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ARTICLES

THE DAMAGINGS CLAUSES

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Twenty-seven state constitutions contain a clause prohibiting the “damaging” or “injuring” of property for public use without just compensation. Yet when compared to its relative, the Takings Clause of the Federal Constitution—which says that private property cannot be “taken” for public use without just compensation—the ways in which state courts interpret and apply their “damagings clauses” have remained opaque and virtually unstudied.

This Article recovers the hidden history of the state damagings clauses. It traces the clauses to the threats to private property posed at the turn of the twentieth century as a result of rapid infrastructural improvement. These state constitutional provisions were meant to fix perceived inequities resulting from strict application of takings law: many jurisdictions would not recognize a right to compensation when

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public works affected use rights and drastically devalued property but did not physically invade or appropriate it. Drafters envisioned the damagings clauses as a powerful bulwark for property owners whose livelihoods and homes were affected yet not touched by public works. However, as state courts were tasked with the brunt of the interpretive work, their rulings coalesced around a variety of doctrinal limitations that severely undercut the clauses' potency. As a result, modern interpretations of the clauses mainly provide coverage in a variety of contexts where the offending activity would already qualify as a physical-invasion taking under most federal precedents.

This Article argues that the damagings clauses deserve broader applications in condemnation law. Damagings comprise a more limited and historically supported category than regulatory takings, for which courts have long awarded compensation. Moreover, courts already try to mandate compensation for some of these types of injuries by manipulating ordinary takings law, leading to unnecessary doctrinal confusion. As a new wave of infrastructural growth looms, it is time for professors and practitioners to return their attention to these forgotten provisions of the state constitutions.

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INTRODUCTION

When the Supreme Court issues an unpopular or confusing ruling on the federal Takings Clause,¹ the refrain often comes: to better protect property rights, litigants should turn to state courts, state laws, and state politics. The last few decades provide several examples of this cycle. In the aftermath of the Supreme Court's decision in *Kelo v. City of New London*, where the Court announced a capacious view of the requirement that property be taken for "public use,"² some scholars cheered as state courts began interpreting their takings clauses more stringently and as new, stricter takings clause amendments were passed in the states.³ Just in the last year, as the Court announced an immediately maligned test for defining takings "property" in *Murr v. Wisconsin*,⁴ calls have already begun for state courts to step in and develop tests that provide more protection to owners.⁵ To those who put faith in state law and state courts as a source of enduring property protection, this Article offers a cautionary tale. It tells the story of a

¹ U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

² 545 U.S. 469, 472, 480, 489 (2005).

³ Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *Tulsa L. Rev.* 751, 762 (2009); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 888, 888, 891–92 (2006); see also Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 257 (2004) (arguing, even before *Kelo*, that "states are better suited to police overzealous land use regulation than is the Supreme Court and, second, that the Supreme Court has in practice left much of the policing to the states"). But see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *Minn. L. Rev.* 2100, 2171 (2009) (characterizing the legislative response to *Kelo* as a "partial failure" and calling for greater judicial enforcement of the public-use requirement).

⁴ 137 S. Ct. 1933, 1945 (2017). For early critical reactions, see Gideon Kanner, *Murr—SCOTUS Meets Dick Babcock's Ghost*, *Gideon's Trumpet* (June 23, 2017), <http://gideonstrumpet.info/2017/06/murr-a-legal-mish-mash-meets-dick-babcocks-ghost/> [<https://perma.cc/987B-ULBW>]; Ilya Somin, *A Loss for Property Rights in Murr v. Wisconsin*, *Wash. Post: The Volokh Conspiracy* (June 23, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/> [<https://perma.cc/5BZF-HP3B>].

⁵ E.g., Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?* 21–25 (July 22, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3007166> [<https://perma.cc/MFM2-DBVL>]; see also Rick Hills, *A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in Murr v. Wisconsin*, *Prawfsblawg* (June 23, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/a-half-hearted-two-cheers-for-the-victory-of-federalism-over-property-rights-in-murr-v-wisconsin.html> [<https://perma.cc/Q58Z-KY6Q>] (explaining that *Murr* correctly leaves property rights to state courts).

nearly forgotten state constitutional movement to repair deficiencies in ordinary takings law—and how that movement had a far less lasting impact than its participants might have conceived.

More than half of the state constitutions contain a takings clause that is materially different from the federal one, in that it prohibits property from being both “taken” and “damaged” or “injured” for public use without just compensation.⁶ Despite their ubiquity, these “damagings clauses” have received minimal attention in the literature on property law.⁷ Recently, however, judicial interest in the damagings clauses has

⁶ Ala. Const. art. XII, § 235; Alaska Const. art. I, § 18; Ariz. Const. art. 2, § 17; Ark. Const. art. 2, § 22; Cal. Const. art. I, § 19; Colo. Const. art. II, § 15; Ga. Const. art. 1, § 3, para. 1; Haw. Const. art. I, § 20; Ill. Const. art. I, § 15; Ky. Const. § 242; La. Const. art. I, § 4(B); Minn. Const. art. 1, § 13; Miss. Const. art. 3, § 17; Mo. Const. art. I, § 26; Mont. Const. art. II, § 29; Neb. Const. art. I, § 21; N.M. art. II, § 20; N.D. Const. art. I, § 16; Okla. Const. art. II, § 24; Pa. Const. art. X, § 4; S.D. Const. art. VI, § 13; Tex. Const. art. I, § 17; Utah Const. art. I, § 22; Va. Const. art. I, § 11; Wash. Const. art. I, § 16; W. Va. Const. art. III, § 9; Wyo. Const. art. 1, § 33. Twenty-seven may slightly understate the number of states in which protection is provided. An additional state—Kansas—has the damagings language in its statutory takings provision. Kan. Stat. Ann. § 26–513(a) (1993); see *Garrett v. City of Topeka*, 916 P.2d 21, 30 (Kan. 1996) (explaining this statute as Kansas’s equivalent of the federal Takings Clause). Massachusetts has legislation requiring compensation for some property taken or damaged for public improvements. Mass. Gen. Laws ch. 79, § 10 (2016). This Article focuses on the constitutional provisions.

⁷ Until now, the most comprehensive accounts of these constitutional changes were a descriptive student note written in 1902, see Carl H. Davis, *Constitutional Provisions Against Damaging Private Property*, 8 Va. L. Reg. 525, 545 (1902), and an article broadly discussing compensable harm in eminent domain law, see Emerson G. Spies & John C. McCoid, II, *Recovery of Consequential Damages in Eminent Domain*, 48 Va. L. Rev. 437, 446–47 (1962). Robert Brauneis provided some additional history of the clauses in his work, which argued that the clauses led courts to recognize constitutionally implied rights of action. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 115 (1999). This author previously mentioned this flurry of constitutional change in telling another story: the story of court-driven changes to conceptions of takings clause “property.” See Maureen E. Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 Va. L. Rev. 1167, 1190–94 (2016). A few other pieces have periodically mentioned damagings, but often in conjunction with takings, making them of limited descriptive or theoretical assistance in understanding damagings as an independent source of protection. Michael M. Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loy. L.A. L. Rev. 253, 260–61 (1975); H. Dixon Montague & Billy Coe Dyer, *Compensability of Nonphysical Impacts of Public Works: A Game of Chance*, 34 Urb. Law. 171, 172, 235 (2002); Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 1–11 (1971). Finally, a few works have focused on individual states’ damagings provisions. Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 Stan. L. Rev. 727, 729–30 (1967) [hereinafter Van Alstyne, *Statutory Modification*]; William K. Swank,

begun to grow. In an oral argument on a takings issue held in April 2017, a Supreme Court of Virginia justice noted “the big difference [between the federal and the Virginia state takings provisions] is the word damage. That’s a huge conceptual difference.”⁸ In November of that year, Justice Peterson of the Supreme Court of Georgia penned a concurrence in which he observed the difference in language between the state and federal constitutions, asserting that it is “not at all clear . . . that the [state] Just Compensation Clause and the [federal] Takings Clause have the same scope and meaning.”⁹ By recovering the hidden history of the clauses in constitutional convention records, this Article provides new evidence about the clauses’ origins and intended effects to state-court judges, litigants, and scholars.

It is the mission of this Article to tell the untold stories of the damagings clauses: why they came about, what they were meant to do, and why they deserve new attention. Studying the damagings clauses helps reveal a gap in the coverage of conventional condemnation law: in the process of building and using something for public benefit, the government can drastically impair and devalue adjoining or nearby property, yet this is neither a physical taking (an actual appropriation of property) nor a regulatory taking (a regulation that so interferes with property rights that it triggers the just compensation requirement).¹⁰ The damagings clauses were intended to cover these interstitial harms, those where nothing has been taken or regulated, but landowners are

Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 *Stan. L. Rev.* 779, 779–80 (1976); Jeremy M. Christiansen, ‘Takings’ and ‘Damagings’: A Return to the Original Meaning of Article I, Section 22 of the Utah Constitution 2 (April 30, 2013) (unpublished manuscript) <https://ssrn.com/abstract=2318515> [<https://perma.cc/AK6Z-BESV>].

⁸ Oral Argument at 27:32, *Palmer v. Atlantic Coast Pipeline*, 801 S.E.2d 414 (Va. 2017) (No. 160630), http://www.courts.state.va.us/courts/scv/oral_arguments/2017/apr/160630.MP3 [<https://perma.cc/W4CA-NJET>].

⁹ *Diversified Holdings v. City of Suwanee*, 807 S.E.2d 876, 891 (Ga. 2017) (Peterson, J., concurring).

¹⁰ At least two other articles have argued that there is a related “third category of takings cases” apart from physical and regulatory takings—those where the government’s land use creates a nuisance or where the government does not compensate for all the externalities it inflicts through its exercise of the eminent domain power. See Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 *B.U. L. Rev.* 819, 820–21 (2006); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 *Va. L. Rev.* 277, 280 (2001) (referring to this category as “derivative takings”). Neither article discusses the damagings provisions, which provide an especially strong footing for arguing that at least some state constitutions already encompass a third category of claims.

nonetheless unfairly burdened by a project for public benefit. Despite the overwhelming evidence that the clauses were meant to cover these injuries, as time passed, state-court judges rendered the clauses fairly impotent. After offering some tentative hypotheses for this development, this Article identifies reasons for revisiting damagings law in the jurisdictions with the operative language. In particular, the arguments for compensating for damagings appear especially strong when compared with the reasons offered in favor of compensating for regulatory takings.

The primary aim of this Article is to map the field of damagings. Its secondary contribution is to a newly resurgent body of work on the development of condemnation law in state courts. As Supreme Court rulings in takings law have led to calls for states to take on the task of fashioning better doctrines, scholars are increasingly turning their attention toward descriptively understanding the operation of takings rules and other aspects of condemnation law in state forums.¹¹ This Article is further evidence that lawyers' "preoccupation with Supreme Court doctrine" has obscured important trends in condemnation law at the state level.¹² It has been over a century since the last comprehensive accounting of damagings provisions.¹³ The history provided here sheds light on how states have been interpreting their unique takings provisions, and it raises new questions about the efficacy of state constitutional change in property law.

This Article proceeds as follows. Part I begins by describing the status of federal and state eminent domain law: physical takings, regulatory takings, and the things that fall in between and are covered by neither. It then describes the origins of the damagings clauses: where they came from, how they spread, what their adopters argued about, and what they were supposed to cover. Part II moves to the decades of subsequent court decisions interpreting the damagings clauses and what that doctrinal development yielded: a limited, stunted version of the clauses, covering little beyond what traditional physical takings law would. Part

¹¹ See, e.g., James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 *Wm. & Mary L. Rev.* 35, 38–40 (2016); Sterk, *supra* note 3, at 205; David Dana, *Takings Clause Federalism as Cooperative Federalism 1–4* (Sept. 2016) (unpublished manuscript) (on file with author).

¹² Krier & Sterk, *supra* note 11, at 38.

¹³ See Davis, *supra* note 7 (containing the most recent analysis of state damaging clauses, written in 1902).

III sets forth numerous reasons—economic, historical, theoretical—why the damagings clauses deserve broader application, and it imagines a number of modern applications for the clauses. While there are many unanswered questions about the damagings provisions, at a minimum, this Article aims to reintroduce them into scholarly debates about the scope and purpose of condemnation law and to provide new sources of support for litigants and judges who believe that this textual difference between state and federal compensation provisions should matter.

I. THE ORIGINS OF THE DAMAGINGS CLAUSES

A. The Landscape of Takings Law and the Damagings Gap

The standard form of a takings clause says that “private property” shall not be “taken for public use without just compensation.”¹⁴ Scholars and judges routinely bemoan the difficulty of interpreting this text.¹⁵ As a matter of constitutional interpretation, there is nearly no historical evidence for what the Framers intended by the word “taken.”¹⁶ As a result, it has fallen to courts to develop its meaning and applications. Functionally, the categories of protection provided by both state and federal takings language are coextensive and fall into two broad groups: physical takings and regulatory takings.¹⁷

¹⁴ See U.S. Const. amend. V; Conn. Const. art. I, § 11; Iowa Const. art. I, § 18; Mich. Const. art. X, § 2. Unlike some other federal constitutional provisions where colonial or state-level protections predated the federal ones, the federal Takings Clause was the first to prohibit property from being “taken.” See generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 782–84 (1995) (cataloging the state-level precedents and the unique federal formulation).

¹⁵ E.g., Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285, 285 (1990); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 *S. Cal. L. Rev.* 561, 561–62 (1984); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149, 149 (1971).

¹⁶ Treanor, *supra* note 14, at 791.

¹⁷ There are some doctrinal variations, see Sterk, *supra* note 3, at 261–70, but it appears that a number of states construe the state and federal takings clauses coextensively. See sources cited *infra* note 34. Regrettably, there is very little work on potentially different regulatory takings rules followed by the state courts; this author may take that project on another day. But see Robert J. Hopperton, *Ohio Supreme Court Regulatory Takings Jurisprudence: An Analytical Framework*, 29 *Cap. U. L. Rev.* 321, 322 (2001) (discussing Ohio regulatory takings); Robert S. Mangiaratti, *Regulatory Taking Claims in Massachusetts Following the Lingle and Gove Decisions*, 90 *Mass. L. Rev.* 54, 54–55 (2006) (discussing Massachusetts regulatory takings law); Josh A. McCreary, *The Viability of A Regulatory*

The clearest category of government activity covered by the takings clauses are what I have called “physical takings”: appropriations or physical invasions of land for government purposes.¹⁸ The classic example of a taking is a public road through private property; be it farmland or a city lot, such a fact pattern unquestionably qualifies as a taking under every state and federal constitution.¹⁹ But the clauses’ applications are often not so straightforward. Beginning in 1922, the Supreme Court began recognizing what are now called “regulatory takings.”²⁰ As Justice Holmes famously announced in the instantiating case, regulations that “go[] too far” in extinguishing property rights can trigger the compensation requirement.²¹ Many lower court decisions (and law review articles) since have worked to distinguish permissible exercises of the government’s police powers from regulations that so impair or destroy property rights and values that they require compensation.²²

The most influential and widespread regulatory takings rules have come from the U.S. Supreme Court. Broadly speaking, there are three different measures for regulatory takings: two bright-line rules and a balancing test.²³ The first bright-line rule dictates that a regulation

Takings Claim Under *Phillips v. Montgomery County*, 50 Tenn. Bar J. 20, 20–21 (2014) (same, for Tennessee).

¹⁸ *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537 (2005) (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”). Others might refer to physical takings as acts of eminent domain. I use “condemnation law” as a catch-all term to refer to eminent domain, regulatory takings, and damagings: the areas where the just compensation requirement might come into play.

¹⁹ This is the classic example for a good reason: the takings clauses emerged from earlier Highway Acts. See John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 Am. J. Legal Hist. 253, 253–57 (1996).

²⁰ The history of regulatory takings is generally thought of as beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922). But see Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1211–13 (1996) (contending that regulatory takings were recognized much earlier).

²¹ *Mahon*, 260 U.S. at 415.

²² See *Lingle*, 544 U.S. at 538 (“The rub, of course, has been—and remains—how to discern how far is ‘too far.’”); see also Krier & Sterk, *supra* note 11, at 38 n.4 (describing the history of federal regulatory takings scholarship and some recent examples, but noting it would be “a pointless task to cite the many hundreds of similar articles produced” since 1960); *id.* at 54 (noting that 64.2% of implicit takings claims in state courts involve regulation cases).

²³ Like the Supreme Court has tended to do, I leave the special rules applicable to land-use exactions out of this general discussion. See *Lingle*, 544 U.S. at 538 (referring to land-use exactions as a “special context” outside of the three main categories for analyzing regulatory takings).

authorizing a permanent physical occupation will qualify as a regulatory taking.²⁴ The second bright-line rule provides that when regulations deprive an owner of “all economically beneficial us[e]” of property, a taking has occurred.²⁵ Barring one of these two situations, courts are to apply a general balancing test for regulatory takings derived from *Penn Central Transportation Co. v. New York City*.²⁶ The test has three parts: (1) “the character of the governmental action,” for example, whether the action is a physical invasion or simply some generally applicable regulation affecting property interests;²⁷ (2) the “economic impact of the regulation on the claimant,” or the extent of the diminution in the property’s value; and (3) the degree to which the regulation interferes with “distinct investment-backed expectations.”²⁸ Although every balancing test may be subject to critique from those who prefer bright-line rules, it is fair to say that the *Penn Central* test has been the subject of more criticism than defense.²⁹

Every state except North Carolina and Kansas has at least one state constitutional provision prohibiting property from being “taken” without compensation.³⁰ Putting the damagings language to the side, there is

²⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

²⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

²⁶ 438 U.S. 104, 124–28 (1978).

²⁷ *Id.* at 124; *Lingle*, 544 U.S. at 539.

²⁸ *Penn Central*, 438 U.S. at 124. Although the second prong is straightforward, the meaning of investment-backed expectations is less so. See J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 *Sw. U. L. Rev.* 351, 352 (2005) (“[T]he meaning and significance of ‘investment-backed expectations’ is among the most baffling elements of this confusing and seemingly schizophrenic doctrine.”).

²⁹ For criticism, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *Cornell L. Rev.* 1549, 1558 (2003) (“[T]he *Penn Central* approach cannot be defended solely on the ground that the law cannot do any better.”); John D. Echeverria, *Making Sense of Penn Central*, 23 *UCLA J. Envtl. L. & Pol’y* 171, 174–75 (2005) (discussing the doctrine as “intellectual bankruptcy” or “legal decoration for judicial rulings based on intuition”). For defenses, see Gary Lawson et al., “Oh Lord, Please Don’t Let Me Be Understood!”: Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 *Notre Dame L. Rev.* 1, 3–5 (2005); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 *Cardozo L. Rev.* 93, 93 (2002).

³⁰ Ala. Const. art. I, § 23; id. art. XII, § 235; Alaska Const. art. I, § 18; id. art. 8, § 18; Ariz. Const. art. 2, § 17; Ark. Const. art. 2, § 22; Cal. Const. art. I, § 19; Colo. Const. art. II, §§ 14–15; Conn. Const. art. I, § 11; Del. Const. art. I, § 8; Fla. Const. art. X, § 6, cl. A; Ga. Const. art. 1, § III, ¶ I; Haw. Const. art. I, § 20; Idaho Const. art. I, § 14; Ill. Const. art. I, § 15; Ind. Const. art. 1, § 21; Iowa Const. art. I, § 18; Ky. Const. § 13; La. Const. art. I, § 4; Me. Const. art. I, § 21; Md. Const. art. III, § 40; Mass. Const. pt. I, art. X; Mich. Const. art.

minimal textual variation in the takings portion of these clauses. Many are identical to the Federal Constitution and prescribe that property “shall not be taken”,³¹ most others state that no property “shall be taken”,³² California, Idaho, Ohio, and Vermont require compensation when property is “taken,” combined with other text about the eminent domain power.³³ Perhaps as a result of this textual similarity, state courts tend to rely heavily on federal precedents in construing the state constitutions, often interpreting their takings clauses in lockstep.³⁴ While

10, § 2; Minn. Const. art. I, § 13; Miss. Const. art. 3, § 17; Mo. Const. art. I, § 26; Mont. Const. art. II, § 29; Neb. Const. art. I, § 21; Nev. Const. art. 1, § 8, cl. 6; N.H. Const. pt. I, art. 12; N.J. Const. art. I, § 20; N.M. Const. art. II, § 20; N.Y. Const. art. I, § 7, cl. a; N.D. Const. art. I, § 16; Ohio Const. art. I, § 19; Okla. Const. art. II, § 24; Or. Const. art. I, § 18; Pa. Const. art. I, § 10; R.I. Const. art. 1, § 16; S.C. Const. art. I, § 13; S.D. Const. art. VI, § 13; Tenn. Const. art. I, § 21; Tex. Const. art. I, § 17; Utah Const. art. I, § 22; Vt. Const. ch. I, art. 2d; Va. Const. art. I, § 11; Wash. Const. art. I, § 16; W. Va. Const. art. III, § 9; Wis. Const. art. I, § 13; Wyo. Const. art. 1, § 33. On North Carolina, see Michael B. Kent, Jr., *Public Pension Reform and the Takings Clause*, 4 *Belmont L. Rev.* 1, 4 n.8 (2017). North Carolina courts have nonetheless read the just compensation requirement into the state constitution as a matter of “the law of the land.” See *Bailey v. State*, 500 S.E.2d 54, 68 (N.C. 1998). On Kansas, the constitution states only that “[n]o right of way shall be appropriated to the use of any corporation” without compensation. Kan. Const. art. 12, § 4. However, a statute prohibits property from being “taken.” Kan. Stat. Ann. § 26-513(a) (1993); see *Garrett v. City of Topeka*, 916 P.2d 21, 30 (Kan. 1996) (explaining statute as analogous to federal Takings Clause).

³¹ E.g., Alaska Const. art. I, § 18; Ariz. Const. art. 2, § 17; Mich. Const. art. 10, § 2; Mo. Const. art. I, § 26; Mont. Const. art. II, § 29; N.Y. Const. art. I, § 7, cl. a; Pa. Const. art. I, § 10; W. Va. Const. art. III, § 9; see also Kan. Stat. Ann. § 26-513(a) (2000) (“Private property shall not be taken or damaged for public use without just compensation.”).

³² E.g., Conn. Const. art. I, § 11; Fla. Const. art. X, § 6, cl. A; Ind. Const. art. 1, § 21; Neb. Const. art. I, § 21; Wis. Const. art. I, § 13; see also Ky. Const. § 13 (“[N]or shall any man’s property be taken . . .”); Md. Const. art. III, §§ 40A, 40B, 40C (“The General Assembly shall enact no Law authorizing private property, to be taken . . .”).

³³ Cal. Const. art. I, § 19; Idaho Const. art. I, § 14; Ohio Const. art. I, § 19; Vt. Const. ch. I, art. 2.

³⁴ E.g., *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 100–01 (Cal. 2002); *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm’rs*, 38 P.3d 59, 64 (Colo. 2001); *Haw. Hous. Auth. v. Lyman*, 704 P.2d 888, 896 (Haw. 1985); *Hampton v. Metro. Water Reclamation Dist.*, 57 N.E.3d 1229, 1240 (Ill. 2016); *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 210 (Ind. 2009); *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005); *Mansoldo v. State*, 898 A.2d 1018, 1023 (N.J. 2006); *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 856 (N.D. 2005); *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 616 (Pa. 1993); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531–32 (Wis. 1996); Josephine L. Ennis, Comment, *Making Room: Why Inclusionary Zoning Is Permissible Under Washington’s Tax Preemption Statute and Takings Framework*, 88 *Wash. L. Rev.* 591, 617 (2013) (noting that Washington Supreme Court interprets clauses coextensively, except in recent public use jurisprudence); Derek O. Teaney, Comment, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory*

fuller empirical and doctrinal study of state takings doctrine is desperately needed, from aught that appears, the state constitutions generally provide protection against the same kinds of physical and regulatory takings recognized as a matter of federal law.³⁵

Though state and federal prohibitions on physical and regulatory takings might seem to cover the gamut of potentially compensable government acts, a category of government harm to property is unaddressed by these two categories. Indeed, there is a third category of government activity that has periodically raised compensability issues: actions by the government falling short of technical appropriation, occupation, or regulation, but which nonetheless diminish the value or usefulness of property or functionally oust property holders. A few other scholars have discussed components of this category of activity for which compensation is often not constitutionally required. Professors Abraham Bell and Gideon Parchomovsky have identified the concept of “derivative takings,” devaluations of nearby properties that accompany a traditional physical or regulatory taking of the targeted parcel.³⁶ Professor Carlos Ball has argued that government land uses that are nuisances likewise devalue and harm the use rights of adjacent owners,

“Takings” Are Not Compensable Under A Traditional Originalist View of Article I, Section 18 of the Oregon Constitution, 40 *Willamette L. Rev.* 529, 530 & n.5 (2004) (“The Oregon Supreme Court long has treated the takings clauses of the state and federal constitutions as ‘identical in language and meaning.’” (quoting *Cereghino v. State Highway Comm’n*, 370 P.2d 694, 697 (Or. 1962))); see also *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1308 (11th Cir. 1992) (federal court concluding that Florida and federal takings law are “essentially the same”); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1131 (Nev. 2006) (Becker, J., dissenting in part and concurring in part) (noting that Nevada takings have generally been coextensive with federal Fifth Amendment protections); Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners’ Property in the Course of Law Enforcement: The View from Five State Supreme Courts*, 34 *McGeorge L. Rev.* 1, 1, 22 (2002) (noting that five state supreme courts—California, Texas, Minnesota, Oklahoma, and Iowa—have mingled federal precedents into state takings decisions).

³⁵ Some state courts have interpreted “public use” differently. E.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136 (Ohio 2006). But in defining what counts as a taking, it is hard to find examples of variation—particularly anything distinguishing a separate category outside the physical-regulatory dichotomy. Cf. *Sterk*, supra note 3, at 264–70 (discussing some state variations in takings doctrine).

³⁶ See Bell & Parchomovsky, supra note 10, at 279; Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale L.J.* 547, 573–74 (2001); see also Spies & McCoid, supra note 7, at 458 (noting that article discusses “compensation for consequential losses caused by activity clearly categorized as eminent domain”).

typically without triggering the compensation requirement.³⁷ Following cues from these works, it is helpful to explore what acts occupy this space between physical and regulatory takings by examining a few historical examples. In each of the following cases, courts struggled to use principles from physical or regulatory takings law to fit new circumstances where it appeared that—based on broad principles of fairness and justice³⁸—compensation should be awarded to the landowners affected by nontrespassory, nonregulatory harms.

Perhaps the clearest example comes from airplane overflights.³⁹ As air travel expanded across the country in the early twentieth century, courts across the states were asked to determine whether flying over someone's property constituted some form of tort against the property owner.⁴⁰ Eventually, an overflight claim was brought against the government as a constitutional takings claim. In that case, *United States v. Causby*, the Causby family sued when "frequent and regular flights of army and navy aircraft . . . at low altitudes" impaired their chicken business by distressing the animals, ultimately reducing the value of their farm.⁴¹ In a deeply perplexing and much analyzed decision, the Supreme Court found that the Causbys had suffered a taking of some easement through their airspace. So far, this might sound like a garden-variety physical appropriation of the owners' air rights, but the Court had more to say about planes.

The Court also announced that not every overflight by the government would create compensable injury: "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."⁴² In other words, it is not only the fact that physical air rights were invaded that matters, but rather the fact that the government acted unreasonably to affect the Causbys' use and enjoyment of land—something that looks

³⁷ See Ball, *supra* note 10, at 820–21.

³⁸ *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

³⁹ See Bell & Parchomovsky, *supra* note 10, at 279–80.

⁴⁰ E.g., *Hinman v. Pac. Air Transp. Corp.*, 84 F.2d 755, 756 (9th Cir. 1936).

⁴¹ 328 U.S. 256, 258–59 (1946).

⁴² *Id.* at 266.

much more like nuisance than trespass or confiscation.⁴³ And yet, despite the clear influence of nuisance law on the holding, the Court held that it was critical that the flights actually occurred over the Causbys' property.⁴⁴ What if the Causbys were novelists, but the overflights over the Causby property were equally disruptive to their chicken-farmer neighbors? Especially in this situation, it seems unfair—if the harms and property devaluation are identical—to compensate the Causbys but not others affected by identical harms.⁴⁵ Tellingly, in the years since *Causby*, a number of state and federal courts have reached different results about whether an indirect overflight should be a physical taking or not, usually by uncomfortably shoehorning the overflight into physical takings law.⁴⁶ For instance, one court found a taking had occurred when individuals dwelled a thousand feet from a number of runways, but where airplanes did not fly in low altitudes over their land, on the grounds that “logically the same kind and degree of interference with the use and enjoyment of one’s land can also be a taking even though the noise vector may come from some direction other than the perpendicular.”⁴⁷ Those verbal gymnastics alone indicate how difficult it can be to force government activity that devalues property or affects use rights into a physical takings framework.⁴⁸

⁴³ Early on, Professor William Stoebuck recognized that overflights presented a problem of “condemnation by nuisance” rather than an actual physical taking. See William B. Stoebuck, *Nontrespassory Takings in Eminent Domain* 155–62 (1977).

⁴⁴ *Causby*, 328 U.S. at 256–66.

⁴⁵ See William A. Fischel, *Regulatory Takings: Law, Economics and Politics* 97 (1995) (noting that many authors have thought this rule “perplexing if not silly”); Bell & Parchomovsky, *supra* note 10, at 279–80 (describing the rule in *Causby* as “neither fair nor efficient”).

⁴⁶ *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962) (finding no taking unless overflight is direct); *Branning v. United States*, 654 F.2d 88, 99 (Ct. Cl. 1981) (relying on *Batten* and other cases to state that the “‘great weight’ of Federal authority” is that a taking occurs when aircraft are present in the “superjacent airspace”) (emphasis omitted); *Thornburg v. Port of Portland*, 376 P.2d 100, 107, 110 (Or. 1962) (holding that indirect overflights can be a taking); *Jackson v. Metro. Knoxville Airport Auth.*, 922 S.W.2d 860, 863–64 (Tenn. 1996) (same).

⁴⁷ *Thornburg*, 376 P.2d at 106.

⁴⁸ Determining what should count as an invasion and why is a problem even in non-constitutional law. Within ordinary trespass and nuisance law, a number of jurisdictions have begun permitting “recovery in trespass for indirect, intangible invasions that nonetheless interfere[] with exclusive possessory interests in the land.” *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 220 (Mich. Ct. App. 1999). The *Adams* case contains an excellent critique of the blending of the two doctrines. See *id.*; see also Thomas W. Merrill & Henry

The gap in condemnation law was also exposed in an earlier time: during controversies over street grading and railroad construction. Both grading and railroad construction had a common aim: leveling the ground to make it safer and cheaper for travel, by horse, engine, or (much later) automobile.⁴⁹ In the case of street grading, roads that were at the bottom of valleys and hills were filled in; for railroads, embankments and bridges were built to prevent the train from unsafe descents.⁵⁰ Roads that ascended too high too fast were made less steep to reduce the amount of horsepower needed for travel and because early locomotives could not climb steep gradients.⁵¹ These alterations in the landscape could have devastating effects on nearby properties. Nineteenth century newspapers and court records are filled with individuals trying—and often failing—to receive compensation for having their homes either left in midair or buried by mountains of dirt filling in the streets. Adding to the trouble, many states, cities, and railroad companies were incentivized to build embankments and lay track in the middle of existing thoroughfares. Why? Because rail travel was considered an appropriate “street use,” courts held that the use of existing streets for railways was not an additional taking (beyond the one that had created the street in the first place). Thus, a landowner who had built a shop or home alongside a main street might find him or herself suddenly behind a railroad embankment, unable to use main entrances, let alone welcome business.

As in the overflight context, takings law did not easily fit the grading and railroad cases. Early on, the large majority of courts held that because no property had been appropriated, these physical acts simply did not come within the ambit of the state takings clauses.⁵² And even though it is an anachronism to think about regulatory takings applying in this context, it seems fanciful to imagine that any analysis would apply here, since there was no regulation burdening the affected properties.

E. Smith, *Property: Principles and Policies* 944–47 (3d ed. 2017) (distinguishing trespass from nuisance on directness and tangibility grounds, among other factors).

⁴⁹ Cf. Brady, *supra* note 7, at 1176–77 (describing grading used for city planning purposes).

⁵⁰ Christian Wolmar, *The Great Railroad Revolution: The History of Trains in America* 38–39 (2012).

⁵¹ *Id.*

⁵² See generally Brady, *supra* note 7, at 1180–86 (detailing early court decisions following Massachusetts’ no-taking rule as applied to grading and Ohio’s decision not to follow Massachusetts).

Instead, the harms posed by street grading and rail embankments provide another example of physical acts by government that are not appropriations, but that nevertheless destroy property values or functionally oust the property holders. Such activities occupy space between the two recognized categories in condemnation law.

Although these examples help to illustrate the types of acts that fall in that gap, the fact that there is a gap was in fact more recognized a century ago than it is today. Indeed, long before regulatory takings were even conceived of as a category, hundreds of lawyers in jurisdictions across the country worried about the fact that physical takings might not cover all the activities of government affecting land for which compensation should be required. To address this problem, individuals and groups in a number of states moved toward state constitutional change.⁵³ It is to the story of these constitutional provisions—the damagings clauses—that the next several sections turn.

B. The Birth and Spread of the Damagings Clauses

When the Fourteenth Amendment was ratified in 1868—incorporating most of the Bill of Rights, including the federal Takings Clause, against the states—nearly all the states already had a takings clause in their own constitutions.⁵⁴ And in 1868, there was great and growing interest in all the provisions of state constitutions. The mid-nineteenth century was the era of state constitution-making.⁵⁵ For one thing, new states were entering the union at a rapid clip with the settlement of the American West, naturally increasing interest in the proper scope and contents of constitutional documents.⁵⁶ Moreover, the southern states were adopting new constitutions in compliance with the

⁵³ See *supra* note 6 (listing states).

⁵⁴ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *Tex. L. Rev.* 7, 72 (2008). Calabresi and Agudo state that thirty-three of the thirty-seven states had takings clauses, including all with pre-1855 constitutions. *Id.* William Treanor has asserted that all states but North Carolina had a takings clause in 1868. Treanor, *supra* note 14, at 840. The reasons for the discrepancy are unclear.

⁵⁵ See G. Alan Tarr, *The State of State Constitutions*, 62 *La. L. Rev.* 3, 8–10, 8 n.22 (2001).

⁵⁶ See generally Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 *Rutgers L.J.* 945, 947–48 (1994) (discussing interest in state constitutionalism in new western states during this period).

requirements of post-Civil War Reconstruction.⁵⁷ But even apart from these events, other, older states were also engaged in frequent constitutional revision.⁵⁸ There were sixty-seven state constitutional conventions in the twenty-five-year period between 1851 and 1875—compared to seventy-eight total before that date, and fifty-four in the seventy-five years that followed.⁵⁹

It was during this period that the first damagings clause made its debut. On the eighty-fourth day of the Illinois Constitutional Convention of 1870, the following provision from the Committee on the Bill of Rights was debated: “Private property shall not be taken *or damaged* for public use without just compensation.”⁶⁰ It is unclear who on the Committee of the Bill of Rights was responsible for this first damagings clause. But the first to discuss it on the floor was William H. Underwood of St. Clair, Illinois.⁶¹ Underwood observed that the provision was meant to provide compensation for property devalued by street grading,⁶² other delegates also pointed out its applicability to railroads.⁶³ In short, it is clear that the Illinois damagings clause was a direct response to one of the situations where the shortcomings of existing takings law had become clear.

The damagings clause was meant to compensate for these government activities falling short of physical appropriations, but there was some fear about its potential effects. Underwood observed that it was a “very original section.”⁶⁴ Another delegate was more direct: “It is a wild innovation—an untried, and I fear, dangerous experiment.”⁶⁵ This was not exactly true. Though Illinois was the first state to adopt the new provision, there was precedent from across the proverbial pond.⁶⁶

⁵⁷ See Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at v (1868).

⁵⁸ Albert L. Sturm, *The Development of American State Constitutions*, 12 *Publius* 57, 83 (1982).

⁵⁹ For example, Illinois, Indiana, and Vermont, among others, all revised their constitutions in the mid-nineteenth century. See *id.*, at 82.

⁶⁰ 2 *Debates and Proceedings of the Constitutional Convention of the State of Illinois 1870* (1870) [hereinafter *Illinois Convention*] (emphasis added).

⁶¹ 2 *Illinois Convention*, *supra* note 60, at 1576–77 (Underwood); James A. Rose, *Blue Book of the State of Illinois* 110 (1911).

⁶² 2 *Illinois Convention*, *supra* note 60, at 1577 (Underwood).

⁶³ *Id.* at 1579 (Church).

⁶⁴ *Id.* at 1577 (Underwood).

⁶⁵ *Id.* at 1583 (Medill).

⁶⁶ *Id.* at 1578 (Allen).

Responding to its own boom in rail construction, the British Parliament had passed three acts containing “clauses,” or language, meant to be inserted in the private bills (similar to charters) authorizing companies to take advantage of the government’s expropriation power.⁶⁷ One of these, the Lands Clauses Consolidation Act of 1845, provided that compensation should be paid “in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected” by authorized expropriations.⁶⁸ The intended meaning of “injuriously affected” is not exactly clear,⁶⁹ and judicial decisions between 1845 and 1870 did little to add clarity.⁷⁰ But no doubt, the Lands Clauses Consolidation Act permitted landowners to seek damages from railways and grading where they previously could not—and in exactly the types of circumstances that the Illinois delegates were worried about.⁷¹ Illinois delegates had other sources of inspiration, too: many cities and states passed statutes or put language in municipal charters that required the payment of damages for particular street grading or railroad activities.⁷² Still, Illinois was the first to constitutionalize the provision at such a high level of generality.

From the Illinois heartland, the damagings clause radiated outward. West Virginia came second, in 1872.⁷³ Arkansas and Pennsylvania followed in 1874.⁷⁴ Alabama, Missouri, and Nebraska added damagings clauses in 1875,⁷⁵ Colorado and Texas in 1876,⁷⁶ Georgia in 1877,⁷⁷ and

⁶⁷ Brauneis, *supra* note 7, at 116–17.

⁶⁸ Lands Clauses Consolidation Act 1845, 8 & 9 Vict. c. 18 §§ 2, 68 (Eng.).

⁶⁹ Brauneis, *supra* note 7, at 117 n.261; Keith Davies, “Injurious Affection” and the Land Compensation Act 1973, 90 L.Q. Rev. 361, 366–67 (1974); Eric C. E. Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, 1967 U.B.C. L. Rev. 127, 135–36 (1967).

⁷⁰ For an overview of the different currents and cross-currents in the common law, see Arthur Jepson, *The Lands Clauses Consolidation Acts: With Decisions, Forms, and Table of Costs* 109–50 (1880).

⁷¹ See, e.g., *Beckett v. The Midland Ry. Co.* [1867] 3 LR 82 (CP) at 82–84 (Eng.) (awarding damages when rail embankment reduced accessibility and light to first story of abutting structure).

⁷² Brady, *supra* note 7, at 1189–90; Brauneis, *supra* note 7, at 118 n.264.

⁷³ W. Va. Const. of 1872, art. III, § 9.

⁷⁴ Ark. Const. of 1874, art. II, § 22; Pa. Const. of 1874, art. XVI, § 8.

⁷⁵ Ala. Const. of 1875, art. XIII, § 7; Mo. Const. of 1875, art. II, § 21; Neb. Const. of 1875, art. I, § 21.

⁷⁶ Colo. Const. of 1876, art. II, § 15; Tex. Const. of 1876, art. I, § 17.

⁷⁷ Ga. Const. of 1877, art. I, § 3, ¶ 1.

California and Louisiana in 1879.⁷⁸ Soon, states new to the Union would put a thumb on the scale in favor of damagings, rather than the old takings clause. In 1889, Montana, North Dakota, South Dakota, Washington, and Wyoming each decided on damagings.⁷⁹ After some older states adopted the clause—Mississippi in 1890 and Kentucky in 1891—Utah added it in 1895.⁸⁰ Minnesota added the clause by popular referendum in 1896,⁸¹ and old Virginia joined the fray in 1902.⁸² Thereafter, the language was chosen by Oklahoma in 1907, Arizona and New Mexico in 1912, and Alaska in 1959.⁸³ Hawaii included it after its 1968 convention.⁸⁴ Indeed, with a single exception, every state that joined the Union after 1870 selected some version of the damagings clause.⁸⁵ I have only found evidence of delegates in a small handful of states debating and rejecting the language.⁸⁶ Michigan took up an amendment adding “or damaged” to its takings clause in 1961, but despite forceful arguments in its favor,⁸⁷ a specific amendment that

⁷⁸ Cal. Const. of 1879, art. I, § 14; La. Const. of 1879, art. 156.

⁷⁹ Mont. Const. of 1889, art. III, § 14; N.D. Const. of 1889, art. I, § 14; S.D. Const. of 1889, art. VI, § 13; Wash. Const. of 1889, art. I, § 16; Wyo. Const. of 1889, art. I, § 33.

⁸⁰ Miss. Const. of 1890, art. III, § 17; Ky. Const. of 1891, § 242; Utah Const. of 1895, art. I, § 22.

⁸¹ Minn. Const. art. I, § 13 (amended 1896).

⁸² Va. Const. of 1902, art. IV, § 58.

⁸³ Okla. Const. art. II, § 24 (1907); Ariz. Const. art. II, § 17 (1912); N.M. Const. art. II, § 20 (1912); Alaska Const. art. I, § 18 (1959).

⁸⁴ 2 Proceedings of the Constitutional Convention of Hawaii of 1968, at 24–32 (1972) [hereinafter *Hawaii Convention*].

⁸⁵ The single exception: Idaho. Brauneis, *supra* note 7, at 120 n.272.

⁸⁶ Apart from the much clearer Michigan and Hawaii examples that follow, there is some scant evidence of controversy in New York, Idaho, and Florida. In New York, an amendment relating to condemnations wrought by dams and canals contained the “taken or damaged” language; though it made it out of committee, it did not survive to the constitution, and there is no record explaining why. *Journal of the Constitutional Convention of the State of New York* 446 (1894); 2 Proposed Constitutional Amendments, at No. 333, Int. 325 (1894). Idaho considered the damagings amendments, but delegates disagreed vehemently about another section of the takings clause relating to condemnations for private irrigation; the version ultimately passed uses only “taken,” even though no delegate opposed the “damaged” language specifically. 1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, at 288–368 (1889); *id.* at 1608–25; Idaho Const. art. I, § 14. In Florida, the damagings language was proposed, *Journal of the Proceedings of the Constitutional Convention of the State of Florida: Which Convened at the Capitol, at Tallahassee, on Tuesday, June 9, 1885, at 423* (1885), but the takings clause emerged from committee without the “damaged” portion, *id.* at 489.

⁸⁷ 2 Fred I. Chase, *Official Record: State of Michigan Constitutional Convention 1961*, at 2580–2602 (1964). The language came up a second time. See *id.* at 2834–35, 2844–45.

would have included the language failed 42–44.⁸⁸ Hawaii initially rejected the language in 1950,⁸⁹ but then adopted the clause during the next convention.⁹⁰

These new amendments took different formulations. By far, the original Illinois formulation—that property should not be “taken or damaged” for public use—remained most popular.⁹¹ But Pennsylvania’s version was also influential.⁹² It said:

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.⁹³

The drafter of this provision noted that he had been inspired by a judicial decision denying damages in a street grading case.⁹⁴ The judge who

⁸⁸ *Id.* at 2602, 2845.

⁸⁹ 2 Proceedings of the Constitutional Convention of Hawaii, 1950, at 18 (1961) (Tavares) (noting that committee declined damagings language because “the state courts [are not] fully agreed on the meaning of it”).

⁹⁰ 2 Hawaii Convention, *supra* note 84, at 24–32.

⁹¹ In addition to Illinois, Ill. Const. of 1870, art. II, § 13, constitutions adopting the “taken or damaged” formulation included: Alaska Const. art. I, § 18 (1959); Ariz. Const. art. II, § 17 (1912); Cal. Const. of 1879, art. I, § 14; Colo. Const. of 1876, art. II, § 15; Ga. Const. of 1877, art. I, § 3, ¶ 1; Haw. Const. art. I, § 20; La. Const. of 1879, art. 156; Miss. Const. of 1890, art. III, § 17; Mo. Const. of 1875, art. II, § 21; Mont. Const. of 1889, art. III, § 14; N.M. Const. art. II, § 20 (1912) N.D. Const. of 1889, art. I, § 14; Neb. Const. of 1875, art. I, § 21; Okla. Const. art. II, § 24 (1907); S.D. Const. of 1889, art. VI, § 13; Utah Const. of 1895, art. I, § 22; Va. Const. of 1902, art. IV, § 58; W. Va. Const. of 1872, art. III, § 9; Wash. Const. of 1889, art. I, § 16; Wyo. Const. art. I, § 33 (1889).

⁹² Ala. Const. of 1875, art. XIII, § 7; Ky. Const. of 1891, § 242. South Dakota considered the Pennsylvania formulation, but stuck with the original. 1 Constitutional Debates: South Dakota, 1885, 1889, at 134–35, 333 (1907) [hereinafter South Dakota Convention] (Haines). North Dakota rejected tacking on the Pennsylvania provision on the ground that it would be redundant with the Illinois provision they had already included. Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota, Assembled in the City of Bismarck, July 4th to Aug. 17th, 1889, at 600–02 (1889) [hereinafter North Dakota Convention]. Pennsylvania’s was perceived to be stronger than the other versions, at least by one other state. Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky 990 (1890) [hereinafter Kentucky Convention].

⁹³ Pa. Const. of 1874, art. XVI, § 8.

⁹⁴ 6 Debates of the Convention to Amend the Constitution of Pennsylvania 745–46 (1873) [hereinafter Pennsylvania Convention] (Lamberton) (“These two words I have taken from

authored that decision lamented that the Pennsylvania Constitution only covered “private property *taken* for public use, [and] extends not to the case of property *injured* or *destroyed*.”⁹⁵

Twenty-four of the twenty-seven states use either the Illinois or the Pennsylvania wording.⁹⁶ The outliers hardly differ in material ways: Arkansas prohibits property from being “taken, appropriated, or damaged,”⁹⁷ Minnesota from being “taken, destroyed or damaged,”⁹⁸ and Texas from being “taken, damaged or destroyed.”⁹⁹ But the similarities among the states with damagings provisions are not just textual. Indeed, the constitutional debates that led to the adoption of these clauses share many similarities. The next two sections in turn take up the arguments made for and against the clauses.¹⁰⁰

the opinion of the Supreme Court in the case of *O’Conner v. Pittsburg* [sic.]”) (citing *O’Connor v. Pittsburgh*, 18 Pa. 187, 90 (1851)); *id.* at 741 (Biddle) (noting that proposed language was “taken almost literally from the language of the Judge who pronounced the decision in the case of *O’Connor v. Pittsburg*”).

⁹⁵ *O’Connor*, 18 Pa. at 190.

⁹⁶ See *supra* notes 91–92.

⁹⁷ Ark. Const. of 1874, art. II, § 22.

⁹⁸ Minn. Const. art. I, § 13 (amended 1896).

⁹⁹ Tex. Const. of 1876, art. I, § 17.

¹⁰⁰ There are several states where I found no discussion of the damagings provision. Gen. Laws of Minn. for 1895, ch. 5, at 11–12, <https://www.revisor.mn.gov/laws/?year=1895&type=0&id=005&format=pdf> [<https://perma.cc/ZUU6-V8QR>] (proposing referendum on issue); Alaska Constitutional Convention, Transcript, at 2483–84, http://www.akleg.gov/pdf/billfiles/Constitutional_Convention/Proceedings/Proceedings%20-%20Complete.pdf [<https://perma.cc/9898-R59J>]; Proceedings and Debates of the Constitutional Convention Held in the City of Helena, Montana 148, 253 (1921); Journal and Debates of the Constitutional Convention of the State of Wyoming 9 (1893); North Dakota Convention, *supra* note 92, at 600–02 (containing no debate on bill of rights provision, though there was subsequent debate on a supplemental provision); The Journal of the Washington State Constitutional Convention 1889, at 503–06 (1962) (containing record of debates, none concerning “damaged” language); Journal of the Constitutional Convention of the People of Georgia 120–21 (1877); Journal of the Constitutional Convention of the State of Texas 237–38 (1875) [hereinafter *Texas Convention*] (containing debates on the revised takings clause, but not the damagings portion). Other states’ records offer minimal detail on the debates, although there is evidence that the language was somewhat controversial. E.g., Journal of the Proceedings of the Constitutional Convention, of the State of Mississippi 505 (1890) (describing motion of Mr. Kennedy to strike out “or damaged,” which was lost); Journal of the Constitutional Convention, Assembled at Charleston, West Virginia, January 16, 1872, Con. Doc. No. 24, 4 (1872) (showing that delegates struck “or damaged” where it appeared in the section relating to the liability of internal improvement corporations, but not in the generic “taken or damaged” portion).

C. Arguments for the Damagings Clauses

From its origins in Illinois to its adoption by Hawaii nearly a century later, the primary evils against property that the damagings clauses sought to remedy were externalities placed on owners by infrastructural growth. At the turn of the twentieth century, it was the damages wrought by the railroads and street graders.¹⁰¹ When these early conventions incorporated preambles or resolutions defining the task ahead for delegates, those pertaining to the state takings clause explicitly called out these villains.¹⁰² Just as in Illinois, delegates from all over the country discussed the wrongs committed by chartered railroad companies and municipalities, who built up the streets or lowered them so as to seriously devalue and impair the use of properties nearby. Although railroads and grading were undoubtedly the source of most complaints, delegates in at least one state also discussed canals and dams that were constructed to the great detriment of individual landowners, particularly those that depended on fisheries or mills totally cut off by man-made alterations in natural watercourses.¹⁰³ By the time Hawaii included “or damaged” in its eminent domain provision in 1968, there were more modern villains: freeway builders and utility companies.¹⁰⁴

¹⁰¹ See 1 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Held in the City of Richmond, June 12, 1901, to June 26, 1902, at 145 (1906) [hereinafter *Virginia Convention*] (Parks) (noting that when Federal Bill of Rights was drafted, “this country was not threaded on every hand . . . with railroads. . . . Large cities having control of their streets, were not flourishing then as they are flourishing now.”); 3 Debates of the Missouri Constitutional Convention of 1875, at 18–19 (1936) [hereinafter *Missouri Convention*] (Gottschalk) (“But where, on the other hand, a railroad is laid out across a man’s premises, running between his house & out-buildings, necessitating perhaps, the removal of some of them or upon such a grade as to render deep cuttings or high embankments necessary, & thereby greatly increasing the inconveniences (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 566 (3d ed. 1874)) (internal quotation marks omitted); 3 Pennsylvania Convention, supra note 94, at 606 (Palmer) (discussing grading damages and railroad encroachments as a “great wrong” and “defect in jurisprudence”).

¹⁰² 1 Virginia Convention, supra note 101, at 714 (Ingram); 2 Pennsylvania Convention, supra note 94, at 415 (Barclay). Barclay, who introduced the Pennsylvania preamble, was the delegate from Reading, see A.D. Harlan, *Pennsylvania Constitutional Convention 1872 and 1873*, at 23 (1873), where a dramatic uncompensated regrade had occurred, see 3 Pennsylvania Convention, supra note 94, at 585 (Darlington).

¹⁰³ 3 Pennsylvania Convention, supra note 94, at 600 (Aldricks).

¹⁰⁴ 2 Hawaii Convention, supra note 84, at 27, 31 (Lewis, Ueoka).

A variety of legal rules contributed to property owners' inability to recover for losses resulting from these activities.¹⁰⁵ Certainly in the late nineteenth and early twentieth centuries, sovereign immunity severely limited the liability of states, municipalities, and even private corporations exercising public powers to be sued in tort in state or federal forums.¹⁰⁶ This meant that nuisance actions—claims for the loss of use and enjoyment of property—tended to be unavailable. Even apart from immunity, governments and chartered corporations also benefitted from somewhat foreign doctrinal rules that treated governments and their agents differently from private parties under core property and tort law. For example, for reasons that are unclear, several jurisdictions held that the right of lateral support—the right to prevent a neighbor from excavating so as to cause subsidence—was only enforceable against private parties.¹⁰⁷ In other words, if the government's actions caused subsidence, no action would lie, even though an action might lie if a neighbor caused the same type of harm.

With the injustice of these background rules firmly in their minds, many proponents of the new damagings language cited specific examples from their states, where individuals—often poor

¹⁰⁵ It is impossible to know how often owners were voluntarily compensated in the years before the law was theoretically amended to require it. It seems unlikely that compensation occurred with any frequency for a few reasons. First, at least in the regrading circumstances most prevalent in the damagings clauses debates, neighboring property owners were often assessed for the improvements that damaged them. See, e.g., 2 Official Report of the Proceedings and Debate of the Third Constitutional Convention of Ohio, Assembled in the City of Cincinnati, on Tuesday, December 2, 1873, at 1326 (1874) (telling the story of a hypothetical widow damaged but assessed \$2000). It is possible that governments reduced the assessments to account for damages, but I have found no record of that. Second, the sheer volume of litigation suggests that owners did not have readily available mechanisms for compensation. See Brady, *supra* note 7, at 1171–72, 1175–76 (describing volume of cases about grading). Third—while no historian wants to argue from the absence of evidence—I have not located any opponent of the clause referring to voluntary payments, nor any other records in contemporary sources for these sorts of payments. To the contrary, detractors of the damagings clauses worried that compensation would depress construction, which suggests voluntary payments were not regularly made.

¹⁰⁶ See generally Edwin M. Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 1, 9–11, 22–28 (1924) (discussing then-extant state of sovereign immunity from tort actions in both state and federal courts); Brauneis, *supra* note 7, at 72–83 (tracing immunities from tort actions available to states, counties, cities, private corporations, and government officials).

¹⁰⁷ See, e.g., *City of Quincy v. Jones*, 76 Ill. 231, 244 (1875); *Fyfe v. Turtle Creek Borough*, 22 Pa. Super. 292, 297 (1903) (“The owner of land which abuts upon a public street cannot be said to possess the right of lateral support, as against the commonwealth or its municipal agent . . .”).

individuals¹⁰⁸—went without any compensation after drastic infrastructural change imposed externalities on these groups. In many states, delegates lamented the filling in or cutting down of streets,¹⁰⁹ leaving structures “in the air,” “absolutely destroyed,” so that only “angels” could reach storefronts.¹¹⁰ Delegates in Pennsylvania recalled how St. Paul’s Cathedral in Pittsburgh was left “perched on a bluff” and inaccessible to its parishioners.¹¹¹ Railroads and street railways could also significantly affect the use of adjoining property; delegates in Pennsylvania discussed the case of Market Street in Philadelphia, at the time full of railways, “destroy[ing] the commercial uses of the warehouses.”¹¹² In other states, it was subterranean transit tunnels. In Missouri, for example, the St. Louis Tunnel and Railroad Company built a tunnel that damaged countless adjoining properties.¹¹³ Though the company had made promises so “soft and sweet” that “butter would not have melted in the[ir] mouths,” “[h]ouses and buildings along [the street] were untenable.”¹¹⁴ After the advent of the car, freeways presented similar risks. In Hawaii, Delegate Peter Lewis lamented how one Honolulu resident had suffered as an elevated freeway passed feet from his bedroom window, subjecting him to headlights and constant

¹⁰⁸ E.g., Virginia Convention, *supra* note 101, at 729 (Meredith) (“The class of people who suffer under this thing in a city are in the outlying wards. They are the class of people who have their little homes. They are not the wealthy class of people, not those who have the large and handsome residences, not those who live on streets that are graded, but the damage always comes upon the man who has a little home, who has by earnest efforts just managed to purchase a home. You are going to put the burden, so far as municipalities are concerned, upon the weakest and poorest citizens for the benefit of what.”); see also Bell & Parchomovsky, *supra* note 10, at 283 (noting that “[r]oads and undesirable public facilities” are often built in low-income areas).

¹⁰⁹ E.g., Kentucky Convention, *supra* note 92, at 726–27 (Knott); 4 *id.* at 4748 (Askew) (discussing a case, *City of Louisville v. Louisville Rolling Mill Co.*, 3 Bush 416, 421–22 (Ky. 1867), where the entry gate to a mill was completely buried by a railroad embankment); 3 Pennsylvania Convention, *supra* note 94, at 585 (Darlington) (“I know that in the city of Reading . . . a railroad company filled up one street so as to bury the first story of the buildings . . .”); *id.* at 597 (Meredith); 2 *id.* at 415 (Barclay); 2 Illinois Convention, *supra* note 60, at 1584 (Haines) (describing how Beach Street had been completely filled for some three-quarters of a mile).

¹¹⁰ 1 Virginia Convention, *supra* note 101, at 701 (Westcott), 729 (Meredith).

¹¹¹ 3 Pennsylvania Convention, *supra* note 94, at 589–90 (Biddle); *id.* at 591 (Hunsicker); *id.* at 597 (Meredith); 6 *id.* at 741 (Biddle); *id.* at 742–43 (MacConnell); *id.* at 745–46 (Lamberton).

¹¹² 3 *id.* at 588 (Cuyler); 6 *id.* at 742 (Biddle) (discussing disruption to Market Street).

¹¹³ 3 Missouri Convention, *supra* note 101, at 93 (Taylor).

¹¹⁴ *Id.* at 100 (Letcher).

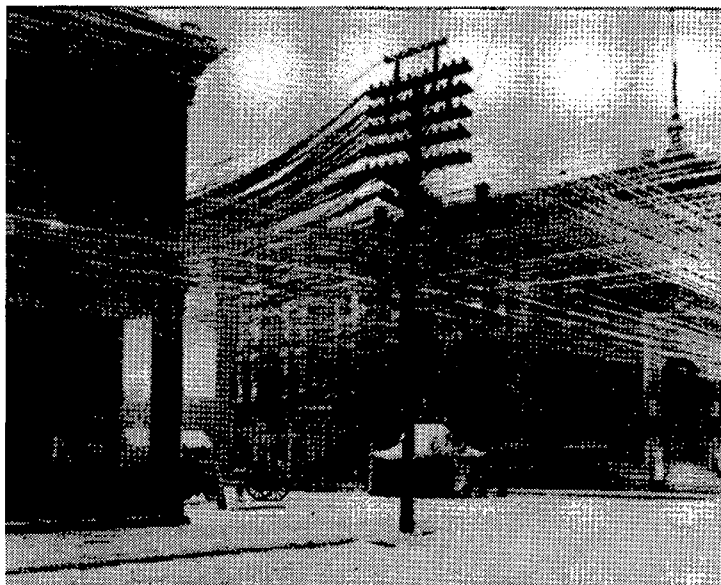
traffic noise.¹¹⁵ Although the below photographs are not from any incidents referred to in the debates, they give a sense of how a variety of government-built or -chartered projects—street railways, power lines, freeways—could potentially disrupt neighbors' use and enjoyment of adjoining property.

Elevated Railway in Street, New York City, 1876¹¹⁶



¹¹⁵ 2 Hawaii Convention, *supra* note 84, at 27 (Lewis).

¹¹⁶ 9th Ave., from Gansevoort Street Looking North Across Little West 12th St., New-York Historical Society (1876) (on file with New-York Historical Society, Geographic File (PR20), Box 43, Folder: Ninth Avenue: 12th St.–59th St., Neg. No. 3252, Image No. 87407d).

Power Lines, Pratt, Kansas, 1911¹¹⁷

It is also striking that some of these damages achieved national prominence, used by delegates in faraway states to illustrate the unjust results reached by courts applying traditional takings law. Cases of especially severe abuses trickled into the constitutional debates of states far from where the original injuries occurred. Texans discussed how during the building of roads and railways in New York City, “the homes of people [were] pulled down over their heads, without previous compensation.”¹¹⁸ Examples from New York and Illinois made it down to Kentucky.¹¹⁹ On the floor of the Virginia convention, a delegate discussed the doomed Pittsburgh cathedral some four hundred miles away.¹²⁰ Distance could also be temporal: one hundred years after a viaduct in Chicago deprived a nearby owner of rental income, a delegate

¹¹⁷ Lineman Working on Power Lines, Kansas Historical Society (1911), [kansasmemory.org/item/209358](https://perma.cc/E3NX-AG27) [https://perma.cc/E3NX-AG27].

¹¹⁸ Texas Convention, *supra* note 100, at 238 (Stockdale).

¹¹⁹ In Kentucky, proponents actually cited wrongly decided cases from New York and Illinois. 4 Kentucky Convention, *supra* note 92, at 4743 (Bullitt).

¹²⁰ 1 Virginia Convention, *supra* note 101, at 716–17 (Ingram).

in Hawaii presented the owner's case on an island his protagonist might not have been able to spot on a globe.¹²¹

There were other common themes put forth by the proponents of the damagings clauses. First, there was a rising and profound mistrust of corporations, whether municipal or railroad.¹²² In several states, delegates accused each other of being beholden to these artificial persons;¹²³ someone on the floor of the Pennsylvania convention stated that "he had seen notorious agents of corporations flitting about among the members."¹²⁴ Second, proponents argued that by unjustly denying compensation to individual landowners, railroads, in particular, were being inappropriately subsidized relative to the benefits they brought.¹²⁵ Third, delegates noted the injustice of compensating some landowners when just a tiny portion of their property was physically taken, but permitting them nothing when a far more serious devaluation occurred through a non-physical injury.¹²⁶ And finally, proponents argued that constitutional change, rather than legislative or common law change, was the best way to rectify the wrongs.¹²⁷ A delegate from Kentucky

¹²¹ 2 Hawaii Convention, *supra* note 84, at 26 (O'Connor).

¹²² South Dakota Convention, *supra* note 92, at 292 (Owen) (stating that "corporations have taken our lands . . . at just what price they choose"); 1 Virginia Convention, *supra* note 101, at 706 (Westcott); *id.* at 145 (Parks) ("Corporations were not built up [at the time of the Framing] as they are built up now."); Kentucky Convention, *supra* note 92, at 727 ("Do not let the humble citizen be run over by a railroad or any other corporation with millions at its back."); 3 Pennsylvania Convention, *supra* note 94, at 592 (Hunsicker).

¹²³ William Darlington was accused on the floor of being a "railroad lawyer," a charge he vociferously denied. 3 Pennsylvania Convention, *supra* note 94, at 584 (Kaine).

¹²⁴ *Id.* at 607 (Gowen).

¹²⁵ 3 Missouri Convention, *supra* note 101, at 65 (Gantt); see also *id.* at 68 (Roberts) ("We have had almost in its worst shape the siren song of progress which has already lured us to destruction.").

¹²⁶ 1 Virginia Convention, *supra* note 101, at 698 (Westcott) (contrasting the total compensation owed for a "public improvement which takes one-eighth of an acre in a thousand-acre tract" with no compensation for those who lost "one-half of the market value of the land"); *id.* at 145 (Parks) ("Persons go upon invitation and buy lots bordering upon a street, build houses, fix their homes to suit themselves, and are enjoying life and all the benefits of their property . . . [City authorities] cut down the street five or ten or fifteen feet and take that earth back and fill up five or ten or fifteen feet in another place. On the one hand, they leave the houses up in the air. On the other hand, they leave them below the street. They do not touch the property."); 3 Pennsylvania Convention, *supra* note 94, at 597-98 (Meredith); 6 *id.* at 742 (Biddle) ("For instance, it will occur to almost everybody that the casting of filth or of water upon the whole body of a man's land injures it, or may injure it, a great deal more than the actual deprivation of a small corner of it.").

¹²⁷ 1 Virginia Convention, *supra* note 101, at 706 (Westcott) (stating that matters of "limitations upon the power of the General Assembly" should be in the constitution).

noted the potential that both the common law and existing statutes could be repealed by legislative action, so neither was sufficient to offer permanent protection.¹²⁸ And even if some judges began awarding damages resulting from railroads, grading, or other infrastructural change, one could not always trust that those precedents would win out over conflicting ones.¹²⁹

As the clause spread, its spread became a reason for adoption. In Missouri, delegates brought copies of the Illinois constitution to the floor and showed it to fellow delegates when advocating for the damagings provision.¹³⁰ A California delegate cited the new constitutions in Illinois and Missouri.¹³¹ In South Dakota, copies of the Illinois and California constitutional provisions appeared.¹³² The provision's main defender in Kentucky observed that "[e]very other State, which has revised its Constitution since 1870, except North Carolina, which never had any provision on the subject, has followed the example of Illinois, by adding the word damaged."¹³³ And by the time Virginia debated the damagings clause in 1902, proponents could remark that "[o]ut of twenty-six States of the Union which since 1870 have revised and amended their constitutions, or originally adopted constitutions, no less than twenty have adopted the provision which is

¹²⁸ 4 Kentucky Convention, *supra* note 92, at 4727 (Askew) ("[T]he common law . . . could be repealed by the Legislature. There is no principle in the common law made sacred by the Constitution, and if that property is injured, and we rely on that, and fail to put this clause in, it can be repealed by the Legislature.")

¹²⁹ When confronted by an opponent of the clause who noted that the Court had recently been following its own precedents, a Kentucky delegate noted that "[t]he Court of Appeals has undertaken to legislate for the State that which the Constitutional Convention ought to do, and how long ought we to expect the Court of Appeals to adhere to it, if it is contrary to principle?" *Id.* at 4744 (Bullitt).

¹³⁰ 3 Missouri Convention, *supra* note 101, at 97 (Gottschalk, Letcher).

¹³¹ 3 Debates and Proceedings of the Constitutional Convention of the State of California 1190 (1881) [hereinafter *California Convention*] (Hager).

¹³² South Dakota Convention, *supra* note 92, at 292 (Owen); *id.* at 297 (Dollard).

¹³³ 4 Kentucky Convention, *supra* note 92, at 4724. Delegate Goebel went on to cite West Virginia, Missouri, Nebraska, Colorado, California, Arkansas, Texas, Alabama, and Pennsylvania. *Id.* It seemed especially relevant that similar provisions existed in Pennsylvania and Alabama. *Id.* at 4687 (Goebel).

proposed by this amendment.”¹³⁴ Perhaps more importantly: “Not a single State has ever abandoned the principle.”¹³⁵

It was not just the fact of widespread adoption that was important; it was also the promise of aid in interpretation from courts of other jurisdictions. Proponents of the new language argued that courts would not unduly expand liability too wildly because they could look to courts in other states for guidance.¹³⁶ Some delegates argued that the English cases could prove useful, though there was not always consensus on the wisdom of following the Brits.¹³⁷ Delegates also pointed to the opinions and descriptions of treatise writers as sources of guidance for future decision makers: John Lewis, author of one of the leading treatises on eminent domain;¹³⁸ John Dillon, famed author of foundational texts on municipal corporations;¹³⁹ and Thomas Cooley, author of a treatise on constitutional limitations.¹⁴⁰ Each of these authors cataloged and glossed recent damagings cases in different states, which proponents argued would help courts in their jurisdictions.¹⁴¹ Dillon even expressed the

¹³⁴ 1 Virginia Convention, *supra* note 101, at 699 (Westcott). The delegate asserted that constitutional changes were unnecessary in some other states—he named Massachusetts, New Hampshire, New York, and “others”—because their courts had awarded damages more liberally for similar injuries. *Id.*

¹³⁵ *Id.* at 705 (Westcott).

¹³⁶ 1 Virginia Convention, *supra* note 101, at 701 (Westcott) (observing that the language had been interpreted by several “courts of last resort”); *id.* at 704 (Westcott) (“[W]e have an unbroken line of construction by no less than seventeen States of the Union on that question, led by the great State of Illinois, several of whose cases have gone to the Supreme Court of the United States.”); 4 Kentucky Convention, *supra* note 92, at 4727 (Askew) (“[I]t has been construed by the Supreme Court of Pennsylvania, and . . . we will have the benefit of a construction put upon it by that Court.”); 1 *id.* at 990–91 (Goebel) (quoting *Pa. R.R. Co. v. Miller*, 132 U.S. 75, 83 (1889)); *id.* at 4744 (Bullitt) (quoting *Rigney v. City of Chicago*, 102 Ill. 64, 80–81 (1881)).

¹³⁷ 1 Virginia Convention, *supra* note 101, at 700 (Westcott); Kentucky Convention, *supra* note 92, at 991 (Goebel); 4 *id.* at 4724 (same). A delegate in Pennsylvania noted that this was a statutory reform, not a constitutional one. 3 Pennsylvania Convention, *supra* note 94, at 599 (White). Not everyone was so complimentary; one Virginia delegate lambasted a decision where a person ten miles from a waterway was found to be “damage[d]” by construction of a dock interfering with his access. 1 Virginia Convention, *supra* note 101, at 692 (Robertson).

¹³⁸ *Id.* at 690 (Robertson); *id.* at 705 (Westcott).

¹³⁹ *Id.* at 724 (Moore).

¹⁴⁰ 3 Missouri Convention, *supra* note 101, at 18–19, 91 (Gottschalk).

¹⁴¹ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 689–90 (6th ed. 1890); 2 John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 587(d), at 687–88 (4th ed.

strong view that compensating for these sorts of injuries was just,¹⁴² and Lewis noted that the provisions should “be liberally construed in favor of the individual whose property is affected.”¹⁴³

D. Arguments Against the Damagings Clauses

Without question, the most prominent objection levied against the clause’s proponents was that the addition of a damagings clause would deter or halt public improvements. As one worried, the provision “will prohibit the building of railroads hereafter, or if it will not prohibit them, will at least put such a clog upon them that they cannot be built with the facility with which they should be.”¹⁴⁴ Delegates worried that by increasing the potential expense of road building and transportation growth, the new language would discourage enterprise and progress,¹⁴⁵ unfairly allowing holdouts to thwart public goods for private profit.¹⁴⁶ This concern was particularly acute for delegates from underdeveloped areas of the states in which they resided.

1890); 1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* §§ 221–36, at 518–61 (2d ed. 1900).

¹⁴² 2 Dillon, *supra* note 141, § 587(b), at 685–86; see also Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 462–63 (2d ed. 1874) (“[I]t seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes.”).

¹⁴³ 1 Lewis, *supra* note 141, § 232(a), at 550.

¹⁴⁴ 3 Pennsylvania Convention, *supra* note 94, at 596 (Reed); see also 4 *id.* at 735 (Reed) (wondering about the “exact force and effect that this will have on the building of railroads”).

¹⁴⁵ E.g., 1 South Dakota Convention, *supra* note 92, at 336 (Fowler); 1 Virginia Convention, *supra* note 101, at 691 (Robertson); 4 Kentucky Convention, *supra* note 92, at 4721 (Mackoy); 3 Pennsylvania Convention, *supra* note 94, at 598 (White) (“It would be a discouragement to capitalists and enterprising energetic men . . . who desire to organize and construct lines of railroad.”); 2 Illinois Convention, *supra* note 60, at 1579 (Skinner) (“[W]e will commit blunders that, instead of advancing the progress of the State, will cripple her energies and damage her progress, which no member of the Convention desires.”); *id.* at 1577 (Underwood); *id.* at 1582 (Allen) (erroneously stating that Ohio’s constitution had been amended and that it had “check[ed] the building of railroads and other improvements”).

¹⁴⁶ 3 Pennsylvania Convention, *supra* note 94, at 605 (Darlington) (“[T]he improvement of any town would be most effectually under the control of persons who might be denominated ‘old fogies’”); 4 *id.* at 737 (Niles) (“It would enable one man to play the ‘dog in the manger’ and prevent the development of his own country.”); 2 Illinois Convention, *supra* note 60, at 1583 (Medill) (“There are far too many . . . dead-weights on other people’s efforts and enterprise. They grapple by the throat every enterprising community and say, ‘Not a step shall you go until you pay me toll.’”).

The debate over damagings pitted town against country—urban against rural. Delegates pointed out that the provision would have a greater effect on the development of rural areas than in the cities, where improvements were farther along.¹⁴⁷ Rural places also relied much more heavily on transport networks to get products to market.¹⁴⁸ One opponent in Illinois put it this way: “The harm will fall upon the rural regions, upon the interior, where the people want these public facilities, which will be cut down by these dense populations that refuse to allow these public thoroughfares to enter”¹⁴⁹ And a delegate from Virginia managed to belittle his entire state in arguing that it would harm less developed regions:

Is not Virginia very largely a great dessert-waste [sic], grown up with pines and broom-sage? This State . . . is a poor state in point of wealth, and we are not progressing so rapidly as we ought, and yet here in our Constitution it is proposed to put in something which . . . will have a tendency to prevent capital from coming into this State and building up our waste places.¹⁵⁰

Indeed, while things like politics and religion do not seem to correlate with the views of delegates on the damagings question, the character of their district seems to have made a difference. This is apparent simply from glancing through the biographical sketches of various proponents and opponents; with some exceptions, delegates who advocated for the clause often came from the metropolises, and those opposed came from smaller, often agrarian areas.¹⁵¹ Some even professed their biases on the

¹⁴⁷ 4 Pennsylvania Convention, *supra* note 94, at 735 (Lilly) (“We in the eastern part of the State are probably not as well acquainted with the injury that will result from such a provision as this, as gentlemen from the interior and western part of the State”); see 3 Missouri Convention, *supra* note 101, at 78 (Letcher) (noting that the clause was meant to cover situations “whereby private property may be injured, as we have seen often in cities”).

¹⁴⁸ 3 Missouri Convention, *supra* note 101, at 80 (Priest). Priest was a lifelong farmer. 1 Journal Missouri Constitutional Convention of 1875, at 99 (Isidor Loeb & Floyd C. Shoemaker eds., 1920).

¹⁴⁹ 2 Illinois Convention, *supra* note 60, at 1579 (Skinner).

¹⁵⁰ 1 Virginia Convention, *supra* note 101, at 694 (Robertson).

¹⁵¹ In Missouri, strong proponents of the change were the delegates from St. Louis: James O. Broadhead, Thomas Tasker Gantt, and Amos R. Taylor. 3 Missouri Convention, *supra* note 101, at 63 (Gantt); *id.* at 93 (Taylor); *id.* at 102 (Broadhead); see 1 Journal Missouri Constitutional Convention of 1875, *supra* note 148, at 76, 85, 109. The most vocal Virginia delegates split along urban and rural lines as well. Opponents William B. Pettit and Beverley A. Hancock hailed from more rural counties, 1 Virginia Convention, *supra* note 101, at 111 (Pettit); *id.* at 237 (Hancock); Virginia Constitutional Convention Directory 72 (1901), and

floor. A Pennsylvania representative, for example, told the assembly that he lived “in a section of the State that would be very glad to be cursed with a few more railroads than we have to-day.”¹⁵² A South Dakota farmer told the rest of the delegates, and especially the lawyers, that “from a farmer’s standpoint . . . I want a railroad out into our country beyond the Missouri river and we want this Constitution framed so we will not be prohibited from having a railroad.”¹⁵³ He had traveled some 250 miles to get to a station and therefore to the convention.¹⁵⁴

Delegates also worried that the language would do violence because it was too vague. At what distance would the damagings clause operate—a quarter mile, ten blocks, ten miles?¹⁵⁵ Opponents of the clause put forth

proponents Charles V. Meredith, John Garland Pollard, and Robert Walton Moore came from the city of Richmond and populous Fairfax County, see 1 Virginia Convention, supra note 101, at 701 (Westcott); id. at 724 (Moore); id. at 729 (Meredith); Virginia Constitutional Convention Directory, supra, at 72–73. In Kentucky, the biggest proponent of the clause was William Justus Goebel, who introduced some version of the damagings clause three separate times. Kentucky Convention, supra note 92, at 989; id. at 1241; 4 id. at 4687–88, 4760–61. Goebel was from the city of Covington, and he hated the local railroad so much that when he was later assassinated after being elected governor, his body was not carried on it. James C. Klotter, William Goebel: The Politics of Wrath 1–2 (1977). In California, proponents John S. Hager and Morris M. Estee represented the first congressional district, which consisted of the City and County of San Francisco. 3 California Convention, supra note 131, at 1190; Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts 1789–1983*, at 111, 219 (1982); *Delegates to the Constitutional Convention, Pac. Rural Press*, July 20, 1878, at 36. Though an antagonist, Samuel Wilson, also came from that same district, objector Horace C. Rolfe represented San Diego and San Bernardino. 3 California Convention, supra note 131, at 1190; *Delegates to the Constitutional Convention*, supra, at 36. While San Diego and San Bernardino are now major population centers, their respective counties held only about 16,000 people in 1880. By way of contrast, San Francisco County had 233,959 residents according to the 1880 census. See Dep’t of the Interior, Census Office, *Statistics of the Population of the United States at the Tenth Census* (June 1, 1880), at 51. Perhaps more tellingly, while San Francisco residents were suffering through significant injuries to property from regrades around the 1870s, see Brady, supra note 7, at 1193, San Diego was struggling mightily to get rail service. Around the same time as the constitutional convention, both San Bernardino and San Diego were desperately trying to woo various rail companies. Franklyn Hoyt, *San Diego’s First Railroad: The California Southern*, 23 *Pac. Hist. Rev.* 133, 133–35, 141 (1954).

¹⁵² 4 Pennsylvania Convention, supra note 94, at 737 (Niles).

¹⁵³ 1 South Dakota Convention, supra note 92, at 336 (Fowler).

¹⁵⁴ Id.

¹⁵⁵ 1 Virginia Convention, supra note 101, at 111 (Pettit) (“A man living five miles or any number of miles within reach of a railroad may have his property seriously reduced in value by the construction of the railroad.”); 4 Kentucky Convention, supra note 92, at 4721 (Mackoy) (“A man who lives a quarter of a mile from the line of the road proposed to be built, may, upon the theory that he has suffered some injury, although his property has not been taken, come in and retard or prevent the construction of a public improvement until his

a variety of hypotheticals that would warm a law professor's heart, suggesting that almost anything could be characterized as damage resulting from public use. A Virginia delegate noted how farmers had objected when canals were turned into railroads because they could no longer so easily load produce onto boats—would that come within the new language?¹⁵⁶ Would the clause apply to a tavern proprietor who lost business because the railroad meant fewer highway passersby stopped in to drink?¹⁵⁷ What if a railroad blemished a rich man's view of his countryside estate?¹⁵⁸ Or, heaven forbid, if it "attracts about it a population which aristocratic gentlemen . . . may not like"?¹⁵⁹

As a result of the indeterminacy, delegates argued that endless litigation would be required to interpret the provision.¹⁶⁰ And they were concerned that plaintiffs' lawyers would be incentivized to bring scores of spurious suits.¹⁶¹ As one delegate in Kentucky put it: "It will open a floodgate where speculative lawyers can destroy public improvement. There are hundreds of lawyers who go around hunting up these kind of suits to harass people with."¹⁶² More problematically, delegates argued that where the clause had been adopted, the jurisprudence was a mess.¹⁶³ Why invite that sort of chaos?

petty damage is ascertained."); *id.* at 4750 (Young) (noting that a man "four squares off" might claim injury); *id.* at 4754 (Young) ("Every man for half a mile around would say that the whistling and the ringing of the bell injures his property . . . Is that the sort of a spirit that ought to be allowed to be manifested?"); 3 Pennsylvania Convention, *supra* note 94, at 583 (Darlington) ("Consequential damages' may refer to speculative, uncertain, contingent things that may never arise, and which, of course, ought not to be compensated.").

¹⁵⁶ 1 Virginia Convention, *supra* note 101, at 111 (Pettit).

¹⁵⁷ 3 Pennsylvania Convention, *supra* note 94, at 592 (Darlington). A Virginia delegate had much the same concern. 1 Virginia Convention, *supra* note 101, at 111 (Pettit) (wondering whether valuable taverns and businesses that lost business because of a canal would be "damaged").

¹⁵⁸ Kentucky Convention, *supra* note 92, at 992 (Rodes).

¹⁵⁹ 3 Pennsylvania Convention, *supra* note 94, at 585 (Darlington).

¹⁶⁰ 3 Missouri Convention, *supra* note 101, at 92 (Crews) ("I believe more-over sir, that if we open the door by adding the word 'damage,' that we will open the door to endless litigation."); 1 Virginia Convention, *supra* note 101, at 237 (Hancock) ("I fear that it will prove a prolific source of vexatious suits against those who are endeavoring to develop the country."); *id.* at 693 (Robertson) ("[I]f the city was not compelled to pay, it would be put to the most tremendous amount of expense in defending suits of this kind."); 4 Pennsylvania Convention, *supra* note 94, at 735 (Reed) (expressing concern about areas where "the trial of causes is one, two, or three years back"); *id.* at 737 (Niles).

¹⁶¹ 4 Kentucky Convention, *supra* note 92, at 4740 (Mackoy).

¹⁶² *Id.* at 4752 (Young).

¹⁶³ 1 Virginia Convention, *supra* note 101, at 693 (Robertson) (noting "great mass of conflicting authorities in the Western and Southern States which have adopted this

A flurry of other objections made it to the convention floors. Delegates in several states suggested that such a drastic legal change should be left to the legislature,¹⁶⁴ or to the ebb and flow of the common law and existing takings doctrine.¹⁶⁵ One of the most unique objections involved the potential application of the clause to a type of personal property: animals. In Kentucky, a delegate posed the hypothetical of a diseased horse or cattle—would the new amendment be triggered by killing that threat to the public?¹⁶⁶

Several opponents of the clause also ridiculed the idea that just because other states were choosing the language, they should choose it too.¹⁶⁷ Sometimes, these comments were accompanied by some disparagement of the residents of other states. A particularly vivid example came from Nebraska, where a delegate said that advocating the approach from Pennsylvania would be like saying that “because the heathen mother casts her child into the Ganges to be destroyed by the crocodile, therefore we should do so.”¹⁶⁸ In another instance, a delegate in South Dakota suggested they should ignore the California damagings

provision”); *id.* at 707 (Carter) (same). A proponent (wisely) parried that the decisions were not even uniform about the meaning of “taken,” *id.* at 723 (Moore), so chaotic court decisions were not reason enough to abandon the clause.

¹⁶⁴ 3 Missouri Convention, *supra* note 101, at 92–93 (Crews); 1 Virginia Convention, *supra* note 101, at 688 (Robertson) (“[W]e submit that that evil can be cured by a proper legislative enactment.”); *id.* at 708 (Carter); 4 Kentucky Convention, *supra* note 92, at 4747 (Lassing); 3 Pennsylvania Convention, *supra* note 94, at 587–88 (Cuyler); 2 Illinois Convention, *supra* note 60, at 1578–79 (Skinner).

¹⁶⁵ 4 Kentucky Convention, *supra* note 92, at 4726 (Washington); *id.* at 4740–41 (Mackoy) (“[T]he rights of the people of Kentucky are already fully protected under the law as it now is . . . [A] fundamental change in the law of the State of Kentucky is not needed at the present time.”); *id.* at 4747 (Lassing); 3 Pennsylvania Convention, *supra* note 94, at 583 (Darlington). Pennsylvania delegates claimed that the courts were already awarding damages in some sets of cases. *Id.* at 584 (Darlington); *id.* at 588 (Dallas). A fairly powerful rebuttal to this claim came from Goebel: if the common law were all that were needed, “[w]hy, therefore, does the Federal Constitution and all the State Constitutions in this country, with the single exception of North Carolina, declare that no man’s property shall be taken for public use without just compensation being made?” 4 Kentucky Convention, *supra* note 92, at 4749 (Goebel).

¹⁶⁶ Kentucky Convention, *supra* note 92, at 990 (Straus).

¹⁶⁷ 4 *id.* at 4753–54 (Young) (“With my knowledge of Kentucky, I say if it has been adopted in heaven, it does not suit us here. We are behind in Kentucky. We need every thing that we can get to help us develop, and I do not care where it has been adopted.”); 4 Pennsylvania Convention, *supra* note 94, at 739 (Cuyler) (“More crude ideas have been developed in western States and inveigled into this body than are at all useful.”).

¹⁶⁸ 11 Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention 384 (1871) (Stevenson).

provision because it was “a ‘sand lot’ constitution.”¹⁶⁹ This was not a reference to California’s beaches; instead, it was a derogatory way of asserting that the California constitution had been influenced by radical communist agitators, who met in a sand lot near San Francisco City Hall as it was framed.¹⁷⁰

E. Ascertaining the Meaning of the Damagings Clauses

What was the accepted meaning of “damaged” or “injured”? The text itself provides few limitations, except in those states where compensable damages or injuries were limited to those caused in the construction or enlargement of public works, highways, or improvements.¹⁷¹ From both late nineteenth-century dictionaries and the floor discussions, it is obvious that “damaged” and “injured” are synonymous and mean a ‘loss’ or ‘detriment.’¹⁷² But beyond that, further clues to the meaning are wanting. For one thing, loss could mean a loss in property value or a loss of property rights. And for another, the text provides few clues as to whether “damaged” or “injured” implied only injuries of a certain extent or type.

Perhaps the logical follow-up to the vagaries in the text is this: what sorts of damages did the delegates believe would be covered or not covered? This is a hard question to examine. Nevertheless, this Section will describe some centrally important themes, controversies, and proposed decision rules that emerge from the drafters’ debates.

One of the most common interpretations of the new language was that all forms of chartered corporations—railroad, municipal, or otherwise—should simply have the same liability they would if they were natural persons.¹⁷³ As previously discussed, both sovereign immunity and other

¹⁶⁹ 1 South Dakota Convention, *supra* note 92, at 292 (Moody).

¹⁷⁰ The Century Dictionary: An Encyclopedic Lexicon of the English Language 5331 (William Dwight Whitney & Benjamin E. Smith eds., 1911) (defining “sand-lot”).

¹⁷¹ Ala. Const. art. XII, § 235; Pa. Const. art. X, § 4.

¹⁷² Alexander Reid, A Dictionary of the English Language 106 (23d ed. 1873); Webster’s Practical Dictionary 94 (Noah Porter & Dorsey Gardner eds., 1884).

¹⁷³ 4 Kentucky Convention, *supra* note 92, at 4744 (Bullitt) (“[G]ive a citizen the same right to sue a railroad as, under the common law, he has to sue an individual.”); 3 Pennsylvania Convention, *supra* note 94, at 599–600 (Alricks) (“But at common law all natural persons are responsible for consequential damages. . . . Now, I understand that corporations ought to be made responsible . . . the same as natural persons.”); 6 *id.* at 740 (Alricks) (“[A]ll that we ask in this case is that an artificial person shall be responsible for damages the same as a natural person. That is perfectly right, and that is all that ought to be done. The artificial person now is not responsible for damages the same as a natural

doctrines made natural persons liable for a far greater range of torts to property than their artificial counterparts.¹⁷⁴ Common law equivalency was thus a salient talking point for proponents of the new clauses.¹⁷⁵ But many contemporaries both for and against the new language pointed out that common law equivalency would not provide clear answers in the most difficult cases, because the government has the power to do more acts—and to effect different kinds of injuries—than ordinary citizens.¹⁷⁶ In other words, private tort and property law could only take courts so far.

Delegates in several states also discussed limiting the damagings language to injuries caused during construction or enlargement, rather than use, of the infrastructure.¹⁷⁷ But even here, there was ambiguity about the exact scope. This ambiguity emerged in discussions about railroad engines running too close to existing structures.¹⁷⁸ Were the resulting injuries caused by foolhardy construction or actual use? And how remote could compensable injuries from such sources be? A delegate from Pennsylvania suggested that passing railroad cars shaking a house or filling it with smoke would trigger the clause,¹⁷⁹ even though this seems like it could just as easily be characterized as a harm from use as from construction. The same delegate again blurred the line between harms from use and from construction by intimating that the provision might cover a situation where cars and locomotives passing could discourage shoppers from coming to businesses “for fear of injury to

person.”). Robert Brauneis has referred to this idea as “common law equivalence,” Brauneis, supra note 7, at 121–26, and I adopt the same phrase.

¹⁷⁴ See supra notes 105–107 and accompanying text.

¹⁷⁵ It helped that some English courts had used the common law equivalency idea to interpret the Lands Clauses Consolidation Act. See *Metro. Bd. of Works v. McCarthy* (1874) 7 LRE & I. App. 243 (HL) 265; *Glover v. N. Staffordshire Ry. Co.* (1851) 117 Eng. Rep. 1132 (QB) 1136 (Lord Campbell, C.J.).

¹⁷⁶ See 2 Philip Nichols, *The Law of Eminent Domain* § 312, at 849–50 (2d ed. 1917).

¹⁷⁷ 1 Virginia Convention, supra note 101, at 729 (Meredith); 4 Kentucky Convention, supra note 92, at 4754 (Bullitt). Several Pennsylvania delegates did not want to distinguish use from construction. 3 Pennsylvania Convention, supra note 94, at 600 (Purviance). However, the version ultimately adopted did not include “use.” See Pa. Const. of 1873, art. XVI, § 8; 3 Pennsylvania Convention, supra note 94, at 604 (Meredith).

¹⁷⁸ 3 Pennsylvania Convention, supra note 94, at 601 (Purviance); 2 Illinois Convention, supra note 60, at 1578 (Allen). In Pennsylvania, the language was in part perceived as overturning the decision of *Cleveland & Pittsburg R.R. Co. v. Speer*, 56 Pa. 325, 334–35 (1867). Others would have included fires started from railroad sparks. 3 Pennsylvania Convention, supra note 94, at 603 (MacVeagh).

¹⁷⁹ 3 Pennsylvania Convention, supra note 94, at 583 (Kaine).

themselves or their horses or their property.”¹⁸⁰ As with the idea of making artificial persons liable as natural persons, the use-construction distinction was clearer in theory than in practice.

Less controversy surrounded two other common refrains about the coverage of the damagings clauses. First, there was a sense that a property owner’s reliance and investment should be protected from subsequent damage for public benefit. Here, two delegates in different states express the idea that reliance and expenditure should matter in the damagings calculus:

[Compensation should be awarded] if, in the construction of that public work, you take away from a man that which a lifetime of toil, energy, privation and providence have enabled him to lay up.¹⁸¹

Why sir in some of these towns a man buys a lot and builds a valuable house, to the amount of \$50,000. He lays out his whole estate upon it and then they conclude to improve him out of his property. They go to work and improve his street, cut him down 50 feet and leave him up in the air.¹⁸²

Relatedly, delegates often spoke about the damagings clause in terms of significant, rather than trivial, harms. Major depreciations in value were a cornerstone of damagings debates. A Missouri delegate pointed out that once a regrade or railroad came through, abutting “houses will be left to the owls and bats as soon as their present lease is expired They remain untouched by public improvement & their value is ruined.”¹⁸³ Delegates often spoke in terms of functional destruction or uninhabitability.¹⁸⁴ Still, in many states, delegates suggested that something short of total devaluation was sufficient; in Virginia, for example, a delegate suggested that only a fifty percent reduction in market value should trigger the clause.¹⁸⁵ This emphasis on substantiality might have evoked for contemporaries a different area of

¹⁸⁰ *Id.*

¹⁸¹ 1 Virginia Convention, *supra* note 101, at 701 (Westcott).

¹⁸² 3 Missouri Convention, *supra* note 101, at 25 (Adams).

¹⁸³ 1 *id.* at 442 (Gantt).

¹⁸⁴ 3 Pennsylvania Convention, *supra* note 94, at 585 (Darlington) (“[A]lthough you may not take my house from me, if you render it uninhabitable by the proximity of your railroad, you lessen its market value.”); 2 Illinois Convention, *supra* note 60, at 1579 (Church) (describing need for compensation when a corporation builds “such an embankment before [an owner’s] place of business, as to virtually destroy it”).

¹⁸⁵ 1 Virginia Convention, *supra* note 101, at 698 (Westcott).

nonconstitutional law: nuisance. Nuisance analyses involve determining whether one owner's use of property so interferes with another's that the owner will be liable in a tort action.¹⁸⁶ The legal standards for nuisance have always varied by state, and the challenge of determining what actions will create liability has led to the doctrine's reputation as a "legal garbage can."¹⁸⁷ Even in the nineteenth century, there was little coherence or consensus surrounding the doctrine.¹⁸⁸ But the extent of the harm was important. Leading treatises of the period note that trivial nuisances were inactionable; only significant interferences with the enjoyment of property, or substantial devaluations, could create a basis for liability.¹⁸⁹

A final interpretive dilemma involved how to causally link the offending act and the resulting compensable harm to property. While there was widespread agreement that the clause should apply "not in case of a remote or contingent injury, but where it is immediate and direct,"¹⁹⁰ there was no consensus on what exactly "direct" should mean. Instead, there was a sense that courts would know how—or would at least have the tools—to determine when compensation was due.

The United States Supreme Court provided some indicia of what it believed might be covered by these provisions in 1914, just a few decades removed from the passage of most of the clauses. In taking up a prototypical damagings case from the District of Columbia—where a railroad and tunnel adjacent to the individual's property were emitting smoke, cinders, and gases, depreciating the property value and cracking the walls—the Court referenced how the result might be different in states with constitutions containing damagings language. The Supreme Court found that the plaintiff could have no recovery under the federal Takings Clause for most of the harms: those common to all the individuals adjacent to the railway and its emissions, lest "the operation of railroads [come] to a standstill."¹⁹¹ Oddly, however, the Court held that the plaintiff could recover for the damages resulting from his proximity to the opening of the rail tunnel, which were peculiar to him

¹⁸⁶ William L. Prosser, *Nuisance Without Fault*, 20 *Tex. L. Rev.* 399, 410 (1942).

¹⁸⁷ *Id.*

¹⁸⁸ Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* § 1, at 1 (1906) ("A precise, technical definition, applicable at all times to all cases, cannot be given, because of the varying circumstances upon which the decisions are based.")

¹⁸⁹ *Id.* §§ 21–22, at 36–39.

¹⁹⁰ 2 *Illinois Convention*, *supra* note 60, at 1578 (Allen).

¹⁹¹ *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 554–55 (1914).

alone—although it punted on the issue of how those compensable damages caused by the tunnel could possibly be separated from the noncompensable ones caused by the railway more generally.¹⁹² More interesting for our purposes, however, was this assessment:

That the [federal] constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a landowner, no part of whose property has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad, has been so generally recognized that in some of the States (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wyoming are, we believe, among the number) constitutions have been established providing in substance that private property shall not be taken *or damaged*, for public use without compensation.¹⁹³

In other words, the Court used the damagings clauses to show that state law was changed to cover what federal law would most likely not: the nuisances and other damages complained of by plaintiffs adjacent to some government use, but not touched by it.

Long before this statement, in 1870, a delegate in Illinois indicated his hopes that the convention debates would later be useful to courts: “I would be glad to see the record of our proceedings contain a construction of this provision, so that the courts hereafter, when they come to construe it, may at least have the aid of the construction given by the Convention to the provision when passing upon it.”¹⁹⁴ However, given different currents in the debates on the clause, the lion’s share of fashioning interpretive rules would fall to state judges. It is to this chapter of the damagings clause history that the next Part turns.

II. THE AFTERMATH OF THE DAMAGINGS CLAUSES

A. Early Confusion

In the early years, state courts struggled to define the new clauses consistently. Predictably, because it was the first to adopt a damagings

¹⁹² Id. at 557–58.

¹⁹³ Id. at 554.

¹⁹⁴ 2 Illinois Convention, *supra* note 60, at 1578 (Wall).

clause, the first to take on an interpretation of the meaning of “damaged” was Illinois.¹⁹⁵ Yet two of the Illinois Supreme Court’s first major interpretations, both issued on September 1, 1873, were in conflict.¹⁹⁶ In both cases, the facts were similar: railroads had been opened on the streets fronted by plaintiffs’ lots, causing some loss in value; in each case, the court ruled in favor of the plaintiff.¹⁹⁷ In *Chicago and Pacific Railroad Co. v. Francis*, Justice Walker, writing for the majority, announced that “the damage contemplated by the constitution must be an actual diminution of present value, or of price, caused by constructing the road, or a physical injury to the property, that renders it less valuable in the market, if offered for sale.”¹⁹⁸ This would seem to create an action for every diminution in value caused by a public work. Yet in another decision issued the same day, a majority opinion by Justice Craig took a different tack. Justice Craig looked to a Massachusetts statute requiring compensation for damages to land, analogized it to the new constitution, and pronounced that “the damage, in order to enable a recovery, must be a direct, physical injury.”¹⁹⁹ Gone was any acknowledgment that reductions in value caused by a public work might be compensable. The author of the opinion in *Francis*, Justice Walker, offered this pithy add-on to the majority opinion: “I hold that the damage need not be immediate or physical, to authorize a recovery.”²⁰⁰

The Illinois Supreme Court revisited the meaning of “damaged” in 1876,²⁰¹ but did not much clear it up. The court canvassed its prior

¹⁹⁵ The Illinois Supreme Court cited, but did not interpret, the clause in several earlier decisions because it was not crucial to do so. See *Mitchell v. Ill. & St. Louis R.R. & Coal Co.*, 68 Ill. 286, 287, 290 (1873); *Lafayette, Bloomington & Miss. R.R. Co. v. Winslow*, 66 Ill. 219, 223 (1872); *Kine v. Defenbaugh*, 64 Ill. 291, 293 (1872); *People ex rel. Decatur & State Line Ry. Co. v. McRoberts*, 62 Ill. 38, 43 (1871). One must also be careful not to assume that decisions after 1870 implicated the 1870 Constitution. See, e.g., *City of Quincy v. Jones*, 76 Ill. 231, 234 (1875); *Indianapolis, Bloomington & W. R.R. Co. v. Hartley*, 67 Ill. 439, 443 (1873).

¹⁹⁶ Some eight months earlier, the court had awarded damages in a street grading case, but without any discussion of the substantive standard to be used in interpreting the new provision. See *City of Pekin v. Brereton*, 67 Ill. 477, 480–81 (1873).

¹⁹⁷ *Stone v. Fairbury, Pontiac & Nw. R.R. Co.*, 68 Ill. 394, 395 (1873) (“[S]moke and cinders were cast and thrown from the engines and locomotives on and over the property of plaintiff, thereby greatly damaging the same.”).

¹⁹⁸ 70 Ill. 238, 240 (1873).

¹⁹⁹ *Stone*, 68 Ill. at 398.

²⁰⁰ *Id.* (Walker, J., concurring).

²⁰¹ In the interim, it decided at least one other case awarding compensation without delving into the meaning of “damaged.” See *City of Pekin v. Winkel*, 77 Ill. 56, 59 (1875).

inconsistencies, noting: "There is some difficulty in determining with precision, and it is probably impossible to lay down a rule by which to ascertain, in all cases, when property is to be considered as damaged."²⁰² However, this time it turned to English cases on the old Lands Clauses Consolidation Act—the law which had inspired the amendment in the first place.²⁰³ The Illinois court looked at a British treatise on the Act,²⁰⁴ concluding that the Act provided compensation for depreciations in value caused by corporate conduct that would have rendered private individuals liable at common law.²⁰⁵ But the court then went on to say this:

[T]he proof, to authorize a recovery, should show such an actual injury as in some substantial way affects the value of the property or its use This may, however, be, as was held in the cases referred to, relating to streets, by cutting off or obstructing access to the property; by causing rooms to be filled with smoke or unhealthy or offensive vapors; by rendering the walls of buildings damp and unhealthy; by darkening windows; or, in short, by any of the numberless ways by which the value of property may be materially depreciated, and its usefulness impaired—the test being that the injury must rest upon some substantial cause actually impairing the value of the property or its usefulness, and not be the result of taste or fancy, merely because of the proximity of the public improvement to the property assumed to be affected by it.²⁰⁶

Despite the analogy to the Lands Clauses Consolidation Act and its exposition, this laundry list of potentially actionable constitutional harms is not, in fact, a list of actionable harms in American common law. Take, for example, "darkening windows"; Illinois courts had begun repudiating that as a cause of action between private individuals as early as 1854, and certainly by 1876.²⁰⁷ In other words, the Illinois Supreme

²⁰² *City of Shawneetown v. Mason*, 82 Ill. 337, 342 (1876).

²⁰³ *Id.* at 342–43.

²⁰⁴ *Id.* at 342. Cf. Eyre Lloyd, *The Law of Compensation under the Lands Clauses, Railways Clauses Consolidation, and Metropolitan Acts* 64 (1867). Although it is unclear which version of Lloyd's treatise the court in *City of Shawneetown* cited, this version of the treatise contains almost identical language.

²⁰⁵ *Shawneetown*, 82 Ill. at 342–43.

²⁰⁶ *Id.* at 343.

²⁰⁷ *Guest v. Reynolds*, 68 Ill. 478, 488 (1873); *Gerber v. Gabel*, 16 Ill. 217, 222 (1854).

Court struggled to give a clear rule for interpretation while still giving the text the broad interpretation for which it seemed to stand.²⁰⁸

As Illinois was struggling to give meaning to the damagings clause, West Virginia—the second adopter—was implementing its own broad approach.²⁰⁹ In 1880, the Supreme Court of Appeals announced this rule:

Why should one man suffer all the loss for the benefit of the public? If the change was necessary for the public good, does not justice require that the public, for whose good it was made, should pay for the damages occasioned by it? This rule puts all the citizens upon an equality; the common law rule [requiring a physical taking] makes the one suffer for the many The effect of th[e damagings clause] is, to declare that a man's property-rights shall not be invaded for public use unless he receives just compensation, and that his right of property shall not be invaded by a *damage* inflicted upon it, though the property is not taken²¹⁰

The case from which this excerpt comes was a garden-variety street grading case; the authoring judge made much of the fact that the property had been “rendered almost, if not quite, valueless” and that the property owner had built in reliance on the preceding grade.²¹¹ These concerns about the extent of the harm and interference with owner reliance echoed the arguments made for adopting the damagings clause

²⁰⁸ The Illinois court would continue pronouncing ambiguous rules up until 1881. See *Chi., Milwaukee and St. Paul R.R. Co. v. Hall*, 90 Ill. 42, 45–46 (1878) (“The depreciation of the value of the property by these causes may be considered, but not general depreciation in value from other causes—mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity. The injury must be physical. But when it is such, we know of no better measure of damages than the depreciation of the property from that cause alone.”). See also Brauneis, *supra* note 7, at 131–32 (noting that the idea of “common law equivalence” was broader than the common law).

²⁰⁹ Although the new provision was cited in other early adopting jurisdictions, e.g., *Goodrich v. City of Omaha*, 10 Neb. 98, 101 (1880), the meaning of the language was not discussed. Pennsylvania cited its damagings clause a few times, but typically in places where there were statutes authorizing the payment of damages as well. E.g., *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. 331, 339 (1880). As it turns out, controversy would erupt over whether the takings clauses of the states were self-executing or required a statute to be operational. *Hill-Behan Lumber Co. v. State Highway Comm'n*, 347 Mo. 671, 680 (1941); *Moyer v. Commonwealth*, 183 Pa. Super. 333, 338 (1957). Robert Brauneis has ably discussed this controversy within takings. See Brauneis, *supra* note 7, at 113–15, 139–40.

²¹⁰ *Johnson v. City of Parkersburg*, 16 W. Va. 402, 419 (1880).

²¹¹ *Id.* at 418, 426.

in many states. But West Virginia would indeed go further. In another case, the same court found that a ferry proprietor could sue for damage to his franchise when the state authorized the building of a competing toll-bridge over the Shenandoah River.²¹² This recognition of a constitutional action for authorizing a competing business seems far more controversial than other early applications.²¹³ Again, however, it does appear that two key factors were satisfied: the ferry franchise had in effect been utterly destroyed,²¹⁴ and the state had given a purportedly exclusive right to the ferry franchisee (upon which he had relied).²¹⁵

In sum, these earliest cases evinced an ad hoc, case-by-case approach to the question of damagings. When rules were announced, they were often not followed in the next case; instead, broad principles of fairness guided courts toward awarding damages to owners for significant harm incurred after they had invested in improving their property. Soon, however, a new rule would emerge, and previous approaches would go by the wayside.

B. Coalescing Limitations

The trajectory of the damagings clauses took a new turn with one decision: *Rigney v. City of Chicago*, decided by the Illinois Supreme Court in 1882.²¹⁶ Michael Rigney, a carpenter, sued when the city built a viaduct 220 feet west of his property, cutting off his access to a major cross street except by stairwell. As a result of increased inconvenience reaching the major street, Rigney claimed that the value of the rental home on his lot decreased from \$60 to \$23, and the property itself was reduced from \$5000 to under \$2000.²¹⁷

²¹² *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, 399, 420 (1880).

²¹³ I assume controversial because the *Mason* case had facts quite similar to the famous case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 540, 549 (1837), where the Supreme Court declared that legislative authorization of a competitor did not create a federal constitutional claim. The *Mason* case (somewhat confusingly) distinguished *Charles River Bridge* on the basis that the West Virginia charter left the offending ferry company subject to all applicable law. See *Mason*, 17 W. Va. at 412-17.

²¹⁴ See *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 168 S.E.2d 287, 292 (W. Va. 1969). In the case itself, the court acknowledges that the ferry business could still run; it seems it just could not hope to compete. *Mason*, 17 W. Va. at 419.

²¹⁵ *Mason*, 17 W. Va. at 418.

²¹⁶ 102 Ill. 64 (1882).

²¹⁷ *Rigney*, 102 Ill. at 68-69.

The Illinois Supreme Court ignored its past conflicting decisions on damagings and announced a new rule to decide the case, borrowing the wisdom of leading English cases on the Lands Clauses Consolidation Act to construct it.²¹⁸

In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.²¹⁹

The *Rigney* rule thus outlined three important factors for a damagings action: (1) a “direct physical disturbance” of (2) a valuable right enjoyed in connection with property; and (3) special harm, rather than harm suffered by the public at large. In recognizing these factors, the court professed—again—simply to make cities and railroad corporations liable for the same harms for which a private individual would be liable under the common law.²²⁰

Though the immediate inspiration for this test was certainly English railroad law, the similarities to private nuisance are apparent.²²¹ Then, as now, there was no uniform definition of nuisance,²²² but judges and commentators often invoked these principles in deciding and assessing cases. First, the notion that harm must be “physical” meant in nuisance law that the offending act had disturbed the plaintiff and would actually disturb the senses of the ordinary person; a nuisance action would not lie if the complainant had unusually “fancy” tastes or only a fear of unlikely harm.²²³ As to the second factor, reference to “valuable right[s]” evoked

²¹⁸ *Metro. Bd. of Works v. McCarthy* (1874) 7 LRE & I. App. 243 (HL); Brauneis, *supra* note 7, at 131.

²¹⁹ *Rigney*, 102 Ill. at 80–81. The court stated the rule a different way earlier in the opinion. *Id.* at 78 (noting sufficiency of “a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action”).

²²⁰ *Id.* at 80–81.

²²¹ See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *Ecology L.Q.* 755, 800–01 (2001) (noting how the English law of “injurious affect[ion]” for railroad cases bled into nuisance law in England).

²²² *Joyce & Joyce*, *supra* note 188, § 1, at 1.

²²³ *Westcott v. Middleton*, 11 A. 490, 494 (N.J. Ch. 1887) (“In this case, then, we have the broad, yet perfectly perceptible or tangible, ground or principle announced, that the injury

the then-dominant principle in nuisance that one's right to use his or her property ends where another owner's legal rights begin.²²⁴ This rule sounded better in theory than in practice; reading through early nuisance cases, it is nearly impossible to discern a coherent list of "rights" property owners possess to support an action, even within a single jurisdiction.²²⁵ The final factor—specificity—analyzed damagings to the sorts of private and public nuisances for which private suits could be maintained. Public nuisances are those that injure the public as a whole.²²⁶ They can typically be abated by private suit, rather than "public prosecution," only if the suing party has suffered injury "different from that sustained by the rest of the public."²²⁷ Private nuisances, on the other hand, only damage "one or a few persons" and are always enforceable by private action.²²⁸ Unfortunately, the distinction between privately enforceable nuisance and nuisance requiring prosecution has always been difficult to pin down. How many people is a few, and when are there so many that the injury should be perceived as harming the public at large? Must the type of injury be different in kind from that suffered by others to make it "special," or will a difference in degree of harm be enough to support a private nuisance claim? These questions still prove challenging,²²⁹ and there were no easy

must be *physical*, as distinguished from purely *imaginative*. It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy."); Rhodes v. Dunbar, 57 Pa. 274, 291 (1868) (rejecting "fear of fire" as sufficient to sustain nuisance claim); Joyce & Joyce, supra note 188, § 20, at 32.

²²⁴ Thurston v. Hancock, 12 Mass. 220, 224 (1815) ("The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another."); 1 H.G. Wood, A Practical Treatise on the Law of Nuisances in Their Various Forms § 2, at 3 (3d. ed. 1893).

²²⁵ Compare Pickard v. Collins, 23 Barb. 444, 458 (N.Y. Sup. Ct. 1856) (describing "erecting a building, or carrying on a business on one's own land" as legal rights supporting nuisance actions, but not "darkening another's windows" or "digging by a person on his own soil so as to endanger the foundation of the building of the adjoining owner") with Brady v. Weeks, 3 Barb. 157, 159 (N.Y. Sup. Ct. 1848) (describing "enjoyment of life and property" and "the use and benefit of . . . dwellings" as rights protected by nuisance).

²²⁶ 1 Wood, supra note 224, § 14, at 34.

²²⁷ 2 id. § 645, at 853. See also 1 id. § 20, at 43–44; id. § 14, at 34.

²²⁸ Id. § 15, at 35.

²²⁹ See generally Antolini, supra note 221, at 769–71 (discussing the history and evolution of different "special injury" rules and their complications).

answers at the time the *Rigney* court imported them into constitutional condemnation law.²³⁰

Whether the relevant comparison is nuisance law or English railroad cases, the mysteries of the *Rigney* test only deepen with further examination of the case's facts. Oddly, under the three-part test the case articulated, it is unclear why the property owner should have won. First, the court used a fairly loose definition of "physical disturbance." Early maps show that the stairwell was not Rigney's only means of egress from his property. Indeed, multiple more circuitous routes were available to Rigney, so he was not stranded by the viaduct at all.²³¹ By that time, English courts and lawyers had repeatedly stated in construing the Lands Clauses Consolidation Act that inconvenient access to a road did not qualify as a physical disturbance.²³² Even assuming that the construction of the viaduct in the main street was significant enough to be a physical disturbance, what was the right? Evidently, the court considered Rigney to have lost a "public right" in access to a specific street that his property did not actually abut.²³³ But unlike other sorts of harms—those where a public work happened in the street in front of a home or business, or where the construction deprived an individual of the lateral support of the soil—Rigney was claiming the loss of some appurtenant right three-quarters of a football field away from his lot line. There were many individuals similarly affected by the new stairwell within the neighborhood. These ambiguities left lingering confusion, as the Illinois Supreme Court issued several rulings on street cutoffs in the

²³⁰ See 2 Wood, *supra* note 224, § 645, at 853 ("It is often a difficult question to determine when a person can maintain an action for injuries received of a common nuisance.").

²³¹ Digital Sanborn Maps, 1867–1970 (ProQuest Information and Learning Company, Vol. 1, 1906, West Division, Sheet 58, 2001).

²³² In one case from across the pond, a party's lawyers cited these as examples of noncompensable harm: "a road rendered less agreeable or convenient, or a view interfered with, or the profits of a trade [diminished]." *Metro. Bd. of Works v. McCarthy* (1874) 7 LRE & I. App. 243 (HL) 249. See also *Caledonian Ry. Co. v. Ogilvy* (1856) 2 Macq. 229, 237–38. It must be observed that English courts were not totally consistent about the level of interference required, sometimes recognizing inconvenient access claims if the amount of inconvenience was particularly severe. See *Chamberlain v. W. End of London & Crystal Palace Ry. Co.* (1862) 121 Eng. Rep. 1197, 1199–1201 (rendering judgment for the plaintiff where embankment reached height of first-floor windows, meaning pedestrians had to use "flight of steps" to access road and carriages had to use lane to reach road via more circuitous route).

²³³ *Rigney*, 102 Ill. at 70.

aftermath of *Rigney* that labored to distinguish the case by mischaracterizing its facts.²³⁴

Despite these ambiguities, the nuisance formula articulated in *Rigney* was immediately influential. Within seven years of its pronouncement in 1881, the *Rigney* rule had been adopted by seven of the nine jurisdictions that had by that time adopted a “taken or damaged” formulation.²³⁵ But *Rigney* was further amplified when, by virtue of diversity jurisdiction,²³⁶ its holding arrived at the Supreme Court of the United States in the case of *Chicago v. Taylor*, which involved a fact pattern quite similar to *Rigney*.²³⁷ Moses Taylor owned a share in a coal yard in what is now the city’s Lower West Side.²³⁸ The City of Chicago constructed a viaduct, which had the result of “materially diminish[ing]” the market value of the property, obstructing and “practically cut[ting] off” one of the approaches to the property and “seriously impair[ing]” another.²³⁹ As in *Rigney*, it appears that the property was not completely

²³⁴ In a case just one year later, the owner of a building in Chicago sued when the Board of Trade moved farther downtown, evidently both because it would cause the loss of some lucrative business and because, to build its fancy new building, the Board had conditioned its move on the closure of a part of LaSalle street close to its new home. *City of Chicago v. Union Bldg. Ass’n*, 102 Ill. 379, 382 (1882). The court there distinguished *Rigney* on the basis that only “property holders bordering upon streets” could claim they had been damaged—and the plaintiff was some blocks up from the closure. *Id.* at 397. Unfortunately, there was no such basis for distinguishing; in *Rigney* the plaintiff was a non-abutter 220 feet away. In another decision, the court suggested that adjacency was irrelevant: “[I]f the construction and operation of the railroad or other improvement is the cause of the [depreciation in value], though consequential, the party damaged may recover.” *Chicago & W. Ind. R.R. Co. v. Ayres*, 106 Ill. 511, 518 (1883).

²³⁵ *Mollandin v. Union Pac. Ry. Co.*, 14 F. 394, 396 (C.C.D. Colo. 1882); *Hot Springs R.R. Co. v. Williamson*, 45 Ark. 429, 437 (1885); *Reardon v. City and County of San Francisco*, 6 P. 317, 324 (Cal. 1885); *City of Denver v. Bayer*, 2 P. 6, 12 (Colo. 1883); *Rude v. City of St. Louis*, 6 S.W. 257, 259 (Mo. 1887); *Gottschalk v. Chicago, B. & Q.R. Co.*, 16 N.W. 475, 476–77 (Neb. 1883); *Belt Line St. Ry. Co. v. Crabtree*, No. 3413, 1885 WL 6523, at *2 (Tex. Ct. App. 1885); *Spencer v. Point Pleasant & Ohio R.R. Co.*, 23 W. Va. 406, 437 (1884). The outliers: Georgia and Louisiana. It is striking that *Rigney* was even cited in states that had the Pennsylvania formulation, *City Council of Montgomery v. Townsend*, 2 So. 155, 158 (Ala. 1887), and some that had not yet adopted the damagings clause, e.g. *Rochette v. Chi., Minneapolis & St. Paul Ry. Co.*, 20 N.W. 140, 141 (Minn. 1884).

²³⁶ The plaintiff, Moses Taylor, was an extremely famous New Yorker and business magnate. See Daniel Hodas, *The Business Career of Moses Taylor: Merchant, Finance Capitalist, and Industrialist* 1, 7–8, 279–86 (1976). Though there is no record of the reason for jurisdiction in the lower federal courts, it seems a safe assumption that diversity requirements were met.

²³⁷ 125 U.S. 161, 162 (1888).

²³⁸ *Id.*

²³⁹ *Id.*

cut off from the streets; instead, a particular access route had become more inconvenient. However, unlike in *Rigney*, evidence in *Taylor* also showed that the property was periodically flooded as a result of the construction.²⁴⁰

The *Taylor* Court cribbed heavily from *Rigney* in awarding Taylor compensation, giving less attention to cases decided by the Illinois Supreme Court in the intervening seven years.²⁴¹ It did not, however, elaborate on the elements of the *Rigney* rule. But *Taylor* had the effect of giving *Rigney* an even wider audience. The *Rigney* formulation eventually became the foundational law in just about every jurisdiction with a damagings clause.²⁴²

²⁴⁰ Id. at 162–63.

²⁴¹ Id. at 169.

²⁴² In addition to the sources previously cited in note 235, see *Alabama Power Co. v. City of Guntersville*, 177 So. 332, 337 (Ala. 1937); *Gilbert v. Greeley*, Salt Lake & Pac. Ry. Co., 22 P. 814, 817 (Colo. 1889); *Austin v. Augusta Terminal Ry. Co.*, 34 S.E. 852, 855 (Ga. 1899); *City & County of Honolulu v. Mkt. Place, Ltd.*, 517 P.2d 7, 13 & n.2 (Haw. 1973); *Ashland & Cattlettsburg St. Ry. Co. v. Faulkner*, 45 S.W. 235, 239 (Ky. 1898); *Griffin v. Shreveport & A.R. Co.*, 6 So. 624, 624 (La. 1889); *Stuhl v. Great N. Ry. Co.*, 161 N.W. 501, 502 (Minn. 1917); *Van de Vere v. Kansas City*, 17 S.W. 695, 697 (Mo. 1891); *Buhmann v. State*, 201 P.3d 70, 88 (Mont. 2008); *Gottschalk v. Chicago, B. & Q.R. Co.*, 16 N.W. 475, 478 (Neb. 1883); *King v. Stark County*, 271 N.W. 771, 774 (N.D. 1937); *City of Mangum v. Todd*, 141 P. 266, 268 (Okla. 1914); *Scranton Gas & Water Co. v. City of Scranton*, No. 6, in Equity, 1902 WL 3511, at *4 (Pa. Ct. Com. Pl. 1902); *Hyde v. Minnesota, Dakota & Pac. Ry. Co.*, 136 N.W. 92, 100 (S.D. 1912), overruled by *Krier v. Dell Rapids Twp.*, 709 N.W.2d 841 (S.D. 2006); *DuPuy v. City of Waco*, 396 S.W.2d 103, 110 (Tex. 1965); *Twenty-Second Corp. of Church of Jesus Christ of Latter-Day Saints v. Or. Short Line R.R. Co.*, 103 P. 243, 246 (Utah 1909); *Swift & Co. v. City of Newport News*, 52 S.E. 821, 825 (Va. 1906); *Smith v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 81 P. 840, 843 (Wash. 1905). Four jurisdictions may not clearly fall within this group. Wyoming does not use the *Rigney* formulation but similarly requires interference with property rights causing a diminution in value. *Wyo. State Highway Dep't v. Napolitano*, 578 P.2d 1342, 1346 (Wyo. 1978). Alaska's rule appears broader than *Rigney*: "Property is 'taken' or 'damaged' for constitutional purposes when the State deprives the property owner of the economic advantages of . . . ownership . . . for a public purpose." *Bakke v. State*, 744 P.2d 655, 657 (Alaska 1987) (citations omitted). In Arizona, the clause has primarily been applied to changes in grade to date. *City of Phoenix v. Garretson*, 302 P.3d 640, 643–47 (Ariz. Ct. App. 2013) (overviewing history of constructions). And in New Mexico, it is clear that consequential damages are compensable, but there is no uniformly followed rule. See *Primetime Hosp., Inc. v. City of Albuquerque*, 206 P.3d 112, 120 & n.2 (N.M. 2009) (noting compensability of consequential damages but acknowledging the term has been used in different senses). Another requirement has been tacked on to the *Rigney* rule in some jurisdictions: intentionality. The harm must be intended or reasonably certain to result; evidently, this is meant to prevent the clause from being used to make the state liable for the negligence of government employees. *Robinson v. City of Ashdown*, 783 S.W.2d 53, 56 (Ark. 1990); *St. Francis Drainage Dist. v. Austin*, 296 S.W.2d 668, 669 (Ark. 1956); *Neff v.*

Although the Supreme Court had been careful to rely on Illinois law, the way that other states' courts interpreted *Taylor* became muddy. As the *Rigney* rule was adopted in jurisdictions across the country, a multitude of the state supreme courts interpreting damages clauses from Virginia to California noted that the United States Supreme Court had "approved" or "concurred in" the Illinois holding.²⁴³ It is hard to say whether the *Rigney* rule was adopted because it seemed like a good one, or because state courts had an erroneous idea about the application of *Taylor* in their states. Whatever the reason, the tripartite test that came out of Illinois became the default rule in nearly all damages jurisdictions.

C. Narrowing Scope

Between the *Rigney* decision in 1881 and the adoption of the last damages clause in 1968, courts in damages states developed fairly consistent interpretations of the individual requirements set forth in *Rigney*.²⁴⁴ As a result, the damages clauses were mainly applied to a discrete class of physical interferences with a limited number of property rights: periodic damage from flooding, the loss of access from grading or embankment construction, and little else. These interpretations rendered the clauses much more narrow than nuisance and nearly inapplicable to anything except the sorts of physical invasions that would ordinarily qualify as a taking.²⁴⁵

Imperial Irrigation Dist., 299 P.2d 359, 360–61 (Cal. Ct. App. 1956); *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004). See also *Jefferson County v. Bischoff*, 37 S.W.2d 24, 24 (Ky. Ct. App. 1931) (affirming compensation award where "[d]amages might well have been anticipated"). Elsewhere, courts have held that intentionality is necessary to meet the "public use" requirement. See *Electro-Jet Tool Mfg. Co. v. City of Albuquerque*, 845 P.2d 770, 777 (N.M. 1992) (discussing intentionality as public use issue).

²⁴³ *Ala. Power Co.*, 177 So. at 337; *Eachus v. L.A. Consol. Elec. Ry. Co.*, 37 P. 750, 751–52 (Cal. 1894); *City of Pueblo v. Strait*, 36 P. 789, 792 (Colo. 1894); *Pause v. City of Atlanta*, 26 S.E. 489, 491 (Ga. 1896); *Faulkner*, 45 S.W. at 239; *Griffin*, 6 So. at 624; *Dickerman v. City of Duluth*, 92 N.W. 1119, 1120 (Minn. 1903); *Blincoe v. Choctaw, Okla. & W. R.R. Co.*, 83 P. 903, 906 (Okla. 1905); *Lambert v. City of Norfolk*, 61 S.E. 776, 778 (Va. 1908).

²⁴⁴ While this is only a brief summary of the rulings in multiple jurisdictions, John Lewis—the most extensive chronicler of damages law—did describe most of the early cases below as "leading cases in the United States on the construction of the words." 1 Lewis, *supra* note 141, § 236, at 561 n.94.

²⁴⁵ Depending on the severity of the flood, different takings rules apply. The Court has long applied takings liability to permanent flood and debris displacements. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177–78 (1871) ("It would be a very curious and

In many jurisdictions, the first requirement of *Rigney*—a “direct physical disturbance”—quickly lost connection to its meaning in nuisance. In nineteenth-century nuisance parlance, physicality meant that the injury had to be of the sort that would disturb the senses of or cause physical discomfort to an ordinary person; the specter of future harm or disturbances to a property owner with unique sensitivities were not considered “physical.”²⁴⁶ Despite this established meaning, several courts interpreting the “physicality” requirement in damagings law in the first few decades after *Rigney* found that only physical invasions or physical cutoffs of rights or easements would meet the bar.²⁴⁷ This construction of “physical disturbance” was endorsed in John Dillon’s

unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.”). For temporary flooding, the Court has held that the invasion may be compensable depending on a multi-factor test resembling *Penn Central*. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23, 38–39 (2012) (suggesting that duration of occupation, “the degree to which the invasion is intended or is the foreseeable result of authorized government action,” and “the character of the land at issue and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use” are relevant to determining whether government-induced flooding is compensable (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001))). The grading and embankment cases were considered takings in some states earlier than others. In some states, those were held to be traditional takings; in other states, they did not become compensable until the damagings clauses were passed, in part because decades of previous court rulings had held that they were *damnum absque injuria*: loss without injury. See generally Brady, *supra* note 7, at 1190–94 (discussing history).

²⁴⁶ See *supra* note 223 and accompanying text.

²⁴⁷ *Church of Jesus Christ of Latter-Day Saints*, 103 P. at 246 (“[T]he clause in the Constitution that private property shall not be taken nor damaged clearly means that some physical injury or damage to the property itself shall be committed, and does not include something which merely affects the senses of the persons who use the property.”); *Lambert*, 61 S.E. at 779; *Austin*, 34 S.E. at 856 (“And it will be found that in every decision by this court where a plaintiff was held entitled to recover for damages occasioned by works for public use there was always some physical interference with an easement, right of way, obstruction of the street near the premises, or some direct invasion of an appurtenance connected with the land.”); *Spencer v. Point Pleasant & Ohio R.R. Co.*, 23 W. Va. 406, 437 (1884) (compensating for “direct physical obstruction to the right of user or enjoyment of [plaintiff’s] property on Seventh street”). But see *Haney v. Gulf, C. & S.F. Ry. Co.*, 3 Willson 336, 341 (Tex. Ct. App. 1887) (suggesting that compensable injury might arise if an activity “detracts from the enjoyment of their habitations, produces intolerable physical discomfort, and diminishes the value of their premises for the purposes for which they have been devoted”).

influential treatise on municipal corporations, which may have contributed to the spread of the idea.²⁴⁸ Accordingly, physically displacing water onto property was typically actionable as a damaging.²⁴⁹ Similarly, displacing cinders or other physical debris onto the land might count.²⁵⁰ But things like lights, noise, offensive smells, vibration, and smoke, even if fairly severe, often did not suffice.²⁵¹ In one particularly striking case, the smoke from a railway fifty feet away so filled the house every time an engine passed that it discolored clothing and furniture; this did not qualify as a physical disturbance under the *Rigney* rule.²⁵² In sum, the “physicality” requirement lost its connection to the character of the harm and became focused on the character of the governmental act. Courts came to require an actual physical invasion or physical disruption to an easement, instead of cribbing from its meaning in nuisance that the injury be immediate and offensive to the senses rather than speculative and harmful only to the owner’s mind or preference.

Relatedly, numerous courts developed finite lists of the “valuable rights” significant enough to create damagings liability. Apart from the right to exclude, courts typically recognized interferences with the right of access and water rights as generating damagings claims; less frequently, rights to light, air, and view could suffice.²⁵³ Just as the

²⁴⁸ See 2 Dillon, *supra* note 141, § 587(d), at 687–88.

²⁴⁹ See, e.g., *Elliott v. County of Los Angeles*, 191 P. 899, 900 (Cal. 1920).

²⁵⁰ *Chi., Milwaukee & St. Paul Ry. Co. v. Darke*, 35 N.E. 750, 750 (Ill. 1893); *Great N. Ry. v. State*, 173 P. 40, 41–42 (Wash. 1918); *Smith v. St. Paul, Minn. & Minneapolis Ry. Co.*, 81 P. 840, 842 (Wash. 1905). The law on foreign substances is more mixed. Compare *Rupert v. City of Rapid City*, 827 N.W.2d 55, 58 (S.D. 2013) (awarding compensation where de-icer ran onto property and killed trees) with *St. Francis Drainage Dist. v. Austin*, 296 S.W.2d 668, 668–69 (Ark. 1956) (finding no damaging where poison drifted onto adjacent farmland and killed crops because damage was not intended).

²⁵¹ *Aldrich v. Metro. W. Side Elevated R.R. Co.*, 63 N.E. 155, 156 (Ill. 1902); *Church of Jesus Christ of Latter-Day Saints*, 103 P. at 247; *Smith*, 81 P. at 842; *Sheridan Drive-In Theatre v. State*, 384 P.2d 597, 598, 601 (Wyo. 1963). But see *Darke*, 35 N.E. at 750 (awarding damages for harms including soot and vibration); *City of Louisville v. Hehemann*, 171 S.W. 165, 165 (Ky. 1914) (permitting damagings action when flies and smells from town dump devalued property); *Gulf, C. & S.F. Ry. Co. v. Eddins*, 60 Tex. 656, 660 (1884) (permitting jury instruction regarding noises and smoke as elements of damage). Oddly, in Kentucky, noxious smells were previously held to be takings rather than damagings. *City of Georgetown v. Ammerman*, 136 S.W. 202, 203 (Ky. 1911).

²⁵² *De Kay v. N. Yakima & Valley Ry. Co.*, 129 P. 574, 576 (Wash. 1913).

²⁵³ E.g., *Horn v. City of Chicago*, 87 N.E.2d 642, 645 (Ill. 1949) (access); *Less v. City of Butte*, 72 P. 140, 141 (Mont. 1903) (light and air); *Hurley v. State*, 143 N.W.2d 722, 725 (S.D. 1966) (light and air); *Eddins*, 60 Tex. at 667 (access); *State ex rel. Woods v. State*

notion of physicality appears to have been influenced by the treatise writers, this finite list of rights bears striking similarities to lists of “abutter’s rights” described in contemporary treatises.²⁵⁴ What was missing from the lists of abutters’ rights? The broader rights of use and enjoyment—the most important rights in the law of nuisance. In other words, only interferences with a subset of specific rights held by owners abutting streets and waterways could support a damagings action, not interferences with an owner’s more general rights of use and enjoyment. To put it succinctly, using the combination of physicality and a finite list of rights, courts used damagings to protect the property rights that could be physically cut off—the rights most resembling easements—and did not recognize as damagings other disturbances to physical senses, comfort, or health that seriously impaired use and enjoyment and significantly devalued the property.²⁵⁵

Most of the narrowness that the *Rigney* rule produced is due to the way that courts interpreted the “physicality” and “valuable right”

Rd. Comm’n, 136 S.E.2d 314, 316 (W. Va. 1964) (“rights of access, view, light, air and lateral support”). See 1 Lewis, *supra* note 141, § 229, at 543–45 (describing cases on water rights).

²⁵⁴ See 2 Dillon, *supra* note 141, § 587(c), at 686–87 (describing compensable “rights connected” with property as “right to access and to light and air, or other rights annexed to the lot or land”); 1 Lewis, *supra* note 141, § 91(e), § 91(i), at 170, 184–85 (describing “rights of abutting owners” as “light, air and access”).

²⁵⁵ *Austin v. Augusta Terminal Ry. Co.*, 34 S.E. 852, 858 (Ga. 1899) (“Yet we apprehend that no one would claim there could be a recovery for such physical invasions by harmless noise and barely perceptible smoke, and for the reason that noise and smoke do not physically invade a right of property.”); *Aldrich*, 63 N.E. at 157 (“Noise, the obstruction of light and of view, are necessary incidents of the construction and operation of such roads, and if every property owner could recover in all such cases the making of public improvements would become practically impossible.”); *Robertson v. New Orleans & Great N. R.R. Co.*, 129 So. 100, 103 (Miss. 1930) (Anderson, J., specially concurring) (noting some disagreement among the states, but concluding that “[t]he lawful operation of a railroad necessarily involves the ringing of bells, the blowing of whistles, the rumbling of trains, the emission of smoke, fumes, and odors, casting cinders on adjoining property, and the vibration of buildings, all of which not only constitutes annoyance and discomfort, to occupants of homes, as well as business houses in the neighborhood of the railroad, but may actually depreciate their market value.”); *Church of Jesus Christ of Latter-Day Saints*, 103 P. at 243, 246 (“In all of them it is in effect held that the damage clause of the Constitution was not intended to, nor does it, cover actions for annoyances from noises and the like arising from the operation of railroads.”). But see *Matthias v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 146 N.W. 353, 357 (Minn. 1914) (noting some case law suggesting that “so far as disturbance, smoke, and dust emanate from the operation of a railroad between and at stations, there is no redress for the individual who may suffer in the use and enjoyment of his property,” but remanding to jury).

requirements. On both of these factors, courts' interpretations diverged substantially from how those concepts were understood in nuisance. In contrast, the final requirement—that the harm be “specific” to the landowner—maintained its similarities to nuisance, which is to say that it is nearly impossible to define coherently or consistently what level or type of harm a property owner had to suffer in order to win a claim. Sometimes, the specificity prong was used to deny damagings claims by owners who were not immediately adjacent to the offending government use.²⁵⁶ More often, courts required damagings claimants to show that the harm they suffered was either different in kind or different in degree than the harms suffered by other members of the public²⁵⁷—a doctrinal debate that was simultaneously occurring over in nuisance law regarding when and whether private citizens could sue.²⁵⁸ While courts' constructions of the specificity requirement certainly did not help damagings claimants, they also did not appreciably leave them worse off than they would have been had courts applying damagings clauses just imported ordinary nuisance principles.

Although this general description captures the majority of damagings law in the first century after the clauses appeared, there have always been occasional outliers. An early one came from Alabama; in the early 1900s, Dora McEachin used the new provision to argue that when the city of Tuscaloosa cut down some trees near the sidewalk, she was deprived of the “shade and ornament” of them.²⁵⁹ The court awarded her compensation under the damagings clause, but later repudiated and eventually overruled the case.²⁶⁰ Apart from individual outliers like these, Washington and California have always provided more systematic recognition of and protection to potential categories of damagings. In Washington, indirect airplane overflights²⁶¹ and smells and pests from

²⁵⁶ See *Glasgow v. City of St. Louis*, 17 S.W. 743, 745 (Mo. 1891) (using the specificity prong to deny damagings claim for street closure on which plaintiff did not abut).

²⁵⁷ See *Aldrich*, 63 N.E. at 158; *Gilbert v. Greeley, Salt Lake & Pac. Ry. Co.*, 22 P. 814, 816 (Colo. 1889); *Rude v. City of St. Louis*, 6 S.W. 257, 259 (Mo. 1887) (applying “different in kind” standard to damagings claimant).

²⁵⁸ See *supra* notes 228–229 and accompanying text.

²⁵⁹ *McEachin v. Tuscaloosa*, 51 So. 153, 155 (Ala. 1909) (Sayre, J., dissenting).

²⁶⁰ *Hous. Auth. of Birmingham Dist. v. Logan Props., Inc.*, 127 So. 3d 1169, 1176 (Ala. 2012).

²⁶¹ *Martin v. Port of Seattle*, 391 P.2d 540, 546 (Wash. 1964); *Ackerman v. Port of Seattle*, 348 P.2d 664, 667 (Wash. 1960), abrogated on other grounds by *Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle*, 548 P.2d 1085, 1087–88 (Wash. 1976). But see *Thompson*

nearby sewage plants²⁶² have been classified as compensable damagings, despite contrary rulings in other states. And California officially recognizes a larger class of outliers; it is the only state to incorporate a special category of protection into its damagings rules for “intangible intrusion[s]” that result “in a burden on the property that is direct, substantial, and peculiar to the property itself.”²⁶³ By relaxing the physicality requirement somewhat, California courts have been able to recognize actions for damagings where noxious fumes and gases render property uninhabitable, where jet aircraft noise is obtrusive, and where new highways and their traffic cause noise, dust, and darkness.²⁶⁴ These situations are often not compensable in other jurisdictions.

Still, the first century of damagings law mostly produced narrow, stunted conceptions of the clauses.²⁶⁵ More recent waves of damagings actions about harms to property caused by adjacent roadways and electrical lines have also failed.²⁶⁶ In recent years, some state courts have

v. City and County of Denver, 958 P.2d 525, 526–27 (Colo. App. 1998) (rejecting idea that indirect airplane flights are a damaging).

²⁶² *Aliverti v. City of Walla Walla*, 298 P. 698, 699–700 (Wash. 1931); *Southworth v. City of Seattle*, 259 P. 26, 27 (Wash. 1927); *Jacobs v. City of Seattle*, 160 P. 299, 300 (Wash. 1916).

²⁶³ *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996).

²⁶⁴ See *id.* (discussing the relevant cases).

²⁶⁵ See also *Spies & McCoid*, *supra* note 7, at 448, 450 (“Indeed, in some states the present trend is to curtail rather than liberalize the recovery for consequential damages.”).

²⁶⁶ E.g., *Strode v. City of Ashland*, 886 N.W.2d 293, 307 (Neb. 2016) (declining protection to landowner in part because state and federal takings are now “coterminous”); *Krier v. Dell Rapids Township*, 709 N.W.2d 841, 848–49 (S.D. 2006) (declining action when township graveled and closed part of street after allowing it to fall into disrepair); *State v. Heal*, 917 S.W.2d 6, 11 (Tex. 1996) (rejecting damagings action because “prior impaired access cases involved physical obstructions created by a public improvement”); *Byler v. Va. Elec. & Power Co.*, 731 S.E.2d 916, 918, 921 (Va. 2012) (declining to recognize action on electrical lines). But see *Rupert v. City of Rapid City*, 827 N.W.2d 55, 58–63 (S.D. 2013) (upholding judgment for landowner under takings or damagings theory when de-icer ran onto property and killed trees); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 627, 636 (Utah 1990) (reversing dismissal of damagings complaint made by plaintiff alleging that a causeway breach harmed his brine canal); *Livingston v. Va. Dep’t of Transp.*, 726 S.E.2d 264, 276–77 (Va. 2012) (reversing and remanding damagings case based upon flooding due to transportation department’s filling and building activities). The low likelihood of success has not seemed to stop homeowners from trying to bring damagings claims. See, e.g., Brief of Appellants at 2, *Deschner v. Montana*, 390 P.3d 152 (Mont. 2017) (No. DA15-0683) (homeowners brought a damagings action when a two-million-pound slab fell off a rock face, displacing their house); Brief of Appellee at 1–2, *Norton v. City of Hickman*, 2017 WL 3142518 (Neb. Ct. App. 2017) (No. A-16-000085) (purchasers of a lot alleged that the construction of a nearby development caused increased flooding and thereby damaged the land).

even gone so far as to acknowledge that their constitutional damagings clauses protect only the same activities as the federal Takings Clause.²⁶⁷ While plaintiffs occasionally win or survive a motion to dismiss, their odds are best in cases about total loss of access or physical invasion.

Plaintiffs have continued to try creative damagings claims, albeit without much success. Since the late 1960s, damagings actions have been brought in a few states to try to thwart urban renewal and other redevelopment projects. Plaintiffs typically claim that condemnation blight—reductions in property values caused by threatened eminent domain—constitutes a compensable damaging, but several courts have rejected this application.²⁶⁸ At least one jurisdiction has also rejected the claim that the damagings clauses establish a parallel, easier path for obtaining compensation for regulations affecting property rights: in other words, a category of “regulatory damagings” that sets a lower bar than federal regulatory takings might.²⁶⁹

An important exception to this general, pessimistic trajectory includes an unexpected class: cases where the police have damaged property in the course of various activities. Several jurisdictions have recognized compensable damagings in these situations.²⁷⁰ In the earliest case, three

²⁶⁷ *Customer Co. v. City of Sacramento*, 895 P.2d 900, 907 (Cal. 1995); *Buhmann v. State*, 201 P.3d 70, 85 (Mont. 2008).

²⁶⁸ See *Hous. Auth. of Birmingham Dist. v. Logan Props., Inc.*, 127 So. 3d 1169, 1174–75 (Ala. 2012); *DUWA, Inc. v. City of Tempe*, 52 P.3d 213, 216–17 (Ariz. Ct. App. 2002); *City of Northglenn v. Grynberg*, 846 P.2d 175, 178–80 (Colo. 1993); *Orfield v. Hous. & Redevelopment Auth.*, 232 N.W.2d 923, 926–27 (Minn. 1975); *Empire Constr., Inc. v. City of Tulsa*, 512 P.2d 119, 122, 124 (Okla. 1973); Note, *Condemnation Blight and the Abutting Landowner*, 73 Mich. L. Rev. 583, 600–03 (1975). Intriguingly, at least one judge in a non-damagings state claimed that the damagings clauses might have come into play where the government takes some properties in an area and leaves others behind to an uncertain fate. *Fisher v. City of Syracuse*, 361 N.Y.S.2d 773, 775 (N.Y. App. Div. 1974) (Goldman, J., concurring).

²⁶⁹ *Buhmann*, 201 P.3d at 87. In 2016, the damagings clause was invoked by taxi drivers in Georgia to argue that regulation allowing the operation of Uber and Lyft unconstitutionally damaged their taxi medallions. The Georgia Supreme Court rejected the suit without discussion of the damagings allegations, instead holding that “there is no argument here that the Act *deprives* Appellants of their [medallions] or of their right to engage in the taxicab business.” *Abramyan v. State*, 800 S.E.2d 366, 369 (Ga. 2017).

²⁷⁰ See *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 38–39 (Minn. 1991); *Steele v. City of Houston*, 603 S.W.2d 786, 788 (Tex. 1980). But see *Eggleston v. Pierce County*, 64 P.3d 618, 626–27 (Wash. 2003) (declining to apply damagings or takings clauses); *Customer Co.*, 895 P.2d at 901 (same); *Bray v. Houston County*, 348 S.E.2d 709, 709, 711 (Ga. Ct. App. 1986) (same). This category of damagings has received slightly more attention than the others. See C. Wayne Owen, Jr., Note, *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of*

escaped convicts took refuge in a house; the city of Houston set the house on fire in the course of trying to force the prisoners out.²⁷¹ The Supreme Court of Texas held that this could be a compensable damaging and remanded for further proceedings.²⁷² The application of damagings or takings clauses to this category of activity presents a vexing series of questions, not least of all whether the exigency exception—which famously permits burning a house down to stop a conflagration—should bar constitutional recovery.²⁷³ Outside this unusual category, however, the story of the damagings clauses has remained the same for a long time: the damagings clauses are construed narrowly. Only physical disturbances of certain valuable property rights can create constitutional liabilities. Instead of serving as a flexible, nuisance-like vehicle for addressing nontrespassory burdens placed upon individual landowners, the clauses typically mandate compensation in circumstances where the federal Takings Clause would already apply.

D. Making Sense of the Development of Damagings

Unfortunately, there are few clues as to why courts ended up interpreting the damagings clauses so limitedly. In particular, it is striking that—despite facial similarities to nuisance law—the damagings doctrine continued to insulate governments from liability for a broad range of actions significantly impairing property use and enjoyment. While it is impossible to say for certain why the doctrine developed this way, this Section offers some preliminary thoughts.

One hypothesis for why the clauses came to be of such limited effect is that other avenues for compensation replaced damagings, leading to an organic decline in this area of law. Between 1870 and the present, two related legal concepts—one nonconstitutional, one constitutional—developed in ways that could have permitted owners suffering from damagings to seek redress without needing to bring a damagings claim. First, most states passed statutory tort claims acts that waived sovereign

Police Activities?, 9 Wm. & Mary Bill Rts. J. 277, 277 (2000); Jonathan Simonds Pyatt, California Supreme Court Survey, *Customer Co. v. City of Sacramento*, 24 Pepp. L. Rev. 274, 276 (1996).

²⁷¹ *Steele*, 603 S.W.2d at 789.

²⁷² *Id.* at 791–92.

²⁷³ See generally Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 396–97, 399–401 (2015) (discussing both conflagrations and the police-emergency-destruction cases).

immunity for torts committed by state and local governments and their agents—including nuisances.²⁷⁴ Second, federal takings law began formally recognizing the category of regulatory takings after *Pennsylvania Coal Co. v. Mahon*—creating a uniform federal vehicle for pursuing compensation, even in the absence of a technical trespass.²⁷⁵ As it turns out, neither is a satisfactory explanation for why damagings fell into obscurity.

The tort claims acts are not a replacement for damagings law, both because of the substance of the claims for which immunity is waived and because of the available remedies. Foremost, these statutes are a less powerful check on the government's tort liability than it might at first appear.²⁷⁶ In states with damagings clauses, state tort claims acts often codify old common law rules of sovereign immunity, separating acts for which a state or its subdivisions may be sued in tort from those for which it may not.²⁷⁷ The common law distinctions fall into one of two related categories: the “governmental-proprietary” distinction and the “discretionary-ministerial” distinction.²⁷⁸ The governmental-proprietary distinction provides that a municipal corporation is immune from liability when acting as an arm of government on behalf of the state; it is

²⁷⁴ Back in 1967, Arvo Van Alstyne claimed that this reduced some of the need for the constitutional guarantee. See Van Alstyne, *Statutory Modification*, supra note 7, at 740.

²⁷⁵ 260 U.S. 393 (1922).

²⁷⁶ Stoebeuck, supra note 43, at 163–65 (discussing how exceptions and defenses in sovereign immunity law render tort claims an inadequate substitute for constitutional action); Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1350 (1991). For another recent discussion of how immunity may cover government nuisances, see Esther Y. Kim, Note, *Can You Sue the Government? An Examination of the Legal Doctrines for Government Liability Regarding their Involvement with Wind Power Development*, 39 Colum. J. Envtl. L. 319, 331–36 (2014).

²⁷⁷ See, e.g., 18 Eugene McQuillin, *The Law of Municipal Corporations* § 53:2 n.5 & § 53:70 (3d ed. 2016) (listing multiple damagings jurisdictions where common law distinctions are still in effect); Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do “Little” Wrong*, 21 N.M. L. Rev. 441, 468 (1991) (describing how courts have construed the New Mexico Tort Claims Act using governmental-proprietary function distinction); Michael Shaunessy, *Sovereign Immunity and the Extent of the Waiver of Immunity Created by the Texas Tort Claims Act*, 53 Baylor L. Rev. 87, 146 (2001) (describing how Texas Tort Claims Act continues to utilize governmental-proprietary function distinction). See also National Conference of State Legislatures, *State Sovereign Immunity and Tort Liability* (September 8, 2010), <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx#Table> [<https://perma.cc/AK3E-8R2Q>] (providing statutory and constitutional provisions from the fifty states regarding sovereign immunity and tort claims against the government).

²⁷⁸ For a helpful overview of both categories, see Owen v. City of Independence, 445 U.S. 622, 644–50 (1980).

liable in tort like any private corporation when it undertakes acts for its own corporate benefit, for instance, for its own small citizenry.²⁷⁹ The discretionary-ministerial distinction is grounded in the separation of powers; it holds that states and municipal corporations cannot be liable for discretionary legislative policy making, because that would involve judges second-guessing the decisions of the elected body. On the other hand, immunity will attach for torts committed in the course of carrying out “ministerial” duties or carrying out directives that involve little or no judgment.²⁸⁰

What does this mean for damagings? It is easy to see how a public project could fall into either of the spheres of immunity; public works are often beneficial for the state as well as the city, and their implementation typically involves legislative policy judgment about who bears the burdens associated with construction. There is enough play in the joints of these categories that government actors can claim that their damaging acts fall within still-protected spheres of immunity, foreclosing a property owner’s hope of compensation.²⁸¹ Additionally, statutory waivers of sovereign immunity are often subject to damages caps. At last count, there are damages caps in eighteen of the twenty-seven states that have a damagings clause.²⁸² It is hard to tell how adequate these provisions are in a vacuum, but it is safe to say that, while some appear quite generous,²⁸³ others seem low enough that they

²⁷⁹ 18 McQuillin, *supra* note 277, § 53:70.

²⁸⁰ See 18 *id.* § 53:63.

²⁸¹ The interactions between sovereign immunity and takings doctrine have been the subject of some scholarly interest. See, e.g., Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 *Wash. & Lee L. Rev.* 493, 509–18 (2006) (explaining how property owners are entitled to money damages in cases that would normally be barred by sovereign immunity); Brauneis, *supra* note 7, at 136–40. However, the Supreme Court has flatly asserted that constitutional eminent domain provisions waive sovereign immunity—in a footnote. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

²⁸² Colo. Rev. Stat. § 24-10-114 (2017); Ga. Code Ann. § 50-21-29 (2013); 705 Ill. Comp. Stat. § 505/8(d); Ky. Rev. Stat. Ann. § 49.040(1) (LexisNexis 2016); La. Rev. Stat. § 13:5106 (2017); Minn. Stat. § 3.736(4) (2016); Miss. Code Ann. § 11-46-15 (2017); Mo. Rev. Stat. § 537.610; Mont. Code Ann. § 2-9-108 (2015); Neb. Rev. Stat. § 81-8,224 (2014); N.M. Stat. Ann. § 41-4-19 (2013); N.D. Cent. Code § 32-12.2-02(2) (2010); Okla. Stat. tit. 51, § 154 (2011); 42 Pa. Stat. and Cons. Stat. Ann. § 8528 (West 2017); Tex. Civil Practice and Remedies Code Ann. § 101.023; Utah Code Ann. § 63G-7-604 (LexisNexis 2016); Va. Code Ann. § 8.01-195.3 (2015); Wyo. Stat. Ann. § 1-39-118(a) (2017).

²⁸³ In Georgia, for example, the damages cap is one million dollars for a single occurrence. See Ga. Code Ann. § 50-21-29(b)(1) (2013).

may not fully compensate for property devaluations in all instances.²⁸⁴ For that reason, too, the procedures for suing municipalities and states under tort claims acts do not seem to act as full replacements for the constitutional claim.

Likewise, though the doctrine of regulatory takings has assumed prominence in the years since most of the clauses were passed, regulatory takings have not been a replacement for damagings. In bringing a regulatory takings claim, an aggrieved owner asserts that a regulation directly inhibits or limits his or her use of a particular property.²⁸⁵ In a damagings claim, however, the owner points to the indirect effects of government condemnation or property use on his or her own enjoyment and use. As this Article explained at the outset, courts have tried to shoehorn some actions that look like damagings—airplane overflights, for example—into physical or regulatory takings frameworks,²⁸⁶ but neither doctrine has been broadened too far. In the overflight context, courts have hewed to the strict, trespass-based rules of traditional physical takings doctrine, compensating mainly in the case of direct overflights—even though noise does not stop at a boundary line.²⁸⁷ Put another way, while some claimants have probably tried to pursue compensation for damagings-like actions under takings frameworks, neither physical nor regulatory takings law have expanded enough to cover the range of things that might qualify as compensable under broader interpretations of the damagings clauses.

If other legal areas are not to blame for the demise of damagings, maybe judges were simply unaware of the values and parallels the provisions were supposed to evoke. The historical circumstances and legal rulings that animated the clauses only became more distant with time, and courts may have been left puzzling over the additional words. There may be some truth to this idea.²⁸⁸ The constitutional convention

²⁸⁴ By way of contrast, in Kentucky, the cap is \$250,000 per person. Ky. Rev. Stat. §49.040(1) (LexisNexis 2016).

²⁸⁵ E.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992) (describing Lucas's takings claim that a regulation—the Beachfront Management Act—had rendered property valueless by forbidding the construction of any “habitable structures”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 128–29 (1978) (describing Penn Central's takings claim alleging a landmarks regulation substantially restricted their use of property).

²⁸⁶ See *supra* notes 39–48 and accompanying text.

²⁸⁷ *United States v. Causby*, 328 U.S. 256, 256–66 (1946).

²⁸⁸ Anecdotally, there is evidence that the constitutional convention debates were not always accessible to nineteenth-century judges doing constitutional interpretation. Cf. *State v. Moores*, 73 N.W. 299, 314 (Neb. 1897) (Ragan, J., dissenting) (“Unfortunately, we have

records were not and are not discussed often in these cases. Only five jurisdictions cited the debates or proceedings to understand the meaning of “damaged” or “injured” prior to 1968, the year the last clause was passed.²⁸⁹ However, enough cases were brought in the immediate aftermath of the clauses that it seems unlikely amnesia is completely to blame for their impotence.

Alternatively, perhaps judges were susceptible to the same fears as the clauses’ detractors on the constitutional convention floors. If judges raised the cost of growth too much by liberally imposing the compensation requirement, maybe publicly beneficial projects like railroads, highways, and superior roads would not be built. As Morton Horwitz famously argued, mid-nineteenth-century judges often arrived at legal rulings that affirmatively promoted corporations and economic growth at the expense of the rights of individuals.²⁹⁰ A few judges at the turn of the twentieth century observed that if the damagings clauses were interpreted too expansively, it could dramatically impact infrastructural improvement.²⁹¹ Perhaps all the other judges who contributed to the narrowing of the clauses silently shared that fear, overruling the victors in the constitutional conventions when the dissenters could not.

not access to the debates of the constitutional convention, and I do not know for what particular reason the framers of the constitution made the clause.”); *Omaha & R.V.R. Co. v. Standen*, 35 N.W. 183, 186 (Neb. 1887) (“It is a matter of regret that the proceedings of the constitutional convention were not published, but it is a matter of unwritten public history of this state that the section above quoted was reported by the committee having it in charge, without the words ‘or damaged’ inserted therein.”).

²⁸⁹ *Selden v. City of Jacksonville*, 10 So. 457, 462 (Fla. 1891); *Austin v. Augusta Terminal Ry. Co.*, 34 S.E. 852, 854–55 (Ga. 1899); *P. Bannon Pipe Co. v. Illinois Cent. R.R. Co.*, 262 S.W. 1110, 1112–13 (Ky. 1924); *Jones v. George*, 89 So. 231, 236 (Miss. 1921); *Pennsylvania R.R. Co. v. Marchant*, 13 A. 690, 704 (Pa. 1888) (Sterrett, J., dissenting) (“Such a narrow construction of the section under consideration was never dreamed of by those who took an active part in moulding it into its present form, as the debates of the convention will show.”). For two recent examples where state courts discuss the constitutional history to understand the meaning of a takings or damagings clause, see *Rupert v. City of Rapid City*, 827 N.W.2d 55, 61 n.3 (S.D. 2013); *Manufactured Hous. Cmty. v. State*, 142 Wash.2d 347, 357–59 (Wash. 2000).

²⁹⁰ See Morton Horwitz, *The Transformation of American Law 1780-1860*, at xv–xvi (1977).

²⁹¹ See *Marchant*, 13 A. at 698 (arguing that “inconveniences . . . must be endured by individuals for the general good . . . in this age of rapid development”); *Ledbetter v. Beach*, 421 S.W.2d 814, 818 (Tenn. 1967) (“[I]f railroad companies were liable to suit for such damages . . . the practical result would be to bring the operation of railroads to a standstill.”).

Whatever the explanation, the outcome remains the same. Constitutional actors created a pathway for courts to award property owners compensation for some actions falling short of direct trespass and regulation. For the most part, courts did not take the bait. As the first Part explained, courts have occasionally tried to award compensation in some cases that damagings law could have redressed, but by torturing takings law principles in ways that still draw odd distinctions between those who are compensated and those who are not. The logical next step is to wonder about the future: Is there a modern application for damagings clauses? And should there be? It is to those questions that the next Part turns.

III. THE FUTURE OF THE DAMAGINGS CLAUSES

This Part explains why a broader interpretation of the damagings clauses is warranted in the states where these clauses exist, and it exhorts state litigants and courts to give the clauses renewed attention. The arguments for damagings are at least as good as those for regulatory takings: the historical evidence is stronger, economic arguments that it repairs inefficiencies in government decision making are equally strong, and there are even prudential reasons to interpret these provisions more capaciously.

Each state has its own constitutional and doctrinal history of damagings—even linguistic variations—so it would be undesirable to articulate any specific one-size-fits-all approach to twenty-seven constitutions. The task of further rehabilitating damagings law must fall to individual litigants, state judges, and future scholars. Accordingly, the first Section discusses reasons for giving the clauses more expansive interpretations than they have so far received, focusing specifically on the reasons why damagings are a more coherent and defensible category for protection from condemnation than regulatory takings. The second Section discusses some areas where the next wave of damagings actions might originate and some of the lingering challenges in developing a doctrine more flexible than the current interpretations permit.

A. Reviving Damagings

Despite the difficulties that may have led courts to narrow the damagings clauses out of existence, there are five arguments for reviving damagings—or at least encouraging litigants and courts to

revisit the clauses with a renewed sense of their history and benefits. It is important to note at the outset that some of these considerations could be used to argue that owners affected by damagings should receive compensation in every state through takings law, regardless of whether the state constitution contains one of the provisions herein discussed. This Article does not go so far. Instead, in the states where the language was adopted, there are arguments from text, history, and theory in favor of more flexible damagings rules encompassing a broader range of interferences.

The most salient reason to revive damagings is because of the strong adoption history indicating the clauses' expected applications to nontrespassory, nonregulatory harms. Even if one is not some form of originalist,²⁹² adoption history is often evidence of important values—in this case, the need to address inequities resulting from strict application of takings law.²⁹³ Especially in comparison with regulatory takings doctrine, the support for recognizing damagings is voluminous. There are hundreds of pages of convention records for litigants and courts to use in implementing and restoring damagings as a matter of state constitutional law. Regulatory takings doctrine, on the other hand, is famously without such historical support.²⁹⁴

The adoption history from the conventions certainly counsels in favor of an expanded interpretation.²⁹⁵ While the drafters' discussions differ in

²⁹² A recent article suggests that state judges often use originalism, or at least history, in approaching state constitutional questions. Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. Haw. L. Rev. 63, 70–72 (2016) (overviewing the current state of originalism in state constitutional law).

²⁹³ See generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L. Rev. 641, 660 (2013) (explaining that adoption history is relevant to all sorts of constitutional arguments, including those about text, tradition, value, consequences, and purpose).

²⁹⁴ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (“In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”); see J. Peter Byrne, *Regulatory Takings and “Judicial Supremacy”*, 51 Ala. L. Rev. 949, 955 (2000); Hart, *supra* note 19, at 299–305; Treanor, *supra* note 14, at 803–10. But see Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531, 533 (1995) (arguing that there is no textual basis for denying compensability of regulatory takings); Kobach, *supra* note 20, at 1213 (arguing that regulatory takings were recognized long before *Mahon*, although many of the cases he describes actually fit the damagings paradigm more clearly).

²⁹⁵ Admittedly, the later the adoption, the more evidence there is that drafters were aware of existing narrow judicial interpretations and intended to ratify them. In both Virginia and Hawaii, it is clear that drafters were aware of the *Rigney* rule and some of its subsequent

degrees by state, there are still some generalizable features. The language was inserted to close the gap between private corporations and municipal corporations. As a function of sovereign immunity and other doctrines, municipal corporations had been able to act in ways that significantly harmed property, and those affected were without remedy under existing constitutional or tort law. The damagings clauses were intended to help fix that loophole. But there were also numerous references to other aspirations. Delegates to state constitutional conventions repeatedly asserted that the public should generally bear the costs of public improvements, rather than inflicting undue burdens on individual landowners.²⁹⁶ They criticized the notion that when a person loses a small portion of their physical property, they get compensation, but when they suffer massive interferences resulting from activity just outside their property, they do not.²⁹⁷ They discussed the need to protect owner reliance and investment and the need to compensate for significant, not trivial, devaluations.²⁹⁸ In short, the records of the

interpretations. See Hawaii Convention, *supra* note 84, at 28 (Lewis) (articulating common law rule as five-part test); 1 Virginia Convention, *supra* note 101, at 731 (Moore) (discussing the rule in context of a treatise writer's description). Nevertheless, the drafters in both states also articulated some harms that would not clearly qualify as damagings under narrow interpretations of *Rigney*.

²⁹⁶ See, e.g., 3 Missouri Convention, *supra* note 101, at 63 (Gantt) (noting injustice of public benefitting without proper share of the burden); *id.* at 102 (Broadhead) (same); 3 Pennsylvania Convention, *supra* note 94, at 586 (Darlington) ("It is easier to lay the burden upon broad shoulders than upon light ones.").

²⁹⁷ 3 Pennsylvania Convention, *supra* note 94, at 597 (Meredith); 6 *id.* at 742 (Biddle) ("For instance, it will occur to almost everybody that the casting of filth or of water upon the whole body of a man's land injures it, or may injure it, a great deal more than the actual deprivation of a small corner of it."); 1 Virginia Convention, *supra* note 101, at 698 (Westcott) (contrasting the total compensation owed for a "public improvement which takes one-eighth of an acre in a thousand-acre tract" to no compensation for those who lost "one-half of the market value of the land"); *id.* at 145 (Parks) ("Persons go upon invitation and buy lots bordering upon a street, build houses, fix their homes to suit themselves, and are enjoying life and all the benefits of their property. . . . [City authorities] cut down the street five or ten or fifteen feet and take that earth back and fill up five or ten or fifteen feet in another place. On the one hand, they leave the houses up in the air. On the other hand, they leave them below the street. They do not touch the property.")

²⁹⁸ 1 Virginia Convention, *supra* note 101, at 701 (Westcott) (suggesting the need to compensate when "a lifetime of toil, energy, privation and providence have enabled" individuals to obtain property only to have it taken away); 3 Missouri Convention, *supra* note 101, at 25 (Adams) ("He lays out his whole estate upon it and then they conclude to improve him out of his property."); *id.* at 87 (Conway) ("Suppose I am a poor man and live in the suburbs [sic] of the city. I am a landlord and have a small boarding house there or a small hotel That street cuts down the ground in front of my house and leaves me

constitutional debates are replete with flexible standards for examining whether harm to property is compensable,²⁹⁹ and entirely absent of technical discussions of the meaning of property, the level of physical intrusion required, or anything else approximating modern interpretations.³⁰⁰ Granted, detractors of the damagings clauses worried about their vagueness and the threat that extremely remote harms might fall within the clauses.³⁰¹ But it is striking that proponents never reassured these critics that particular harms would not fall within the clauses, instead entrusting the courts to ensure that the clauses would not be applied too remotely.³⁰²

The second reason for reviving damagings comes from economic theory. In takings scholarship, efficiency-based justifications for the compensation requirement contend that, in their absence, the government will take more than it ought to, inefficiently reducing social welfare.³⁰³ The compensation requirement thus addresses the “fiscal illusion” problem: the idea that government actors ignore costs not reflected in budgets.³⁰⁴ If compensation is required, the argument runs, then government will only engage in a confiscatory act when it is truly beneficial, since it will bear more of the costs of its decisions.³⁰⁵ As a result, compensation will lead to overall superior results: the public will be better off for the improvement, and the property owners will be no

standing up fifty feet above the level of the street. Of course my business is killed”); 2 Illinois Convention, *supra* note 60, at 1579 (Church) (describing need for compensation when corporation builds “such an embankment before [an owner’s] place of business, as to virtually destroy it”); 3 Pennsylvania Convention, *supra* note 94, at 585 (Darlington) (“[A]lthough you may not take my house from me, if you render it uninhabitable by the proximity of your railroad, you lessen its market value.”).

²⁹⁹ See *supra* notes 173–179 and accompanying text.

³⁰⁰ See *supra* Section I.E.

³⁰¹ See *supra* notes 173–176 and accompanying text.

³⁰² E.g., 3 Pennsylvania Convention, *supra* note 94, at 592 (Hunsicker) (suggesting that example of a tavern owner losing business was probably “too remote,” but noting that if actual injury was proven, compensation might still attach).

³⁰³ See James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 *Minn. L. Rev.* 1277, 1301 (1985).

³⁰⁴ Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 *Q.J. Econ.* 71, 72 (1984).

³⁰⁵ See William Fischel & Perry Shapiro, *Takings, Insurance and Michelman: Comments on Economic Interpretations of ‘Just Compensation’ Law*, 17 *J. Leg. Stud.* 269, 269–70 (1988) (stating that “[t]he compensation requirement . . . disciplin[es] the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes”).

worse off than before the improvement took place.³⁰⁶ This theory of government behavior is not without many detractors. Professors Daryl Levinson and Yun-Chien Chang have convincingly argued that lawmakers make decisions according to political costs and benefits rather than budgetary constraints, making the compensation requirement less directly relevant to decisions about a particular act.³⁰⁷ Importantly, however, both Levinson and Chang acknowledge that the beneficiaries of a taking may wield far greater political power than condemnees, although failing to compensate may have its own political costs.³⁰⁸

How do these economic theories apply to damagings? If government officials respond only to budgetary costs, then it is obvious that the absence of damagings liability distorts incentives.³⁰⁹ But even if the fiscal illusion theory is untrue, and government officials respond only to political costs and benefits, there is also evidence from the historical record that the landowners burdened by most infrastructural projects did not possess the political capital to obtain compensation when competing with the widespread benefits both to the public at large and sometimes, to specific, well-organized groups.³¹⁰ As the history demonstrates, this problem may have been exacerbated by the fact that politicians often

³⁰⁶ See Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 *Ohio St. L.J.* 451, 475–476 (2003).

³⁰⁷ See generally Yun-Chien Chang, *Private Property and Takings Compensation: Theoretical Framework and Empirical Analysis* 75–89 (2013) (examining empirical evidence from takings in Taiwan to assess validity of the “fiscal illusion” and “political interest” theories); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 345–47 (2000) (arguing that economic “rational actor” analysis of private firms is ill-suited for governments, which respond to political incentives, not fiscal ones). See also Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *Mich. L. Rev.* 101, 110–24 (2006) (challenging notion that government undercompensates landowners using examples where political constraints increased compensation awards or avoided high subjective-value property); Ronit Levine-Schnur & Gideon Parchomovsky, *Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent-Domain Exercises*, 45 *J. Legal Stud.* 437, 437–41 (2016) (empirically examining whether fiscal illusion hypothesis applies in takings).

³⁰⁸ Chang, *supra* note 307, at 89; Levinson, *supra* note 307, at 376–77.

³⁰⁹ Bell & Parchomovsky, *supra* note 10, at 290–92 (describing the “inefficiency of uncompensated derivative takings”); Swank, *supra* note 7, at 795 (“[T]he fact that public agencies need not always pay compensation lessens their incentive to find the most efficient means of achieving a valid public goal. Putting the burden of payment on these agencies would create the necessary incentives for evaluating the real costs of differing alternatives.”).

³¹⁰ Brady, *supra* note 7, at 1204–07 (describing interest group capture and targeting of the urban poor as central themes in the history of regrading).

built and supported these infrastructure projects—and their associated externalities—in poor or minority areas, targeting groups that may already have been politically marginalized.³¹¹ In the absence of a compensation requirement, owners affected by damagings lacked the ability to use compensation as a bargaining chip to influence policy or obtain some redress. In short, the prospect of damagings liability could bring both the political and budgetary costs of government activity to the forefront as officials make decisions about that activity.

Of course, a counterargument to these efficiency-based claims may be that there are significant social costs associated with recognizing broader damagings liability. It may be for the best that the damagings clauses have had no effect; perhaps they would have inefficiently deterred infrastructure by raising transactions costs, or drastically increased the amount of litigation, or raised the information and search costs governments would incur in making decisions about growth and chilling some beneficial activity.³¹² This is a salient criticism. But early experience suggests that high uncertainty and incessant litigation are not necessary consequences of broader liability. First and foremost, the number of individuals affected by a damaging is likely to be limited by physical proximity; it is far easier to ascertain the number of individuals likely to suffer harm from some externality-generating infrastructure than the number of individuals affected by a prospective regulation. If regulatory takings doctrine has not destroyed regulation, it is hard to imagine that increased damagings liability would end other beneficial government activity. Moreover, as this Article has explained, in jurisdictions like California and Washington, there is already somewhat broader liability for damagings.³¹³ While arguing from the absence of evidence is never a good thing, there have been no efforts to eliminate the clauses and no significant scholarly or judicial attention to undesirable or regrettable consequences of damagings law in these jurisdictions. Coherent standards by which to measure damagings, even

³¹¹ E.g., Virginia Convention, *supra* note 101, at 729 (Meredith) (“You are going to put the burden, so far as municipalities are concerned, upon the weakest and poorest citizens . . .”). See also Bell & Parchomovsky, *supra* note 10, at 283 (noting that “[r]oads and undesirable public facilities” are often built in low-income areas).

³¹² For a discussion of how these sorts of costs may factor into an overall efficiency analysis of takings, see Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 582–83 (1984).

³¹³ See *supra* notes 261–264 and accompanying text.

if encompassing broader liability, would of course help to reduce any costs associated with greater uncertainty.

A third, related reason for revitalizing damagings claims comes from the idea that condemnation law should promote fairness.³¹⁴ In 1960, in the federal takings case of *Armstrong v. United States*, the Court famously pronounced that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³¹⁵ Carlos Ball has translated this “fairness” concept into the idea of “horizontal” and “vertical” burdens: courts applying takings law examine both the magnitude of the burden and the degree to which it is distributed or concentrated in deciding whether to require compensation for a particular activity.³¹⁶ In that regard, arguments for recognizing damagings parallel those made in favor of recognizing regulatory takings. In the first Supreme Court case recognizing regulatory takings—*Pennsylvania Coal Co. v. Mahon*—Justice Holmes referred to the need to compensate when regulations diminish value by “a certain magnitude.”³¹⁷ Concerns about substantial, targeted burdens continue to animate the Court’s regulatory takings rulings.³¹⁸ The historic damagings that gave rise to the subsequent constitutional movement—street alterations, railways, freeways—were widely perceived as unfairly targeting particular individuals with significant harms.³¹⁹ It is perplexing that “fairness” in condemnation law currently means this: if the government indirectly regulates property and causes major devaluations, compensation may be available. But if government construction causes huge devaluations or interferences with use rights, it probably does not.

Fourth, awarding compensation for damagings is supported by other theories on takings law and government decision making. Over fifty years ago, Professor Joseph Sax argued that the case for imposing the compensation requirement is at its apex when government is acting in its

³¹⁴ See Spies & McCoid, *supra* note 7, at 449 (“Fundamental fairness dictates that individuals who suffer consequential loss ought to be compensated.”).

³¹⁵ 364 U.S. 40, 49 (1960).

³¹⁶ Ball, *supra* note 10, at 835–42.

³¹⁷ 260 U.S. 393, 413 (1922).

³¹⁸ Ball, *supra* note 10, at 835–42.

³¹⁹ See *supra* notes 108–115 and accompanying text.

“enterprise capacity”: when its actions directly result in a benefit to itself, acting “much like those who function in the private sector of the economy.”³²⁰ In contrast, the case is weaker when government is acting in its mediating capacity: when it is mediating the disputes between private citizens and groups.³²¹ According to Sax, government should compensate when acquiring resources for its own benefit for three reasons: (1) because it provides a particularly strong “[r]isk of [d]iscrimination,” since the government can choose to single out groups and individuals in its resource acquisition;³²² (2) because when both engaging in an act and deciding whether to compensate for it, the government may be zealously inclined to maximize its gains while minimizing its costs;³²³ and (3) because unlike ordinary neighbors, who bear reciprocal obligations to use property so as not to interfere with others, the government may be immune from similar obligations and can inflict unique and seismic injuries.³²⁴ These reasons for requiring compensation in enterprise cases apply particularly strongly to damagings. Local governments can choose whom will suffer externalities, and they have potentially strong incentives to reduce the costs of infrastructural and similar projects. Indeed, even in his article, Sax described dams, highways, airports, and military bases as the sorts of government enterprises in which the compensation requirement might be effectively deployed³²⁵— analogous types of harms to the ones described in the damagings debates. Recent empirical work by Professors James Krier and Stewart Sterk has shown that descriptively, lower courts are already compensating more often in enterprise cases than for many other types of takings, including regulatory takings.³²⁶ This suggests that there is great explanatory power to Sax’s theory, and that courts might already be suspicious of motive in these cases. Thus, compensating for more damagings might not be as big a step as it may seem.

³²⁰ Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 62–63 (1964).

³²¹ *Id.*

³²² *Id.* at 64–65.

³²³ *Id.* at 65. See also Ball, *supra* note 10, at 844 (“When the government competes for resources, it is more likely to overreach than when it arbitrates the use of resources by others. This is the case because there is an incentive in the former circumstance to acquire resources without having to pay for them.”).

³²⁴ Sax, *supra* note 320, at 59, 65–66.

³²⁵ *Id.* at 66–68.

³²⁶ Krier & Sterk, *supra* note 11, at 69–74.

The fifth and final reason to recover damagings law is structural: experimentation and diversity in state constitutional law are virtues of our federalist system.³²⁷ Especially when state constitutions differ from the Federal Constitution, states can develop different approaches to constitutional problems, allowing for incremental development, feedback, and revision. At present, the states interpret the damagings clauses fairly uniformly. But renewed interest in this area of law could lead to more diverse approaches, which would have the effect of both producing information about different doctrinal paths and better reflecting the needs and preferences of different populations.³²⁸ Of course, having the “autonomy to act [is not] a reason to act.”³²⁹ But takings law suffers from a significant doctrinal problem that should encourage more variation, and particularly, clearer distinctions between federal takings rules and state damagings ones. The conflation of federal and state takings law is partially responsible for one of the most maligned rules in condemnation law:³³⁰ the “*Williamson/San Remo*” rule, which requires litigants to ripen federal takings claims in state court, but then applies issue preclusion rules such that federal courts cannot review issues decided by the state court.³³¹ In the *San Remo* decision underlying the Supreme Court case, the California court had relied on federal precedents in construing its own state constitutional damagings clause, thus triggering preclusion—even though the litigants

³²⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³²⁸ Rex Armstrong, *State Court Federalism*, 30 Val. U. L. Rev. 493, 501 (1996); Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 Cal. L. Rev. 1473, 1474 (1987); Eric A. Lindberg, Note, *Multijurisdictionality and Federalism: Assessing San Remo Hotel’s Effect on Regulatory Takings*, 57 UCLA L. Rev. 1819, 1858–59 (2010).

³²⁹ James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 Val. U. L. Rev. 475, 489 (1996).

³³⁰ For a smattering of critiques, see *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348–51 (2005) (Rehnquist, J., concurring in the judgment); J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under A Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 249 (2006).

³³¹ *San Remo Hotel*, 545 U.S. at 323; *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

had reserved all but their state claims in that venue.³³² Thus, by conflating federal precedents and state law, state courts have contributed to a series of widely-abhorred rules closing federal forums to takings litigants. Clearer diversity and variation in interpretations of state takings and damagings clauses would have the effect of preserving federal forums for vindicating federal property rights.

In sum, there are history-driven, efficiency-based, fairness-based, precedent-supported, and federalism-based reasons to give damagings law a chance to perform its intended function. Instead of serving as an important vehicle for balancing public benefits against the harms inflicted on individual landowners, the clause has been relegated to addressing discrete cases of injury, such as flooding. Either collectively or individually, these considerations indicate that damagings that would not otherwise qualify as takings should not be categorically noncompensable in the jurisdictions where the clauses remain operative. But if damagings are to make a comeback, where might they appear? The next Section examines that question, as well as some of the lingering issues that litigants, scholars, and courts examining new applications for damagings might take into account.

B. Where New Damagings Might Develop

If there are some good reasons for courts to maintain some flexibility in dealing with damagings claims, where might the doctrine begin to redevelop? It might be tempting to see the clauses as a relic of an era of disruptive infrastructural investment in streets, railroads, canals, and highways that may never be repeated. This framing ignores the striking number of ongoing harms from nontrespassory, nonregulatory actions that damagings law could address, but does not. This Section outlines some of these possible applications: areas where the next batch of damagings litigation might come from and where courts might be justified in turning new attention to the provisions. Importantly, I do not claim that these types of property disturbances absolutely give rise to a strong damagings claim, nor contend that broad application of damagings law to these scenarios would necessarily be desirable. Instead, I highlight the below applications as areas where litigants and

³³² *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 91 n.1, 100–01 (Cal. 2002) (“But aside from [the damagings clause], not pertinent here, we appear to have construed [our state and the federal] clauses congruently.”).

courts might find occasion to revisit the clauses and develop more flexible approaches.

Externality-producing infrastructure led to the passage of these constitutional provisions in the late nineteenth century, and infrastructure continues to inflict externalities now as it did then.³³³ Traditional forms of infrastructure—roadways, street railways, airports, and so on—continue to be built and extended, and new types of infrastructure are already being planned that may cause harm for which litigants could try to use the damagings clauses to seek compensation. High-speed rail projects, drone transit networks, and transit methods utilizing magnets or vacuums may be in the near (or distant) future.³³⁴ Before these new forms of infrastructure become reality, it is hard to definitively predict what sorts of externalities they might inflict. However, noise, emissions, physical barriers, and other unintended consequences for nearby properties could result,³³⁵ giving rise to a new set of damagings claims. Of particular interest is the fact that these new forms of infrastructure may differ from the older ones in an important respect: the loss of the average reciprocity of advantage. Railways and roadways burdened localities, but they also benefitted them—creating economic growth and transporting local goods and people. Plans for some new forms of infrastructure, like the Hyperloop, are quite different. Now, individuals may suffer harms to property in communities located hundreds of miles from the nearest service station, making the benefits far more indirect.³³⁶

³³³ Long after most of the clauses were adopted at the turn of the twentieth century, a much bigger boom in infrastructure occurred from the New Deal through the 1950s, as highways, bridges, and other projects proliferated. See Adam J. White, *Infrastructure Policy: Lessons from American History*, New Atlantis, Spring 2012, at 3, 23–27.

³³⁴ The United States has long lagged behind in high-speed rail. Michael Smart, *Why Can't America Have High-speed Trains?*, CNN (May 4, 2015), <http://www.cnn.com/2015/05/03/opinions/smart-high-speed-trains-america/index.html> [<https://perma.cc/G7QJ-LS97>]. While the other forms of transit still remain hypothetical, scholars and planners are trying to anticipate how they will affect property and land use law. See, e.g., Michael N. Widener, *Local Regulating of Drone Activity in Lower Airspace*, 22 *B.U. J. Sci. & Tech. L.* 239, 253–55 (2016).

³³⁵ Ginés de Rus, *The Economic Effects of High Speed Rail Investment 10* (OECD & International Transport Forum Joint Transport Research Centre Discussion Paper No. 2008-16, May 2012), <https://www.itf-oecd.org/sites/default/files/docs/dp200816.pdf> [<https://perma.cc/SY5C-KWJD>] (describing “land take, barrier effects, visual intrusion, noise, air pollution and contribution to global warming” as some externalities caused by high-speed rail).

³³⁶ See Danielle Muoio, *Hyperloop One is Considering 11 US Routes for Its Futuristic Transport System — Here They Are*, *Business Insider* (Apr. 9, 2017),

In addition to transit infrastructure, new energy infrastructure may also provide opportunities for damagings to develop. Fracking is a prime example. Early evidence shows that in at least some cases, drilling shale gas wells near homes and businesses causes a drop in property value because of the risk of water contamination, gas leakage, and air pollution.³³⁷ Additionally, gas and oil pipelines are presently being approved and constructed across the United States with the use of eminent domain.³³⁸ While many studies suggest that these pipelines do not depress values,³³⁹ there is hardly consensus.³⁴⁰ Depending on the nature of the externalities and devaluations that result, all of these new forms of infrastructure might also bring new attention to damagings clauses.

Another potential modern application for damagings comes from land use law. Nontrespassory, nonregulatory harm to property can also be caused by locally unwanted land uses (or “LULUs”). LULUs are often perilously close to being nuisances; the classic example of a LULU is a waste disposal facility, although sometimes homeless shelters, drug and alcohol treatment centers, and nuclear power plants make the list.³⁴¹ Agricultural operations can also be LULUs; in every state, there is some form of “right-to-farm” law that immunizes or reduces liability for

<http://www.businessinsider.com/hyperloop-one-10-possible-routes-united-states-2017-4>
[<https://perma.cc/QX6H-AAX5>].

³³⁷ Lucija Muehlenbachs et al., *The Housing Market Impacts of Shale Gas Development*, 105 *Am. Econ. Rev.* 3633, 3633–35 (2015).

³³⁸ Alejandro Davila Fragoso, *For-Profit Pipelines Are Growing And So Are Eminent Domain Battles*, *ThinkProgress* (June 7, 2016), <https://thinkprogress.org/for-profit-pipelines-are-growing-and-so-are-eminent-domain-battles-2b8bee7af3c/> [<https://perma.cc/CZ84-JNYU>]; Kristen Lombardi & Jamie Smith Hopkins, *Natural Gas Building Boom Fuels Climate Worries, Enrages Landowners*, *NPR* (July 17, 2017), <http://www.npr.org/2017/07/17/536708576/natural-gas-building-boom-fuels-climate-worries-enrages-landowners> [<https://perma.cc/F3JP-SNMA>]; Steven Mufson & Juliet Eilperin, *Trump Seeks To Revive Dakota Access, Keystone XL Oil Pipelines*, *Wash. Post* (Jan. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/24/trump-gives-green-light-to-dakota-access-keystone-xl-oil-pipelines/?utm_term=.f1937a6c26f7 [<https://perma.cc/ML2W-4MXM>].

³³⁹ See *PennEast Pipeline, Studies Find No Impact On Property Values*, <http://penneastpipeline.com/other-studies/> [<https://perma.cc/DRL5-SJHF>] (listing studies aggregated by the pipeline company to show no significant impact on property values).

³⁴⁰ *Conversations for Responsible Economic Development, How Do Pipeline Spills Impact Property Values?*, <http://credbc.ca/wp-content/uploads/2013/12/Pipeline-spills-property-values.pdf> [<https://perma.cc/ZZ22-KLYP>].

³⁴¹ See, e.g., Vicki Been, *What’s Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 *Cornell L. Rev.* 1001, 1001–02 (1993).

farming operations that would ordinarily be considered nuisances to neighbors.³⁴² LULUs often affirmatively affect nearby use and enjoyment—just imagine what comes alongside living next to a landfill—and they may cause nearby property values to plummet.³⁴³ Additionally, as some empirical evidence has shown, LULUs tend to develop or be sited in neighborhoods that are overwhelmingly minority or poor, because siting facilities there is the “path of least resistance” for politicians making decisions about where to locate something no one wants nearby.³⁴⁴

Alongside other legal and political efforts to discourage discriminatory or otherwise socially harmful siting decisions, environmental justice advocates have tried to pursue monetary compensation for those affected by LULUs, hoping both to lessen the burden on the host community and to force internalization of the externalities inflicted on these groups.³⁴⁵ These efforts have met with mixed success. To receive damages for LULU siting decisions under federal statutory and constitutional antidiscrimination law, litigants must prove there was intent to discriminate—a high bar.³⁴⁶ Similarly, common law nuisance actions to obtain damages for LULUs are not always feasible. In the case of agricultural operations, “right-to-farm” laws may affirmatively bar such actions.³⁴⁷ Even outside that context, there are hurdles. For example, some states will deny a landowner’s nuisance claim if the state and locality acted reasonably in making its siting decisions.³⁴⁸

³⁴² Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. Rev. 1694, 1695 (1998).

³⁴³ Been, *supra* note 341, at 1020–23; Matthew B. Leveridge, *Should Environmental Justice Be a National Concern? A Review and Analysis of Environmental Justice Theories And Remedies*, 15 J. Nat. Resources & Envtl. L. 107, 128–29 (2000)

³⁴⁴ Been, *supra* note 341, at 1002–03.

³⁴⁵ As Vicki Been has noted, remedying LULU siting problems with compensation is an imperfect solution to the social problems surrounding siting decisions. For example, there are moral questions surrounding “commodifying certain matters involving life, health and safety, or human dignity.” *Id.* at 1040–46.

³⁴⁶ *Id.* at 1003–04 & nn.10–11.

³⁴⁷ See generally Reinert, *supra* note 342, at 1695 (“All RTFs protect farmers from liability for common law nuisance to some extent, and many also prevent municipalities from passing ordinances that would make an agricultural operation a nuisance.”).

³⁴⁸ E.g., *Chenango Inc. v. County of Chenango*, 681 N.Y.S.2d 640, 641 (App. Div. 1998); *Twitty v. State*, 354 S.E.2d 296, 302 (N.C. Ct. App. 1987).

Damagings law may offer a different path. Already, scholars interested in environmental justice have proposed using takings law to obtain compensation for affected communities, in part because there is no requirement that owners show intentional discrimination in order to receive damages.³⁴⁹ But damagings law is a much more logical place to intervene, because it is expressly concerned with nontrespassory activities affecting property rights or property values. However, there are tricky problems to work out. Should a limited set of LULUs give rise to damagings liability, and if so, which ones?³⁵⁰ And of course, there may be difficult questions about the level of state action needed to support a damagings claim: should a constitutional damagings action be available when the government owns and runs the LULU, when it uses its eminent domain authority to secure a site for future private use, when it makes an affirmative siting decision, or when it merely authorizes a permit? These are difficult questions. But, given that damagings arose in part to address government-inflicted externalities, this is another area where the clauses might be invoked and refined.

There are many factors for courts to take into account if revisiting their states' damagings clauses, whether reexaminations occur in these circumstances or others. One has just been mentioned: what type of government action can give rise to a damagings claim? At least one jurisdiction has rejected the idea that any regulation can give rise to a damaging,³⁵¹ suggesting that one rule would be that only harms resulting from government use or construction in physical space can support an action. (This may not be a particularly significant limitation, since regulatory takings doctrine already protects owners against some regulation-caused devaluations.) But even if limited to physical acts, there are still thorny problems. The early drafters evidently intended for companies invested with formal eminent domain power—like railroads—to be subject to the clauses.³⁵² But what if the government permissively allows damagings, by granting a permit or passing some

³⁴⁹ Ball, *supra* note 10, at 868–79; Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 *B.C. Envtl. Aff. L. Rev.* 87, 88–89 (2006); Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 *Colum. J.L. & Soc. Probs.* 201, 204 (1998).

³⁵⁰ Right when the clauses were proposed, treatise writers argued that locating something like a jail or hospital near a private owner should not give rise to a damagings action. 2 Dillon, *supra* note 141, § 587(d), at 687; 1 Lewis, *supra* note 141, § 236, at 558–60.

³⁵¹ *Buhmann v. State*, 201 P.3d 70, 86–88 (Mont. 2008).

³⁵² See *supra* notes 101–102 and accompanying text.

legislation? Courts in different jurisdictions might read their text, history, and precedent to provide different answers to these questions.

There are more uncertainties. Though most courts have come down firmly on the side that the damagings clauses protect property rights, rather than property value, the extent to which diminutions in value indicate the loss of some use or enjoyment has always troubled those trying to construe the clauses.³⁵³ Moreover, while the historical relationship between nuisance and the damagings provisions is clear, how exactly that relationship should work is not. Should the clauses provide a remedy for situations according to current common law nuisance rules, some modern version of nineteenth-century nuisance law, or something else? Almost since the clauses were passed, courts were inconsistent in their understandings of how the two legal areas should relate.³⁵⁴ Another problem arises from the old use-construction distinction, present in some of the earliest constitutional debates.³⁵⁵ Are damagings actions available only for individuals harmed by the very construction of the offending thing, or injuries incident to its use, like noise, smoke, and other disturbances? Again, differences in the text and interpretation of the clauses make one answer to this question impossible. Some jurisdictions cannot compensate for injuries from use, and others have more flexibility.³⁵⁶

There are challenging questions regarding reintroducing damagings into condemnation law. But there are good reasons for litigants to seek reexamination in light of the clauses' history and a better understanding of the development of the doctrine away from its nuisance roots. Moreover, there are good reasons for courts to reevaluate whether the language should have the limited interpretation it has been given. Takings law is a poor substitute for covering nontrespassory, nonregulatory harms to property. A more robust damagings law could patch the gap where fairness and justice militate in favor of compensation, but twisted takings rules prove to be the wrong means.

³⁵³ 1 Lewis, *supra* note 141, § 227, at 307 (“It is sufficient if [the damaging] is such an obstruction or interference as produces a diminution in *value* of the property . . .”).

³⁵⁴ *Id.* § 235(b), at 555–58 (describing four different decision rules for damagings actions, ranging from wholesale transport of nuisance to a nuisance-derived test to mere diminution in value).

³⁵⁵ See *supra* notes 177–180 and accompanying text.

³⁵⁶ See 1 Lewis, *supra* note 141, § 224, at 526–29 (describing holdings in jurisdictions where damaging must occur during “construction or enlargement” of public works).

CONCLUSION

The damagings clauses were a direct response to a crisis in condemnation law posed by rapid infrastructural change. In their debates on the floors of myriad constitutional conventions, delegates pushed for language to be added to the takings provisions that would permit property owners to recover compensation when actions short of a physical invasion or appropriation interfered with owners' uses and enjoyment of property and devalued it as a result. But as state courts took on the brunt of the work interpreting these new words, they came to rely on a single test emphasizing the need for a physical cut-off of one of a limited series of core property rights. Damagings clauses lost their connection to nuisance and re-emerged as oddly narrow provisions limited mainly to interferences with access and exclusion. These court interpretations ensured that almost nothing that would not already qualify as a physical taking would be covered by the new language.

When compared with the trajectory of another doctrine within condemnation law—regulatory takings—this is a bizarre result. Devaluations occurring as the result of legislation are sometimes compensable, whereas devaluations occurring as the result of government uses may not be. Granted, courts sometimes twist takings principles to compensate for activities more appropriately considered damagings, like airplane overflights. But by examining the nature of the invasion rather than the nature of the harm, these rulings still yield uneven applications of the compensation requirement. As this Article has explained, different aspects of takings theories—those focused on fairness, efficiency, and the nature of government use—and the historical material all counsel in favor of broader interpretations of the damagings provisions to require compensation for nontrespassory, nonregulatory harms. These clauses still have a role to play in modern development, if given new implementations.

There is much more work to do. In its ambition to map the broad contours of damagings law, this study has had to leave out some pieces of each state's fascinating constitutional and doctrinal history on damagings. But if the reader is at all persuaded that there is a place for damagings within condemnation law, that this neglected constitutional provision has the capacity to address a confusing and undertheorized gap in the application of the compensation requirement, and that courts have lost sight of the language's history in narrowly construing it, this Article has accomplished its aims. Alongside discussions about revitalizing the

American economy with new infrastructural investment and growth, it is worth reevaluating the damagings provisions, themselves borne of a time of great infrastructural upheaval. They loom large in the legal history of public works, and they deserve more attention as a result.