876 (1942); J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457 (1959).

59. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 63 (1977).

60. *Id.*; *see also* JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 60-61 (Greenwood Press 1996) (writing that the present Texas Constitution replaced "just" compensation with "adequate" compensation and specifically provides that "taking" includes the "damaging and destroying" of property).

61. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 64 (1977).

62. JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 61 (Greenwood Press 1996).

63. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 63 (1977). It is interesting to note the potential conflict that arises due to this finding: As discussed above, the Texas Supreme Court has also held that the Texas Bill of Rights is supreme over all other powers of government, including the police power.

64. U.S. CONST. amend. V.

65. TEX. CONST. art. I, § 17.

tional provisions, most states apply the interpretations of the takings doctrine given by federal courts at least in part.[66]

That which constitutes property protected by the Fifth Amendment is generally a matter of state law.[67] The concept of private property is broad, including everything that is the subject of ownership, including corporeal or incorporeal, tangible or intangible, visible or invisible, and real or personal property.[68]

There is no set formula used in any jurisdiction to determine whether or not a taking has occurred. Generally, a court will consider three factors: (1) the character of the act at issue; (2) the economic impact of that act on the individual's property rights; and (3) the extent to which that action interferes with "distinct investment-backed expectations."[69] A taking may occur even when physical occupation or damage to property does not occur; e.g., a substantial, permanent interference with the use or enjoyment of property will also constitute a taking.[70] When a governmental entity authorizes either a continuing process of physical events or an isolated event or activity that denies an owner the use and enjoyment of his or her property, a taking occurs and the owner is entitled to compensation.[71]

"Public use" occurs in almost any situation in which property is actually used by the public or if its use results in a public advantage or benefit.[72] The concept of public use is broad and has been viewed as being "coterminous with the scope of [the government's] police powers" to protect or promote the public health, safety, welfare, and morals.[73]

---

66. *See* State v. Hale, 96 S.W.2d 135, 141 (Tex. Civ. App.—Austin 1936), *aff'd in part*, 136 Tex. 29, 146 S.W.2d 731 (Tex. 1941) (holding that "adequate compensation" in the Texas Constitution is equivalent to the requirement of "just compensation" in the Fifth Amendment).

67. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

68. *See id.* at 1003 (noting that property extends beyond tangible goods and includes other intangibles).

69. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

70. *See* United States v. Causby, 328 U.S. 256, 261-62 (1946) (holding that the frequency of the overhead flights rendered the land unusable and created a complete loss, as if the United States had physically invaded the land and taken possession of it).

71. United States v. Dickinson, 331 U.S. 745, 749 (1947); *see also* Kimball Laundry Co. v. United States, 338 U.S. 1, 2 (1949) (awarding compensation to a laundry company for its loss when the government temporarily took over its plant for military purposes).

72. Thornton Dev. Auth. v. Upah, 640 F. Supp. 1071, 1077 (D. Colo. 1986).

73. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

D. *Intentional Acts v. Negligent Acts*

Though the states have, for the most part, adopted strikingly uniform statutory or constitutional provisions that require compensation when private property is taken for public use, the states differ in the legal tests used to evaluate cases brought under the provisions.[74] The difference lies in whether the courts of a particular jurisdiction require proof that the governmental act was intentional in order to invoke the protection of the takings clause.[75] Some jurisdictions insist that the act, and in some cases, arguably, the harm, be intended by the governmental entity, while others have found that takings occur even when the government's acts were merely negligent or accidental.[76] Upon review of cases from various jurisdictions, it becomes evident that the courts apply two different approaches to takings law. One group, including the federal courts, views compensable takings as occurring when the government causes damage to or the destruction of property when the govern-

---

74. *See, e.g.*, State v. Dart, 202 P. 237, 239 (Ariz. 1921) (concluding that there is no liability for damage that does not result from an eminent domain privilege); Dep't of Agric. & Consumer Servs. v. Polk, 568 So. 2d 35, 40 (Fla. 1990) (holding that the bacteria infected trees were non-compensable and a taking only occurred with regard to the unaffected trees); Elk City v. Rice, 286 P.2d 275, 277 (Okla. 1955) (concluding that the damage was not a necessary incident to the construction and therefore no "taking" occurred); Vokoun v. City of Lake Oswego, 56 P.3d 396, 401 (Or. 2002) (emphasizing that a takings claim requires a government's intent to take the property for the use of the public); Borough of Dickson City v. Malley, 503 A.2d 1035, 1036 (Pa. Commw. Ct. 1986) (requiring a landowner to establish that the damages were "the direct and necessary consequence" of the government's action); City of Tyler v. Likes, 962 S.W.2d 489, 505 (Tex. 1997) (concluding that no intentional acts were committed, and mere negligence that eventually causes damages is not a taking); Olson v King County, 428 P.2d 562, 567 (Wash. 1967) (holding that the damage due to the debris and rocks was neither contemplated, nor a necessary incident in the construction of the road and only a temporary interference); State *ex. rel* Firestone Tire & Rubber Co. v. Ritchie, 168 S.E.2d 287, 291 (W. Va. 1969) (stating that the general rule that damages in eminent domain proceedings are not recoverable if they resulted from negligence); Wisconsin Power & Light Co. v. Columbia County, 87 N.W.2d 279, 282 (Wis. 1958) (concluding that a taking did not exist in the constitutional sense when the county had no intent, the public obtained no benefit, the county did not anticipate that the damage would result, and the injury was accidental); Chavez v. Laramie 389 P.2d 23, 25 (Wyo. 1964) (holding that an injury caused by negligence is not considered a taking).

75. *Compare* Gruntorad v. Hughes Bros., Inc., 73 N.W.2d 700, 706 (Neb. 1955) (indicating that negligence is immaterial in determining a taking), *with* City of Tyler v. Likes, 962 S.W.2d 489, 505 (Tex. 1997) (concluding that negligence alone is not a taking).

76. *See* discussion *infra* Part II.D.1-2.

ment acts in a certain way or under certain circumstances.[77] The other group views virtually any damage to or destruction of property that results from any act of the government as a compensable taking, with few exceptions.[78]

Cases from the various jurisdictions are often difficult to compare, but courts generally analyze takings claims involving negligence by considering five factors: (1) the language and/or construction of the constitutional provision; (2) whether, in the jurisdiction, recovery is allowed at all under an inverse condemnation theory; (3) the method by which the action is presented to the court; (4) whether the governmental act or project, negligently planned or carried out, was a basis for an inverse condemnation claim; and (5) whether the resulting damage or destruction was a necessary consequence or result of the act.[79]

1. Requirement of Intent

In one of the few U.S. Supreme Court opinions to address the issue of intent in takings cases, the Court held that only an intentional and complete taking or destruction of property will warrant mandatory compensation by the government under the federal constitution.[80] In *Keokuk & Hamilton Bridge Co. v. United States*,[81] a privately-owned pier in the Mississippi River was badly damaged when government contractors, working to deepen a channel in the river, used dynamite to loosen the bedrock in the bed of

77. *See, e.g.*, Sanguinetti v. United States, 264 U.S. 146, 149-50 (1924) (requiring a direct and necessary result from a government entity to impose a taking); Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 126 (1922) (holding that incidental damage do not constitute a taking).

78. State v. Hollis, 379 P.2d 750, 751 (Ariz. 1963); Louisville & N.R. Co. v. Craft, 233 S.W. 741 (Ky. 1921); Hodges v. Town of Drew, 159 So. 298, 301 (Miss. 1935); Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 691 (Mo. 1993); *Gruntorad*, 73 N.W.2d at 706; Sea Harbor Corp. v. G & M Dredging Co., 105 N.Y.S.2d 497, 499 (N.Y. Spec. Term 1951); Rhyne v. Town of Mount Holly, 112 S.E.2d 40, 45 (N.C. 1960); Sale v. State Highway & Pub. Works Comm'n, 89 S.E.2d 290, 295 (N.C. 1955); Sheriff v. Easley, 183 S.E. 311, 316 (S.C. 1936); Jenkins v. County of Shenandoah, 436 S.E.2d 607, 609 (Va. 1993); Makela v. State, 205 A.2d 813, 815 (Vt. 1964); Griswold v. Sch. Dist. of Weathersfield, 88 A.2d 829, 831 (Vt. 1952).

79. A.W. Gans, Annotation, *Damage to Private Property Caused by Negligence of Governmental Agents As "Taking," "Damage," or "Use" for Public Purposes, in Constitutional Sense*, 2 A.L.R.2d 677, 681 (1948).

80. *See Keokuk*, 260 U.S. at 126-27 (rejecting a claim that the property was destroyed and a taking had occurred, when the property was only damaged).

81. 260 U.S. 125 (1922).

a stream near the pier.[82] The Court, in an opinion by Justice Holmes, affirmed a lower court ruling that no compensation was warranted because (1) "the pier was not destroyed but simply . . . damaged in a way that could have been repaired for a moderate sum" and (2) the action was not deliberate, but "an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else."[83] Justice Holmes concluded: "In such cases there is no remedy against the United States."[84]

The Supreme Court's position in *Keokuk* that only a complete taking or destruction is compensable is justified; the Fifth Amendment guarantees compensation when property is "taken" but makes no promise as to property that is merely damaged.[85] The rationale for the requirement of an intentional act, however, is less obvious. Federal cases offer little historical analysis to support the finding that takings cannot occur as a result of the government's negligence.[86] In other cases, such as *Hughes v. United States*,[87] decided a decade before *Keokuk*, and *Sanguinetti v. United States*,[88] decided just two years later, the Court easily dismisses claims for damages that were not a "direct and necessary result" of the government's action or "within the contemplation of or reasonably . . . anticipated by the government."[89]

Of states with reported cases on the issue of negligent takings, about half support the federal courts' position with at least a clear majority of their case law.[90] Early Oklahoma cases represent the

---

82. Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 126 (1922).

83. *Id.* at 126-27.

84. *Id.* at 127.

85. U.S. CONST. amend. V.

86. *See, e.g.*, Sanguinetti v. United States, 264 U.S. 146, 149-50 (1924) (denying liability for flooding due to accidental discharge of water from government-owned structure); *Keokuk*, 260 U.S. at 127 (holding that the incidental damage offers "no remedy against the United States"); *see also* Hughes v. United States, 230 U.S. 24, 34-35 (1913) (involving damages resulting from a government officer's use of dynamite to break a levee during an emergency)

87. 230 U.S. 24 (1913).

88. 264 U.S. 146 (1924).

89. *Sanguinetti*, 264 U.S. at 149-50; *Hughes*, 230 U.S. at 34-35.

90. The majority of jurisdictions on both sides of this argument have not completely settled the issue. In each state, exceptions to the general rule exist, as do conflicting court decisions. *See, e.g.*, State v. Dart, 202 P. 237, 239 (Ariz. 1921) (concluding that there is no liability for damage that does not result from an eminent domain privilege); Dep't of

fiercest resistance to the idea that a negligent act could result in a taking. In *Hawks v. Walsh*,[91] the Oklahoma Supreme Court dismissed an action brought by property owners against the state highway commission for damages allegedly resulting from highway construction, simply holding that a sovereign state can never be sued except by express legislative consent.[92] The court only elaborated that position by explaining that consequential damages were tortious in nature and that for a court to allow such a remedy without legislative permission would amount to a judicial usurpation of power.[93] A later change in Oklahoma law would at least weaken these decisions.[94] Nonetheless, other states avoid constitutional liability by claiming that, because negligence is a tort, the state is immune from suit.[95]

Agric. & Consumer Servs. v. Polk, 568 So. 2d 35, 40 (Fla. 1990) (holding that the bacteria infected trees were non-compensable and a taking only occurred with regard to the unaffected trees); Elk City v. Rice, 286 P.2d 275, 277 (Okla. 1955) (concluding that the damage was not a necessary incident to the construction and therefore no "taking" occurred); Vokoun v. City of Lake Oswego, 56 P.3d 396, 401 (Or. 2002) (emphasizing that a takings claim requires a government's intent to take the property for the use of the public); Borough of Dickson City v. Malley, 503 A.2d 1035, 1036 (Pa. Commw. Ct. 1986) (requiring a landowner to establish that the damages were "the direct and necessary consequence" of the government's action); City of Tyler v. Likes, 962 S.W.2d 489, 505 (Tex. 1997) (concluding that no intentional acts were committed, and mere negligence that eventually causes damages is not a taking); Olson v. King County, 428 P.2d 562, 567 (Wash. 1967) (holding that the damage due to the debris and rocks was neither contemplated, nor a necessary incident in the construction of the road and only a temporary interference); State *ex rel.* Firestone Tire & Rubber Co. v. Ritchie, 168 S.E.2d 287, 291 (W. Va. 1969) (stating that the general rule that damages in eminent domain proceedings are not recoverable if they resulted from negligence); Wisconsin Power & Light Co. v. Columbia County, 87 N.W.2d 279, 282 (Wis. 1958) (concluding that a taking did not exist in the constitutional sense when the county had no intent, the public obtained no benefit, the county did not anticipate that the damage would result, and the injury was accidental); Chavez v. Laramie, 389 P.2d 23, 25 (Wyo. 1964) (holding that an injury caused by negligence is not considered a taking).

91. 61 P.2d 1109 (Okla. 1936).

92. Hawks v. Walsh, 61 P.2d 1109, 1112 (Okla. 1936).

93. *Id.* at 1112.

94. *See* State v. Adams, 105 P.2d 416, 419 (Okla. 1940) (concluding that the action for consequential damages was allowable under the constitution and pursuant to the authority of the permissive act).

95. *See, e.g.*, Morris v. Douglas County Bd. of Health, 561 S.E.2d 393, 395 (Ga. 2002) (holding that mere negligence could not support a claim for inverse condemnation); Nordby v. Dep't of Pub. Works, 92 P.2d 789, 790 (Idaho 1939) (recognizing that in Idaho it is well settled law that without an express statute, the state is not liable for an employee's negligent acts); Sousa v. State, 341 A.2d 282, 285 (N.H. 1975) (determining that the claim is one based on negligence and there is no constitutional provision which allows a plaintiff in

Some courts have taken the approach that negligence cannot generally cause a taking because there is no benefit to the public. In *Gearin v. Marion County*,[96] the Supreme Court of Oregon held that a county was not liable to a citizen when the county, in attempting to clean up flood damage, caused further flooding and damage of the plaintiff's property.[97] The court theorized that "no benefit could arise to the county and [therefore] no promise [on] its part to pay for the damages [could] be implied."[98] The Oregon Supreme Court, in dismissing another negligent taking case, added that no taking could lie when the government did not appropriate land or use property for any purpose beneficial to the public—without such deliberate action, no obligation to pay could be implied.[99] Louisiana, in making a change from prior cases holding that negligent acts could cause a taking, held in *Angelle v. State*[100] that the eminent domain provision of the state constitution could not apply unless there was an intentional taking of private property by the government.[101] The court stated that a taking would occur when the damage was a necessary consequence of a public undertaking, but noted that an unintentional destruction of property can serve no purpose to the public.[102] Thus, an unintentional destruction of property lacks a necessary element of a takings claim.[103] Similarly, the Arkansas Supreme Court denied damages to a plaintiff whose crops had been damaged as a result of government spraying of crops in an adjacent field, holding that the damaging of the plaintiff's crops served no public use.[104]

At least two courts have defended uncompensated takings of property on grounds of the state police power—lawful actions undertaken by government officers to preserve the health, safety, and morals of the public. In *Rogers v. Tattnall County*,[105] the Georgia

---

a tort action to hold the state liable); *Rice*, 286 P.2d at 276 (holding that the remedy of landowner injured by negligence is for damages and not inverse condemnation).

96. 223 P. 929 (Or. 1924).

97. Gearin v. Marion County, 223 P. 929, 930 (Or. 1924).

98. *Id.* at 932.

99. Theiler v. Tillamook County, 146 P. 828, 829 (Or. 1915).

100. 34 So. 2d 321 (La. 1948).

101. Angelle v. State, 34 So. 2d 321, 325 (La. 1948).

102. *Id.* at 326.

103. *Id.*

104. St. Francis Drainage Dist. v. Austin, 296 S.W.2d 668, 671 (Ark. 1956).

105. 116 S.E. 545 (Ga. Ct. App. 1923).

appellate court denied damages to a plaintiff whose cattle had died when state authorities, executing an authorized program to eradicate ticks by dipping the cattle in pesticide, performed their duties negligently.[106] The Oklahoma Supreme Court, in a similar cattle-dipping case, also held that damages could not be recovered when the destruction of property was merely an incidental or consequential result of an authorized government program.[107]

The definition of intent in some jurisdiction has served to mitigate the harshness of the intent-only rule. Texas courts, for example, have consistently held that actions which are substantially certain to occur as the result of an act are intended by the actor.[108] In addition, Texas courts have held that the government need not intend the resulting harm, but only the original act, for a taking to occur.[109] The Arkansas Supreme Court, in *Robinson v. City of Ashdown*,[110] held that a taking *did* occur, though the city committed no intentional acts, because the city negligently operated its sewer plant for such a substantial period of time that it was constructively on notice of the continual damage to the plaintiff's property.[111] The court even went so far as to surmise that the pub-

106. Rogers v. Tattnall County, 116 S.E. 545 (Ga. Ct. App. 1923).

107. *See* Welker v. Annett, 145 P. 411, 412 (Okla. 1914) (per curiam) (holding that in a suit for consequential damages, arising from the board of county commissioners' negligent acts, the county is not liable).

108. *See* City of Keller v. Wilson, 86 S.W.3d 693, 701 (Tex. App.—Fort Worth 2002, no pet.) (contending that an invasion onto someone's land is intentional when the state knows it is substantially certain to occur, due to its actions); Harris County Flood Control Dist. v. Adam, 56 S.W.3d 665, 669 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd w.o.j.); *see also* Vokoun v. City of Lake Oswego, 7 P.3d 608, 619 (Or. App. 2000) (denying recovery for damages that were not a natural and ordinary consequence of governmental action taken for public use).

109. Kerr v. Tex. Dep't of Transp., 45 S.W.3d 248, 252 (Tex. App.—Houston [1st Dist.] 2001, no pet.); Green Int'l, Inc. v. State, 877 S.W.2d 428, 434 (Tex. App.—Austin 1994, writ denied); Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 830 (Tex. App.—Waco 1993, writ denied); s*ee also* City of Tyler v. Likes, 962 S.W.2d 489, 504-05 (Tex. 1997) (finding no taking because the city "did not intentionally do anything to increase the amount of water in the watershed" which eventually caused damage to plaintiff's property); 32 TEX. JUR. 3D *Eminent Domain* § 458 (1998) (adopting the stance that the governmental entity must have intentionally performed certain acts).

110. 783 S.W.2d 53 (Ark. 1990).

111. *See* Robinson v. City of Ashdown, 783 S.W.2d 53, 56 (Ark. 1990) (determining that an invasion is intentional when one knows that it is substantially likely to result from their conduct).

lic benefited from the repeated flooding of the plaintiff's home because it served as an "overflow dump" for sewage.[112]

2. No Requirement of Intent

As compared to the number of jurisdictions that require intent, a somewhat larger number do not require a showing of intent for a plaintiff to succeed in a takings action.[113] A great majority of these jurisdictions seem to simply rely on the text of the constitutional provision itself, which typically makes no reservations or exceptions. They hold that any loss of property caused by government action is a taking, and that issues of intent and negligence are thus irrelevant.[114] Further, several jurisdictions have made it clear that the determination of whether the government was acting in a governmental or proprietary role (or discretionary or ministerial, depending on the jurisdiction) is also irrelevant, because the Constitution has no such qualifier.[115] The South Carolina Supreme

---

112. *Id.*

113. *See infra* note 113 (indicating that a negligence claim may suffice for a constitutional taking).

114. *See, e.g.*, State v. Hollis, 379 P.2d 750, 751 (Ariz. 1963) (concluding that the authority for a takings claim comes from the constitution, and negligence procedures do not apply); Louisville & Nashville R.R. Co. v. Craft, 233 S.W. 741, 742 (Ky. 1921) (holding the railroad company liable for the taking "irrespective of the question of negligence"); Hodges v. Town of Drew, 159 So. 298, 301 (Miss. 1935) (determining that the constitution should be applied in its plain terms, and has nothing to do with a tort causing harm to a person); Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 691 (Mo. 1993) (holding that the combination of the bypassing of the water and the negligence of an improperly installed culvert amounted to a taking); Gruntorad v. Hughes Bros., Inc., 73 N.W.2d 700, 706 (Neb. 1955) (finding that whether or not negligence existed is immaterial to a question of a taking); Sea Harbor Corp. v. G & M Dredging Co., 105 N.Y.S.2d 497, 499 (N.Y. Spec. Term 1951) (requiring just compensation to be paid regardless of whether or not negligence existed); Rhyne v. Town of Mount Holly, 112 S.E.2d 40, 45 (N.C. 1960) (finding that the test of liability is whether a government's actions "amount to a partial taking of private property"); Sale v. State Highway & Pub. Works Comm'n, 89 S.E.2d 290, 295 (N.C. 1955) (stating that the just compensation for a taking of property for public use is based on natural justice); Sheriff v. Easley, 183 S.E. 311, 316 (S.C. 1936) (holding that negligence is immaterial to decision as to whether or not a taking has occurred); Makela v. State, 205 A.2d 813, 815 (Vt. 1964) (stating that liability in regards to a taking is not dependent on a claim of negligence); Griswold v. Sch. Dist. of Weathersfield, 88 A.2d 829, 831 (Vt. 1952) (reiterating that liability for a taking is not dependent on negligence); Jenkins v. County of Shenandoah, 436 S.E.2d 607, 609 (Va. 1993) (holding that a person is entitled to compensation when their property is taken or damaged for public use, regardless of whether the government acted negligently).

115. *See, e.g.*, *Hodges*, 159 So. at 300 (concluding that not even a municipal corporation is protected against a suit for damages when their actions amount to a taking); *Rhyne*,

Court, in *Rice Hope Plantation v. South Carolina Public Service Authority*,[116] justified this populist stance by explaining that "otherwise there could easily be cases of a taking without compensation, and the one whose property has been taken would be without remedy or redress."[117] In these jurisdictions, it is the end that matters more than the means. If property is injured, and a causal connection to the government exists, a taking will likely be found.[118]

Similar justifications, sounding in equity or fairness, have been raised by other courts as well. The California courts have frequently cited the historical case of *Reardon v. San Francisco*,[119] in which the California Supreme Court asserted that the government is liable for any consequential damage from work performed, whether it is performed "with skill or not."[120] The court added that the constitutional provision was intended to assure compensation to the property owner because, otherwise, he would have no right of recovery at common law due to the doctrine of sovereign immunity.[121] South Carolina has offered similar sentiments, suggesting that the constitutional provision offers property owners protection where the law otherwise does not.[122]

As sovereign immunity is the primary obstacle to a plaintiff's recovery from a government entity, several courts have considered the enactment of such a constitutional provision to constitute a waiver of sovereign immunity, or at least an exception to it, in situ-

---

112 S.E.2d at 46 (holding that the constitution prohibits the state as well as any political subdivision from both damaging and taking private property for public use without just compensation).

116. 59 S.E.2d 132 (S.C. 1950).

117. Rice Hope Plantation v. S.C. Pub. Serv. Auth., 59 S.E.2d 132, 139 (S.C. 1950); *see also* Hines v. City of Rocky Mount, 78 S.E. 510, 511 (S.C. 1913) (holding that a nuisance, even if negligently created by the government, constitutes a taking).

118. *See* Wilson v. City of Fargo, 141 N.W.2d 727, 732 (N.D. 1965) (holding that if a taking of property results in consequential damages to other property that is not intentionally taken, such property is also taken, and compensation is constitutionally required); *see also* City of Gainesville v. Waters, 574 S.E.2d 638, 642 (Ga. Ct. App. 2002) (holding that repeated flooding that resulted from the negligent design of a sewer was a continuing abatable nuisance and was, thus, compensable).

119. 6 P. 317 (Cal. 1885).

120. Reardon v. City & County of San Francisco, 6 P. 317, 325 (Cal. 1885).

121. *Id.*; *see also* Tyler v. Tehema County, 42 P. 240, 242 (Cal. 1895) (holding that the constitutional provision was intended to provide compensation).

122. *See* Faust v. Richland County, 109 S.E. 151, 154 (S.C. 1921) (holding that when a right to compensation is denied by the defendant then an action for a taking may be maintained).

ations where property is lost as a result of government action.[123] In Arizona, consideration of the constitutional provision providing for compensation for "taken" property led to an attempt to abolish sovereign immunity completely in the state.[124] Nebraska's Supreme Court has similarly held that state sovereign immunity has absolutely no application to takings cases brought under a constitutional guarantee to compensation.[125]

A theory of contract has also been proposed in several states, theorizing that a takings clause represents a promise of the government to repay property owners any time property is damaged, destroyed, or taken for the common good.[126] The North Dakota Supreme Court, in *Mayer v. Studer & Manion Co.*,[127] held that the state "[c]onstitution guarantee[d] . . . a private party just compensation [any time] damage to his property result[ed] from public use."[128] The court held that, although the proper course was to ascertain damages and compensate the owner "before proceeding with a public work," such damages could not always be predicted or ascertained beforehand.[129] The implied contract of the constitutional provision thus served as a guarantee to property owners.[130] Such a rationale strikes directly at jurisdictions that require foreseeability or intent to proceed with a takings action.

E. *Negligence and Sovereign Immunity*

The result of a state's doctrine that a taking of private property for public use cannot occur in the absence of an intentional act on the part of the government entity leaves the victim of the govern-

123. Sandlin v. City of Wilmington, 116 S.E. 733, 735 (N.C. 1923) (holding the constitutional provision to supersede the common law doctrine of sovereign immunity); Chick Springs Water Co. v. State Highway Dep't, 157 S.E. 842, 850 (S.C. 1931) (holding the takings clause to constitute legislative permission to sue).

124. *See* State v. Leeson, 323 P.2d 692, 696 (Ariz. 1958) (refusing to extend state immunity).

125. Patrick v. City of Bellevue, 82 N.W.2d 274, 281 (Neb. 1957).

126. *See, e.g.*, Hunter v. City of Mobile, 13 So. 2d 656, 659 (Ala. 1943) (asserting that an implied constitutional contract exists guaranteeing compensation when private property is either damaged or taken for public use); Heldt v. Elizabeth River Tunnel Dist., 84 S.E.2d 511, 514 (Va. 1954) (finding the plain language of the statute guarantees a property owner compensation for a taking).

127. 262 N.W. 925 (N.D. 1935).

128. Mayer v. Studer & Manion Co., 262 N.W. 925, 926 (N.D. 1935).

129. *Id.*

130. *Id.* at 927.

ment's negligence with recourse in tort. A tort action against the state, of course, has only limited value. Though the origin and propriety of state sovereign immunity has been much debated,[131] it does exist, and operates as a general bar to suit against the state except where the state has specifically granted permission to be sued.[132] Generally, sovereign immunity provides that a governmental entity is immune from both suit and liability.[133] Procedurally, the sovereign must specify the circumstances in which suits may be filed and prosecuted, and the recovery that will be permitted.[134] Plaintiffs seeking redress for tortious acts of the government are only able to recover to the extent that the statute allows.

The Federal Tort Claims Act (FTCA),[135] the federal waiver statute enacted in 1946, begins with a broad waiver, making the United States liable to the same extent as a private individual for its tortious acts.[136] As a result, the federal government can be held liable for many of the torts committed by its agents.[137] Liability under the federal statute is determined by applicable state law at the location of the tort.[138] Like most waiver legislation, the FTCA includes a variety of exceptions for which immunity is retained. The most notable exception is the discretionary function, which exempt

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

---

131. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (Harvard Univ. Press 1985) (explaining that the idea of sovereign immunity is contrary to the theories upon which democracy is based).

132. *See* City of Tyler v. Likes, 962 S.W.2d 489, 493 (Tex. 1997) (holding governmental entities immune from tort liability except where immunity is waived, for example, by the Texas Tort Claims Act).

133. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857); Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694-96 (Tex. 2003); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 854 (Tex. 2002).

134. *Taylor*, 106 S.W.2d at 695; *IT-Davy*, 74 S.W.3d at 860.

135. 28 U.S.C.A. § 1346 (1997).

136. *See* Wood v. Standard Prods. Co., 671 F.2d 825, 826 (4th Cir. 1982) (stating that the federal government is liable to the same extent as a private party for certain torts).

137. *See* Ewell v. United States, 776 F.2d 246, 248 (10th Cir. 1985) (asserting that the federal government may be liable for a negligent or wrongful act or omission committed by any government employee while acting within the scope of employment).

138. 28 U.S.C.A. § 1346(b) (1997).

agency or an employee of the Government, whether or not the discretion involved be abused.[139]

The exception for discretionary functions is likely justifiable, as sovereign immunity is often justified, as protection from suit to ensure the efficient operation of government.[140] Other exemptions, such as those prohibiting suits for assault, battery, false imprisonment, false arrest, malicious prosecution, libel, slander, misrepresentation, or interference with contract, are also likely aimed at protecting the process of governance, and have little or no effect on the government's liability for property damage.[141] Because of the broad general waiver of liability for tort, the federal government is liable, under applicable state law, for its negligent damage to property under the FTCA. The waivers of several other states are similarly broad, with limited exceptions.

Texas's waiver statute, the Texas Tort Claims Act,[142] is designed to define narrowly the specific circumstances in which suits against the state may be brought and the recoverable damages. The waiver of immunity from suit, quoted above in Part IB, provides that a state governmental entity may be sued in situations where a private person would be liable under state law if (1) property damage, death, or personal injury resulted from the wrongful act, omission, or negligence of an employee in the operation of a motor vehicle; or (2) death or personal injury resulted from a condition or use of personal or real property.[143] Notably, for the purposes of this discussion, the statute does not waive immunity for suits based on property damage resulting from the government's negligence unless that negligence involved the operation of a motor vehicle.[144] In fact, Texas courts have acknowledged that municipalities, at times, seek to cast plaintiffs' allegations of takings as "negligent" in order to avoid liability.[145]

---

139. 28 U.S.C.A. § 2680(a) (2000).

140. United States v. Gaubert, 499 U.S. 315, 323 (1991); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 854 (Tex. 2002).

141. *See* 28 U.S.C.A. § 2680 (2000) (listing the causes of action from which the sovereign would be immune from).

142. TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (Vernon 1997).

143. *Id.* § 101.021.

144. *Id.*

145. *See* Shade v. City of Dallas, 819 S.W.2d 578, 583 (Tex. App.—Dallas 1991, no writ) (asserting that when the property is damaged through the negligent acts of a government employee, recovery is not allowed); City of Uvalde v. Crow, 713 S.W.2d 154, 157

The limited waivers of immunity for tortious property damage provided by statutes, such as the Texas Tort Claims Act, present a potential pitfall for property owners whose property has been damaged or destroyed as a result of government action. If the government action is intentional, most jurisdictions would generally agree that the destruction (and, in many states, damage) constitutes a taking.[146] Thus, if the act were negligent, sovereign immunity would bar any recovery unless immunity is waived. In states like Texas, immunity is only waived, in a suit involving property damage, when the act is the operation of a motor vehicle.[147] In most cases of negligent property damage, therefore, the property owner is left without recourse. Justice Baker of the Texas Supreme Court, during oral argument in *Jennings v. City of Dallas*, pressed counsel for the city on this very issue: How can it make sense that municipalities are liable when they do something right, i.e., intentionally, but are not liable when they do something wrong, i.e., negligently?

The result, private liability for a harm caused by the government's negligence or error, is a haphazard waiver of sovereign immunity that is hardly justifiable. While a wholesale abandonment of the doctrine of sovereign immunity is not proposed here, a comprehensive waiver that applies to "takings situations" would be beneficial, because it would create logical balance between public and private interests. An express waiver, however, is not necessary, since a constitutional takings provision provides for public liability notwithstanding sovereign immunity.[148] It is, thus, a waiver itself. A broad interpretation of takings provisions, especially those provisions that compensate property owners not only if their property is taken, but also if it is damaged or destroyed, would also provide comprehensive protection.

(Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (finding sufficient evidence of non-negligent nuisance, even though the city insisted that the plaintiff's claim relied on negligence).

146. *See, e.g.*, Vokoun v. City of Lake Oswego, 56 P.3d 396, 401 (Or. 2002) (noting that government intent is a requirement for a takings claim); City of Tyler v. Likes, 962 S.W.2d 489, 505 (Tex. 1997) (affirming that mere negligent acts causing damages do not amount to takings).

147. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).

148. *See* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that sovereign immunity did not shield the city from a claim under Article I, Section 17 of the Texas Constitution).

III. The Requirement of Intent

The differences in statutory language, e.g., whether a constitutional provision provides for compensation when property is "taken" as opposed to when property is "taken, damaged, or destroyed," plays a significant part in the interpretation and application of the takings doctrine in each jurisdiction.[149] Other aspects of the takings law differ, between jurisdiction, for less obvious reasons. The following are a few reasons, besides those cited by courts in jurisdictions that have a broad understanding of the takings clause, that support the reading of the clause not to require a showing of intent.

A. *Original Intent*

As discussed above, the determination of what the framers of the Constitution intended when they adopted the Fifth Amendment to the U.S. Constitution is a difficult, if not an impossible task.[150] As a result, courts are left with the commonly understood meaning of the terms as written, and the rules of statutory construction. The federal courts, for example, seem to rely on the literal meaning of the word "take" for their rationale that a Fifth Amendment taking cannot occur without a deliberate action.[151] When the statutory language is more inclusive, e.g., if it extends protection beyond property that is "taken" to property that is damaged or destroyed, the extension to negligent or completely accidental acts may come naturally. After all, it is easy to see that property can be accidentally or negligently damaged or destroyed.

It is undeniable that Article I, Section 17 of the Texas Constitution does at least provide a somewhat broader protection than the federal provision, as discussed in Part IIB of this Article.[152] Additionally, considering the obvious differences between the Texas and federal constitutional takings provisions, it seems that Texas state

149. *See* discussion *supra* Part II.D (comparing jurisdictional approaches to takings law).

150. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

151. *See* Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 126-27 (1922) (holding that this was an ordinary case of incidental damage, which if inflicted by a private party may be a tort but nothing else).

152. City of Glenn Heights v. Sheffield Dev. Co., 61 S.W.3d 634, 643 (Tex. App.—Waco 2001), *rev'd on other grounds*, 140 S.W.3d 660 (Tex. 2004).

courts's historical reliance on federal case law on the issue of takings may be misguided. The Texas rights scheme as a whole also suggests that the protections provided in the Texas Constitution are such that a narrow interpretation of the protection may not be warranted.

B. *Statutory Construction*

All jurisdictions have some manner of rules of statutory construction, generally adopted from common law, that are utilized in interpreting a constitutional provision.[153] As suggested above, much of the necessary construction in these cases applies to the meaning and breadth of the term "taken." In Texas, courts are required to consider the underlying purpose of the statute[154] and the plain meaning of terms.[155] The ordinary and natural meaning of terms is to be assumed.[156] In addition, courts are permitted to interpret a term to mean something other than its obvious, ordinary definition when it is necessary to effectuate legislative intent.[157] Thus, interpretation by implication is only permitted when it is absolutely necessary.[158]

Utilizing such rules, it can then be argued that it is unnecessary, and thus improper, to assume that "shall not be taken" really means "shall not be intentionally taken"? Or even further, it would seem incorrect to assume that a general requirement of compensation when property "is damaged" does not apply when property is damaged accidentally or negligently?

The legislative definition of "taking" should also be considered. The Texas Government Code defines a "taking" as (1) a government action that affects property in a manner that requires compensation under the state or federal constitution *or* (2) a government action that affects property in a manner that restricts

---

153. 67 TEX. JUR. 3D *Statutes* § 85 (1989) (noting that Texas's rules of statutory construction stem from principles of common law).

154. TEX. GOV'T CODE ANN. § 311.023(1) (Vernon 1998).

155. Tex. & Pac. Ry. Co. v. R.R. Comm'n of Tex., 105 Tex. 386, 393, 150 S.W. 878, 880-81 (Tex. 1912).

156. TEX. GOV'T CODE ANN. § 312.002 (Vernon 1998).

157. Runnels v. Belden, 51 Tex. 48, 50 (1879); Tex. State Bd. of Dental Exam'rs v. Fenlaw, 357 S.W.2d 185, 189 (Tex. Civ. App.—Dallas 1962, no writ).

158. Creager v. Hidalgo County Water Improvement Dist. No. 4, 283 S.W. 151, 152 (Tex. 1926).

the owner's rights in it and reduces its value by at least 25%.[159] The legislature defers to the courts's definition in the first part, but it makes certain that a 25% reduction in property value is always a taking, without specifying whether the government action need be intentional or not.[160]

The courts of a number of states have relied on their tradition of strict construction as a rationale for the broad application of takings protection without regard to a showing of intent.[161] As for the interpretation of the variety of state provisions that are enacted, should it matter that a provision states that property "shall not be taken" without compensation instead of requiring compensation when property "is taken" or when the government "takes" property? Such seemingly petty grammatical issues are at times the focus of statutory disputes[162] and may be suggestive of the intended protection to be afforded by a particular takings clause. For example, a provision using "take" in the active voice may imply an intentional act, while a usage in the passive voice may imply an indifference towards any particular state of mind.

C. *Equity and Economy*

In a more general sense, applicable to all jurisdictions, it has been argued that takings clauses should be construed broadly in the interest of fairness and public economy.[163] If the public cannot anticipate negligent or accidental injury resulting from the function of government, why should an individual citizen be liable for such losses when the damage, as an incident to government, in effect benefits the entire public? It has been speculated that such an assurance of compensation for loss would alleviate economic insecurity, promote economic development, and ensure fiscal responsibility on the part of the government.[164] Others theorize

159. TEX. GOV'T CODE ANN. § 2007.002(5) (Vernon 2000).

160. *Id.*

161. *See supra* note 113 (referring to a likely taking if a causal connection exists between the government and property damage).

162. *See* 67 TEX. JUR. 3D *Statutes* §§ 95-117 (2004) (outlining several rules of statutory construction).

163. *See generally* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 3 (1995) (stating that the federal takings clause was designed in the interest of fairness and justice).

164. *See generally id.* at 4-12 (discussing the objectives of "just compensation").

that such an interpretation is necessary as a form of "insurance" to offset the lack of availability of such protection in the usual market.[165]

In any case, the net social expense of a liability scheme in which the public is liable for unintentional property damage caused by the government would, at worst, be zero.[166] Rather than a private individual bearing the expense of governmental error or negligence, the public would bear it. So long as governments are not liable for damage resulting from their own negligence, they have little incentive to prevent it. However, if liability were possible, the government would have an incentive to proceed with caution, just as private individuals would. Thus, it would likely result in fewer incidents and a diminished net social expense for repairs.

D. *Democracy and Popular Sovereignty*

Still others have argued that in a governmental system in which all power and authority of government is derived from the people, the government should have no authority to cause inequities between citizens without compensation.[167] Our system of government is fundamentally different from the regime that produced the doctrine of sovereign immunity—ours is not a monarchy in which all rights are devolved from the crown. Thus, the argument is more clearly stated: If the government's power is from its citizens, then the government has no more power than its citizens, and therefore, if citizens cannot harm property without liability to the owner, neither can the government.[168] Such a theory attacks the doctrine of sovereign immunity at its foundation.

IV. PROBLEMS WITH EXPANDED LIABILITY

A change from a requirement of intent to a broader interpretation of a takings provision in any jurisdiction would be dramatic.

---

165. *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 571-73 (1984) (stating that compensation may be conceived as insurance against the adverse effects of government regulation).

166. *See* Jones, *supra* note 162, 10-12 (stating that "just compensation imposes a restraint on at least some governmental inefficiencies, making projects unattractive if reimbursement of private losses is greater than expected gains to the public").

167. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (Harvard Univ. Press 1985).

168. *Id.* at 12.

Municipalities, long the beneficiaries of a legal scheme that allows them to escape liability for their negligence and other unintentional acts, would push hard to maintain the status quo.[169] Insurers would likely be the lead proponents for change to the broader rule.[170] It is doubtful, therefore, that any categorical change will come without legislative action. It is possible, however, that a shift towards a broader protection for property owners will come in jurisdictions such as Texas, which over the past decade has seen its judiciary become increasingly Republican and strict-constructionist.

A. *The Slippery Slope*

One concern of cities and other opponents of expanded takings liability is that the increase in the scope of claims could be limitless.[171] Simply allowing suits against governmental entities for all the damages they cause is not a workable rule. As many of the jurisdictions that currently have a broad interpretation of their takings clauses have found, proximate causation is probably the most effective limitation to actions.[172] Of course, government action must also be in the public benefit, but as discussed above, this is a low threshold.[173] Requiring proximate causation would preempt suits for damages that are in no way resultant from the government act. For example, if the driver of a motor vehicle hits a pothole on a public street and skids off the road as a result, causing damage to adjacent private property, the city's act of constructing the road near the property owner and its omission of failing to maintain it

169. *See* Brief of Amicus Curiae Tex. Mun. League, at 2, Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004) (No. 02-0033) (declaring that the Texas Municipal League acts as the legal voice for Texas cities and has a "strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections").

170. *See, e.g.*, Brief of Amicus Curiae Tex. Farm Bureau Underwriters, City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004) (No. 01-1012) (declaring that if the Texas Supreme Court does not affirm the *Jennings* decision, municipalities are unlikely to compensate property owners for personal injuries and property damage resulting from the invasion of sewage into their homes and businesses).

171. *See supra* note 168 (indicating that an expansion of the takings clause could encompass a wide range of government actions).

172. *See supra* note 113 (indicating that liability under eminent domain law extends to damages caused thereby).

173. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 11 (1995).

are causes-in-fact of the damage, but not proximate causes. The driver is the obvious party to blame for the injury.

Foreseeability is not a workable test, as proposed by some intent-requirement jurisdictions, because it effectively eliminates recovery for nearly any damage that a governmental entity causes unintentionally.[174] Acts that were foreseeable by no one, but caused by the government, would be the liability of the property owner alone.[175] On the other hand, proximate causation provides a sufficient tie of the actor to the result to ensure that the party most responsible for the act and most able to prevent the harm is liable for compensation.

B. *Political Pressure*

Another possible downside that has been expressed is that public dollars would be expended for damage that was negligently caused by government workers or that occurred completely by accident.[176] In other words, the public would be losing money as a result of events that it could not directly control. However, so long as the governmental entity is controlled by elected representatives, the public does exert considerable control over it. By imposing something closer to strict liability on governmental entities, an incentive is given to the entity to act with utmost care at all times in order to

---

174. *Compare* City of Newport v. Rosing, 319 S.W.2d 852, 853-54 (Ky. 1958) (stating that although Kentucky does not require a showing of intent, it does require a showing that the harm was foreseeable), *with* Mayer v. Studer & Manion Co., 262 N.W. 925, 926-27 (N.D. 1935) (holding that the purpose of the takings provision is to provide compensation to property owners when their property is harmed as a result of governmental action, and that such harm is often not foreseeable before the event).

175. Consider, for example, that in July 2002, a U.S. Air Force F-177A stealth fighter accidentally dropped a dummy bomb on a private home in Monahans, Texas, causing extensive damage but, miraculously, no injuries to the family inside. *See Air Force Will Pay $12,000 for Bomb Damage to Home*, DALLAS MORNING NEWS, Dec. 28, 2002, *available at* http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/122802dntexbomb.1ff8c.html. Unless the act were to fall into one of the statutory exceptions to the general rule that non-negligent damage is not compensable (e.g., under the Texas Tort Claims Act, we can assume that the family could sue for the pilot's negligence since a plane is a motor vehicle), the family would have no recourse against the government. Thus if no negligence were found—because, e.g., the bomb fell out of the plane purely by accident—no liability would be available under the federal or Texas schemes. Only a liability scheme in which property owners are protected whenever the government proximately causes damage would provide coverage in this situation.

176. This assumes, of course, that the governmental entity in question is funded by tax revenue or another public funding source.

prevent negligence and avoid accidents. The real force behind this incentive is probably not government authorities's own longing for lower government spending, but to please the public. If the public perceives that the government is spending excessively to clean up after its own negligence, the public will undoubtedly pressure its representatives for operational changes.

C. *Property Damage Protection v. Personal Injury Protection*

Would such a scheme elevate the protection of personal property above personal injury protection? Possibly. Texas's waiver of sovereign immunity in relation to suits for personal injury damages caused by negligence is also incomplete[177] and thus leaves citizens similarly unprotected. In the realm of property damage, an expanded interpretation of the takings clause would protect property owners from any damage proximately caused by a governmental action. Consequently, this interpretation would eliminate the lapse in liability left by a partial waiver of sovereign immunity. However, takings clauses do not apply to personal injuries or death.[178] A government entity's liability for personal injury or death would, presumably, still be subject to the particular jurisdiction's waiver of sovereign immunity statute which, in most cases, provides only partial protection.[179]

While this result may appear anomalous, it comports with the current constitutional allowances for suit against and liability of the government: Property is protected, personal injury is not. Even under a limited liability scheme in which intent on the part of the governmental entity must be shown, governmental liability is still not available to injured parties. Instead, injured parties must rely on a waiver of sovereign immunity which may or may not be comprehensive. Assuming that constitutional drafters knew sovereign

---

177. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997) (stating that a state government unit is liable for personal injury or death only if (1) it is caused by the negligence of a state employee in operating a motor vehicle and (2) it is caused by a "condition or use of tangible personal or real property" if the entity would be otherwise liable if they were a private person).

178. *See, e.g.*, U.S. CONST. amend. V (providing compensation due to property loss); TEX. CONST. art. I § 17 (providing, similarly, compensation only for property loss).

179. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997) (waiving immunity for personal injury or death only if caused by the negligence of a governmental employee in the operation of a motor vehicle).

immunity would provide a bar to all non-legislatively permitted suits, it appears that the inclusion of liability for property damage and the lack of liability for personal injury was intentional. The practical effect, however, is the same: Property protection is greater than personal injury protection. Thus, though this distinction may appear to be a shortcoming of a liability scheme that provided for greater governmental liability for property damage, it does not appear to be a change from the status quo.

V. THE DECISION IN *JENNINGS*

The recently released opinion of the Texas Supreme Court in *City of Dallas v. Jennings*[180] does little to further the discussion of Texas takings law.[181] The court begins by framing the legal issue, stating that while the parties agreed that only an intentional act can give rise to a taking under Texas law, the parties disagreed as to what type of intent is needed.[182] The court notes that both the Jennings and the city purport to rely on *City of Tyler v. Likes* for their respective arguments regarding whether the act causing the damage must be intentional versus whether the damage itself must be intended.[183]

In discussing the facts of the *Jennings* case, however, the court steps off on the wrong foot. In the introduction to its discussion of takings law, the opinion states: "[The Jennings] assert that because the City intended to unclog a backup, and because this action resulted in the sewage flood, the City should be liable for the damage caused by the flood."[184] A review of the briefs filed with the supreme court and the opinion of the Dallas Court of Appeals reveals that this was not the argument lodged by the Jennings.[185] The reliance on the clearing of the blockage in the sewer near the

180. 142 S.W.3d 310 (Tex. 2004).

181. City of Dallas v. Jennings, 142 S.W.3d 310, 313 (Tex. 2004).

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* Respondents' Brief at 5-6, 13-14, City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004) (No. 01-1012) (arguing that floodings "are inherent in the operation of sewer lines," such that the allegation made by the Jennings tends to fulfill the intent requirement under Article I, Section 17). Interestingly, the court comes close to adopting the facts of another case currently pending in the First District Court of Appeals in Houston. In *Banda v. City of Galveston*, No. 01-04-00083-CV (Tex. App.—Houston [1st Dist.] filed Jan. 27, 2004), the plaintiffs allege that the city is liable for the flooding of their home with

Jennings' home, as the act at issue in the case, misstates the dispute between the parties and undermines the court's effort to clarify the question of law presented by this case.

The court makes its holding clear:

> [W]hen a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 [of the Texas Constitution] if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of' the government's action."[186]

The opinion equates its ruling to the definition of intent in the Restatement of Torts: "Intent" means "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."[187]

In deciding the Jennings' case, however, the court muddies the water by stating that there was no evidence that the city had knowledge that any flooding would occur "when it unclogged the sewer line."[188] Again, the court's confusion as to the act complained of leads one to wonder if the outcome would have been different had the court considered that the Jennings' did have evidence that the city had knowledge that houses would be flooded by the mere existence of a sewer, any "unclogging" work aside. Assuming that the court would find such evidence sufficient to connote a general intent to cause harm due to the "substantial certainty" rule, the only remaining obstacle to the Jennings' victory would be the lack of a specific intent to harm their home as opposed to just any home connected to the sewer.[189] The final decision in *Jennings* may be due to the supreme court's confusion over the allegations presented in the case or, more likely, an intent to further expand governmental immunity in Texas.[190]

---

sewage because it resulted from the intentional removal of a blockage in the sewer line near their home. Appellants' Brief at 22-23, *at* 2004 WL 1373656.

186. *Jennings*, 142 S.W.3d at 314.

187. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

188. *Jennings*, 142 S.W.3d at 314-15.

189. *Id.* at 314.

190. *Compare id.* (finding that a governmental entity may be liable for a taking when "it (1) knows that a specific act is causing identifiable harm; or (2) knows . . . that the

Recent cases, with facts similar to those in *Jennings* in many respects, have reached opposite results. For example, several cases dealing with flood control plans resulted in findings of liability on the part of governmental entities that designed or implemented the plans when properties downstream were flooded.[191] The Texas Supreme Court, interestingly, affirmed one of those cases, *Tarrant Regional Water District v. Gragg*,[192] on the same day it reversed the court of appeals's decision in *Jennings*.[193]

Although Justice O'Neill, writing for the court in *Gragg*, purports to rely on the same reasoning as Justice Schneider in *Jennings*, the opposing results in the two cases do not comport with the similarities in the facts. In *Gragg*, a ranch located downstream from the Richland-Chambers Reservoir in East Texas was flooded when the floodgates of the reservoir's dam were opened after heavy rains.[194] The ranch owners alleged that the flooding constituted a taking because the flooding resulted from the intentional operation of the dam.[195] The court, in contrast to its holding in *Jennings*, held that the evidence supported the trial court's finding of a taking because the flooding was an "inevitable result" of the construction and operation of the reservoir.[196] The *Gragg* court fails to acknowledge the requirement, newly articulated in *Jennings*, that the specific property damaged or destroyed must have

---

damage is 'necessary incident to, or necessarily a consequential result of' the government's action"), *with* 32 TEX. JUR. 3D *Eminent Domain* § 458 (1998) (stating that an injured property owner must only prove that (1) the government intentionally performed certain acts (2) that resulted in a taking of property (3) for public use).

191. *See, e.g.*, Tarrant Reg. Water Dist. v. Gragg, 47 Tex. Sup. Ct. J. 707, 2004 WL 1439646, at *8 (Tex. June 25, 2004) (holding that construction of a dam caused District to be liable for occasional downstream flooding that it knew was substantially certain to occur as a result); City of Keller v. Wilson, 86 S.W.3d 693, 702-06 (Tex. App.—Fort Worth 2002, no pet.) (holding the city's approval of the drainage plan sufficient to impose liability for the resulting flood of a downstream subdivision); Harris County Flood Control Dist. v. Adam, 56 S.W.3d 665, 668-69 (Tex. App.—Houston [14th Dist.] 2001, pet dism'd w.o.j.) (holding that an allegation that District's design of a freeway caused flooding was sufficient to allow the case to proceed); Kite v. City of Westworth Village, 853 S.W.2d 200, 201 (Tex. App.—Fort Worth 1993, writ denied) (holding the city liable for flooding caused by platting of a subdivision).

192. 47 Tex. Supp. Ct. J. 707, 2004 WL 1439646 (Tex. June 25, 2004).

193. Tarrant Res. Water Dist. v. Gragg, 47 Tex. Sup. Ct. J. 707, 2004 WL 1439641, at *8 (Tex. June 25, 2004).

194. *Id.* at 708.

195. *Id.*

196. *Id.* at 715.

been identified prior to the performance of the act at issue.[197] Applying the *Jennings* specificity rule to the *Gragg* case suggests that one of the two cases must be in error. The *Gragg* decision does not suggest that the water district intended to damage the Gragg ranch specifically. Was it enough that the flooding of the Gragg's ranch (presumably one of many properties downstream of the reservoir) was "more" inevitable than the flooding of the Jennings' home (one of many homes connected to the Dallas sewer)?

VI. CONCLUSION

It is difficult to argue that the Jennings family should be solely liable for the cleanup and repairs to their home after its unexpected and horrific flooding with sewage.[198] But is it necessarily more equitable to put the burden on the public? It would seem so, and the history of the constitutional provision in Texas suggests that this should be the logical outcome. The Jennings did the most possible, considering Texas law on the topic, to make this outcome fit within the law. Specifically, the Jennings argued that, because the city knew that sewers inevitably flood homes, the city intended to flood homes when it built the sewer.[199] The Jennings are correct, generally, that knowledge of a certain consequence does connote intent on the part of the actor.[200] Although the requirement of specificity articulated in *Jennings* is new to Texas, federal cases have held similarly in the past.[201] Although the *Gragg* case appears

197. *Jennings*, 142 S.W.3d at 314.

198. Respondents' Brief on the Merits at 2, City of Dallas v. Jennings 142 S.W.3d 310 (Tex. 2004) (No. 01-1012). Deposition testimony from a City of Dallas wastewater official cited that he had never seen a residence flooded with so much raw sewage. *Id.*

199. *Jennings*, 142 S.W.3d at 313.

200. *See* City of Keller v. Wilson, 86 S.W.3d 693, 701 (Tex. App.—Fort Worth 2002, no pet.) (holding the invasion onto land intentional because the state was substantially certain that the invasion would occur as a result of its conduct); Harris Co. Flood Control Dist. v. Adam, 56 S.W.3d 665, 669 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd w.o.j.) (holding that an invasion of surface water on property is intentional and not negligent if the state knew that it was substantially certain that the act would cause the result).

201. Bettini v. United States, 4 Cl. Ct. 755, 759-60 (1984) (allowing the case to proceed to trial and holding that the plaintiff would be required to show that the government knew or should have known that the *plaintiff's* property would be destroyed by the project).

to be in some conflict, the specificity rule is now court-made law in Texas.[202]

The Jennings have lost their case. They have fallen into a gap in which there is no recourse for the government's destruction of private property. The various jurisdictions in the United States have, over time, interpreted their constitutional takings clauses from two diametrically opposed points of view: Is the clause a broad protection for the property owner, or is it a narrow waiver of liability for suit against the state? This phenomenon, coupled with a doctrine of sovereign immunity that has been, in many jurisdictions, only haphazardly waived in property damage cases, presents a confusing scheme of liability that seems anything but fair, let alone logical in light of the plain words of the Constitution. Legislative action to clarify the purpose of takings clauses may be the only means to effectively end decades, and in some cases centuries, of judicial confusion.

202. *See* City of Van Alstyne v. Young, 2004 WL 2404558, at *2-3 (Tex. App.—Dallas Oct. 28, 2004, no pet. h.) (citing *Jennings* for the proposition that a municipality must intend to harm the specific property at issue in the suit).