

DRAINING THE SERBONIAN BOG: ORIGINALISM AND THE NEED FOR TEMPORARY TAKINGS BY FLOODWATERS

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I. INTRODUCTION

On May 2, 2011, just after 10 p.m., a series of explosions ripped a hole in the levee protecting the Birds Point-New Madrid Floodway (Floodway) from the waters of the Mississippi River.¹ The explosion produced a force equivalent to an earthquake measuring around 3.0 on the Richter Magnitude Scale.² This artificial crevassing of the levee also inundated about 130,000 acres of Missouri farmland and about ninety homes with an estimated 550,000 cubic feet of water, which was threatening to flood the city of Cairo, Illinois, before the crevassing occurred.³ Two more explosions crevassed the levee in other places on May 3 and May 5, allowing even more water to inundate the privately-held property.⁴

Although the United States Army Corps of Engineers (Corps), the governmental agency charged with operating the Floodway, planned to execute the three explosions within a twenty-four-hour window, the final explosion did not take place until the afternoon of May 5 due to a combination of inclement weather and a shortage of explosives.⁵ As a result of the Corps' actions, numerous landowners with property situated in the Floodway brought a lawsuit seeking class action status against the Corps and the United States on May 3, 2011.⁶ The lawsuit alleged that the

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1. Christy Hendricks & Crystal Britt, *Birds Point—New Madrid Floodway complete*, KFVS12, <http://www.kfvs12.com/story/14557528/corps-of-engineers-to-breach-levee> (last updated May 6, 2011, 11:08 AM).
2. Mitch Withers, *Birds Point Levee Explosion*, USGS, <http://earthquake.usgs.gov/learn/topics/temp/levee.php> (last visited Feb. 19, 2012).
3. A.G. Sulzberger, *River Level Drops After Blast at Levee*, N.Y. TIMES (May 3, 2011), <http://www.nytimes.com/2011/05/04/us/04levee.html>.
4. Hendricks & Britt, *supra* note 1.
5. *Id.*
6. *See Complaint—Class Action, Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48 (2012) (No. 1:11-cv-00275-NBF). The plaintiffs subsequently amended their complaint a couple of months

Corps' operation of the Floodway, as well as its permanent plan to do so at its discretion, were takings of private property requiring the payment of just compensation pursuant to the Fifth Amendment of the United States Constitution.⁷

Unfortunately for the landowners, they faced an uphill battle in proving that the Corps' action in May 2011 constituted a taking of their lands requiring the payment of just compensation.⁸ This difficulty was mainly due to the fact that, under existing precedent, the flooding of their land due to the operation of the Floodway had to be either permanent or inevitably recurring in order to constitute a taking.⁹ This standard distinguishes floodwaters from other types of physical takings, which require just compensation to be paid to property owners even if their land was taken only temporarily.¹⁰ The landowners could not establish that the flooding of their land was permanent, especially given that the areas of the levee that were breached to operate the Floodway have been rebuilt or are in the process of being rebuilt.¹¹ Although the landowners alleged facts that could have met the more flexible "inevitable recurrence" standard for floodwaters,¹² the takings analysis for those claims would have been done on a tract-by-tract basis, thereby making class certification difficult, if not impossible.¹³ Compounding the challenge faced by the landowners was the fact that their takings claim based on the Corps' permanent plan to operate the Floodway at its discretion was inconsistent with Supreme Court precedent.¹⁴ Indeed, the landowners were unable to state a valid takings claim, at least as far as the Federal Court of Claims was concerned.¹⁵

later. See Amended Class Action Complaint, *Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48 (2012) (No. 1:11-cv-00275-NBF) [hereinafter Amended Complaint].

7. See Amended Complaint, *supra* note 6, at 2.

8. See Brian Lee & Alice M. Noble-Allgire, *High Water in the Nation's Breadbasket—A Takings Analysis of the Government's Response to the Mississippi River's Great Flood of 2011*, 26 PROB. & PROP., Jan./Feb. 2012, at 28, 33-34.

9. See *United States v. Cress*, 243 U.S. 316 (1917).

10. See generally *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (temporary physical taking occurred when Army condemned laundry plant for almost three and one-half years, forcing laundry company to suspend its regular course of business).

11. See Scott Moyers, *Corps general gives order to repair Birds Point levee*, SE. MISSOURIAN (June 16, 2011), <http://www.semissourian.com/story/1736611.html>; *Corps work to restore Birds Point levee*, KFVS12, <http://www.kfvs12.com/story/16049255/corps-racing-to-restore-birds-point-levee> (last updated Nov. 15, 2011, 6:11 PM).

12. See Amended Complaint, *supra* note 6, at 11 (alleging that the operation of the Floodway resulted in drainage ditches filled with sand and gravel deposits, which resulted in "intermittent and recurring flooding" due to rains which normally would not cause such flooding in the absence of the sand and gravel deposits); Lee & Noble-Allgire, *supra* note 8, at 34.

13. See Lee & Noble-Allgire, *supra* note 8, at 34.

14. See *Danforth v. United States*, 308 U.S. 271, 286-87 (1939) (holding that neither construction of set-back levee nor passage of law authorizing its construction amounted to a taking). Although the claim at issue in *Danforth* was brought after the Floodway had been put into operation by the government's artificial breaching of a levee, the plaintiff did not allege that action was a taking.

This Comment will argue that the standard a landowner must meet, under the Takings Clause of the United States Constitution, to establish a floodwater taking, which requires permanent or inevitably recurring flooding, should be changed to match the standard under which other types of physical takings are analyzed. Section II of this Comment will examine the history of the Takings Clause, as it has been applied to both government-induced floodwaters and other kinds of physical governmental invasions, and its transformation in the early-twentieth century to require just compensation for regulatory takings.

Section III will argue that there is no legitimate reason to treat intentional government flooding of privately-owned land any different from other intentional physical invasions when determining if temporary government action constitutes a taking. Section IV will argue that, given its history, the Takings Clause was not intended to compensate landowners for what are now called regulatory takings, which makes the need to achieve consistency in analyzing physical takings claims dealing with floodwaters all the more necessary. Section V will use the flooding caused by the operation of the Birds Point-New Madrid Floodway as an example to examine how a court should conduct its takings analysis based on government-induced flooding of privately-held land. However, before one can completely understand the history behind the Supreme Court's adoption of a unique standard for analyzing takings claims based on the flooding of private property, one must understand what the Takings Clause requires generally.

II. BACKGROUND

Among its numerous personal protections, the Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."¹⁶ This constitutional provision continued a trend of placing substantial importance on the rights of an individual to own and protect private property, a trend that had its roots in late-seventeenth-century English thought.¹⁷ Over the last century and a half, American courts have established a distinct standard, the rationale of which will be discussed *infra*, as to when the Takings Clause requires just compensation to be paid to persons whose private land has

Id. at 287. In *dicta*, the Court indicated that the operation of the Floodway was not a taking, as the levee was eventually restored to its previous height. *Id.*

15. See *Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48, 55-57 (2012).

16. U.S. CONST. amend. V.

17. See Barbara Jaffe, *William Hogarth and Eighteenth Century English Law Relating to Capital Punishment: Symposium on the Art of Execution*, 15 LAW & LITERATURE 267, 269 (2003) ("From John Locke in 1690 to William Blackstone in 1793, the preservation of property rights was deemed the law's sole purpose.").

been intentionally flooded by the government.¹⁸ In addition, courts have also read the Takings Clause to require the payment of compensation when the government interferes with an individual's property rights through regulation, a so-called "regulatory taking."¹⁹ This "other" method of taking private property affects the Takings Clause analysis of government-induced flooding because government action may merely ensure that private land floods at some later point in time, rather than when the government action is carried out.²⁰

A. The Rationale Behind the Inclusion of the Takings Clause and Its Original Meaning

The history of the Takings Clause does not lend itself to easy interpretation, but understanding the scope of its meaning and application is necessary to determine the situations in which courts have misinterpreted and misapplied it. Even with the importance placed on property at the time, the Takings Clause was the only provision adopted into the Bill of Rights that was not sought as an amendment by the state ratifying conventions.²¹ Instead, the addition of the Takings Clause to the Constitution was largely the result of James Madison's efforts to include it.²²

Sources indicating Madison's intent in including the Takings Clause in the Bill of Rights are virtually nonexistent, but we do know that Madison's draft of the Clause was introduced in the House of Representatives and referred to a Select Committee consisting of Madison and ten others, which amended Madison's draft to the version of the Clause that was eventually adopted.²³ Whether the changes made to Madison's draft were intended to expand the scope of the Takings Clause is not entirely clear, but its use of the word "taken" seemingly indicates that the Clause was intended only to apply to physical takings, given that the government does not "take" private property by merely enacting regulations.²⁴ The language of Madison's draft of the Takings Clause was

18. See *infra* section II.B.

19. See *infra* section II.C.

20. See, e.g., *Danforth v. United States*, 308 U.S. 271, 283-84 (1939).

21. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995); see also Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 539 (1995) (noting that only two states had takings provisions in their constitutions prior to the ratification of the Bill of Rights).

22. See Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 382 (2001)

23. Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) (noting also that there is no legislative history on why changes in the language of Madison's draft were made).

24. See *id.* at 420-21 (noting that definitions of "to take" in the only dictionary in existence when the Bill of Rights was adopted are consistent with the idea that only physical takings trigger the

changed to require compensation if private property was “taken,” as opposed to when a person was “obliged to relinquish” it.²⁵ Although some have concluded that the change in language was meant to ensure the inclusion of regulatory taking within the scope of the Takings Clause,²⁶ the change was likely stylistic in nature because the final language of the Takings Clause would have been more explicit in bringing regulatory takings within its purview if the change in language was made for that purpose.²⁷ Based on the existing information concerning the original intent of the Takings Clause, the Takings Clause was meant to apply only to physical takings.

Although most would agree that examining the original *intent* of the Founding Fathers in including the Takings Clause in the Bill of Rights does not lead to a definitive answer about the extent of the scope of that clause, examining the original *meaning* of the Takings Clause produces a clearer picture.²⁸ To be fair, the language of the Takings Clause is still open to different interpretations through the lens of its original meaning.²⁹ However, the actions of colonial governments in the years before the adoption of the Constitution are better understood than the intentions of the Founding Fathers in adding the Takings Clause to the Bill of Rights.³⁰ Therefore, an interpretation of the Takings Clause based on the former is apt to be better informed than an interpretation based on the latter.

Colonial legislatures did not provide landowners with compensation when the government took private property, which usually occurred where the land was needed to build public roads or the landowner had not

Takings Clause). *But see* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 AM. U. L. REV. 181, 188, 193-94 (1999) (arguing that the use of the passive tense of the verb “to take” and the substitution of “taken” for “relinquish,” the latter of which was used in Madison’s draft, indicate that the final version of the Takings Clause was intended to apply to both physical and regulatory takings).

25. Gold, *supra* note 24, at 193.

26. *See id.* at 194 (noting that both Justice Scalia and the United States Court of Appeals for the Federal Circuit have read the change in language as allowing the expansion of the Takings Clause to include regulatory takings).

27. *See* Schwartz, *supra* note 23, at 420 (arguing that the change in language did not change the intended meaning of the Takings Clause); Gold, *supra* note 24, at 194 n. 69.

28. *See* Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 388 (2007) (noting that “original intent” originalism is based on the subjective intentions of certain individuals, while “original meaning” originalism is based on the original public meaning of the text).

29. *See* Nicole Stelle Garnett, “No Taking Without a Touching?” *Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 766-767 (2008) (noting that it is impossible to base an analysis of the Takings Clause on similar rights present before the adoption of the Bill of Rights because none existed).

30. *See* Treanor, *supra* note 21, at 788-91 (noting both the extensive use of land use regulations in the colonies and the non-existence of recorded discussion about the Takings Clause when it was proposed to Congress or ratified by the states).

developed the land to its full potential.³¹ During the Revolutionary War, states also authorized the taking of Loyalist property without the need for compensation and allowed the military to commandeer private personal property to supply itself.³² For several commentators, it was these kinds of actions, both during and after the Revolutionary War, that led to the idea that government power concerning private property had to be curtailed, at least to some degree, in favor of individual property rights.³³ Therefore, the Takings Clause, if it meant anything to those living at the time of its passage, meant that the federal government would no longer be able to physically take private property for its own use without compensating the owner.

In addition to the instances in which they physically took private property without paying compensation, colonial governments also regulated the ways in which private land could be utilized.³⁴ One type of regulation present before the enactment of the Takings Clause, one which seems contrary to modern ideas about property rights, was the affirmative use requirement, which prohibited a private landowner from leaving land in an undeveloped state or making just a few improvements.³⁵ In contrast, other regulations prohibited the overplanting of certain crops on private farmland or required diversity in the crops that were planted.³⁶ Some colonial states even allowed landowners to erect dams and flood upstream lands for the purpose of erecting mills that would produce certain goods, such as grain or ironworks, so long as damages were paid to the landowner whose lands had been flooded.³⁷

There were also land use regulations in effect before the ratification of the Fifth Amendment that were concerned solely with the aesthetics of

31. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985).

32. *Id.* at 698.

33. See Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2058-59 (2004) (arguing that laws authorizing the printing of large amounts of paper money and granting protections to debtors led citizens to push for increased, but not absolute, protection of private property rights); Treanor, *supra* note 31, at 704-05 (arguing that legislative confiscation of Loyalist land and excessive issuance of paper money caused people to lose faith in legislatures and reject the idea of the common good, which had served as the justification for early colonial takings); Treanor, *supra* note 21, at 790-91 (suggesting that the uncompensated seizure of private goods by revolutionary soldiers and the governmental deprivation of creditors' property rights by permitting debts to be paid with paper money that was practically valueless led to the passage of the first constitutional compensation requirements and the Takings Clause).

34. See Harrington, *supra* note 33, at 2062 (noting that colonial-era land use regulations, although prevalent, drew very little opposition).

35. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-60 (1996).

36. Treanor, *supra* note 21, at 789.

37. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1116-17 (2000).

urban areas,³⁸ some of which even went so far as to limit the height of dwellings³⁹ or require the removal of all trees and brush situated on the property.⁴⁰ With all of these land use regulations in place, it is safe to say that colonial landowners were not allowed to use their private land in any way they saw fit as long as it did not cause injury to another person or his property.⁴¹ Therefore, the people living in the United States when the Constitution was adopted, regardless of whether they owned property, would have understood the Takings Clause to apply only to instances where the government physically invaded or condemned a person's private property.

Despite the fact that land use regulations were prevalent in the years before the ratification of the Fifth Amendment, there was no extensive effort to challenge the authority of the state and national legislatures to regulate land use, regardless of whether the regulation was intended to prevent injury or grant benefits to others.⁴² Given landowners' relative acceptance of land use regulations, they would have interpreted the Takings Clause to have no effect on such regulations, because the clause makes no mention of them.⁴³ Therefore, landowners would have thought the government capable of enacting all sorts of land use regulations, including regulations limiting the use or lowering the value of private property, without violating the Takings Clause.

Some have argued that, when taking into account the idea that the Constitution limited the power of only the federal government in the realm of land use regulations, it is possible that landowners would not have assumed that the document's silence as to those regulations was an implicit approval of them because most of them were enacted by state legislatures.⁴⁴ However, this argument is weakened due to the fact that the Continental Congress, years before the ratification the Bill of Rights, was already

38. *See id.* at 1107-16 (citing numerous examples).

39. *Id.* at 1108.

40. *Id.* at 1115 (noting that requiring the removal all trees and brush from urban land, rather than merely having a limitation on how much could be present, indicates aesthetic, as opposed to safety, concerns).

41. *See id.* at 1130 ("Many land use laws were intended not to protect health or safety but to extract positive benefits from landowners that would be useful to others in the community.").

42. Harrington, *supra* note 33, at 2062; *see also id.* at 2062-63 (claiming that this public indifference to land use laws caused the Founding Fathers to focus on state interference with contracts for debt, rather than on placing limitations on the extent of land use, with the Contracts Clause as a result).

43. *See* Hart, *supra* note 35, at 1292-93 ("The evidence concerning the Framers' experience with land use regulation suggests that the Takings Clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking.").

44. Garnett, *supra* note 29, at 769

regulating private property rights to some extent.⁴⁵ Regardless of whether the Takings Clause applies to regulatory takings under either an original intent or original meaning theory, or at all, it would be a number of years before the Supreme Court would have an opportunity to apply the Takings Clause in the context of government-induced flooding of private property.

B. Floodwaters as Governmental Taking: The *Cress* Standard

When it comes to instances in which the federal government has flooded privately-held land for a public purpose, the Supreme Court has applied a standard to determine whether that flooding is a compensable taking under the Takings Clause that is different from the standard it has applied to other types of invasions. The Court's first foray into takings jurisprudence as it applied to government-induced flooding of private property, *Pumpelly v. Green Bay & Mississippi Canal Co.*,⁴⁶ which coincidentally was one of its first forays into takings jurisprudence altogether, resulted in a finding that a private landowner was entitled to compensation when a constructed dam caused his land to flood.⁴⁷ The dam at issue in *Pumpelly* was authorized by a Wisconsin statute concerning the improvement of two rivers,⁴⁸ and the Court analyzed the plaintiff's takings claim under a provision in the Wisconsin Constitution that was analogous to the Takings Clause of the Fifth Amendment.⁴⁹ The Court took note that the plaintiff's land had been continuously flooded from the time the dam was completed to the time he filed suit, a span of six years.⁵⁰ In what would become the basis for a unique standard for determining when governmental action would constitute a compensable taking, the Court

45. Hart, *supra* note 37, at 1132; *see also id.* at 1143 (noting that Congress enacted three laws shortly after the Fifth Amendment was ratified, with no objection from Madison, that "imposed substantial economic burdens on landowners and also impaired their autonomy"); Garnett, *supra* note 29, at 769 (opining that laws enacted by Congress are stronger evidence that Takings Clause did not apply to regulatory takings than the prevalence of land use regulations in the years before the Constitution's adoption).

46. 80 U.S. 166 (1871).

47. *See* Alan Romero, *Takings by Floodwaters*, 76 N.D. L. REV. 785, 785 (2000). Although Professor Romero cites *Pumpelly* as the first Supreme Court case to deal with the Takings Clause, the Court actually dealt with a Takings Clause issue fourteen years earlier in *Smith v. Corp. of Wash.*, 61 U.S. 135 (1857). *See* Gold, *supra* note 24, at 234-35.

48. *Pumpelly*, 80 U.S. at 168.

49. *See id.* at 176-77 (noting that the Bill of Rights was not a limitation on the states' power). This view would change, however, with *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), in which the Court held that the Takings Clause applied to the states through the Fourteenth Amendment. Although at least one recent commentator has argued that the Supreme Court's view of the Bill of Rights in *Barron v. City of Baltimore*, 32 U.S. 243 (1833)—that the Bill of Rights applies only to actions by the federal government—is more in line with original intent, such an argument, while likely correct, is beyond the scope of this Comment. *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174 (2008).

50. *Pumpelly*, 80 U.S. at 177.

held that floodwater producing an “irreparable and permanent injury . . . subject[ing private land] to total destruction” requires compensation to be paid to the owner.⁵¹ The Court also noted that other cases had resulted in holdings that classified a government invasion as a consequential damage to property, as opposed to a taking,⁵² but held that this view was inappropriate to the case before it, given that the permanent flooding of the land had completely destroyed its usefulness.⁵³

In *United States v. Cress*,⁵⁴ the Supreme Court was again faced with the issue of whether government-induced flooding of private land was a taking requiring just compensation, with the flooding in question caused by the government’s construction of locks and dams on two rivers in Kentucky.⁵⁵ The *Cress* Court noted that Congress had authority to control the navigation of navigable streams as needed to regulate commerce, but also noted that this authority was subservient to the protections guaranteed by the Takings Clause.⁵⁶ The Court then held, “[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”⁵⁷ More specifically, the Court stated that floodwaters could constitute a compensable taking of private property if the flooding of that property was either permanent or would inevitably recur.⁵⁸ Although there is no bright-line point at which flooding automatically becomes inevitably recurring, numerous floods, likely in close temporal proximity to each other, appear to be necessary.⁵⁹ Finally, the Court noted that when flooding is intermittent, fee of the land remains with the landowner, and the government is responsible only for providing fair compensation for the taking of an

51. *Id.* at 177-78. It should be noted, however, that the *Pumpelly* Court did not hold that only permanent flooding would constitute a compensable taking of private property. *See id.*

52. *Id.* at 180-81.

53. *See id.* at 181.

54. 243 U.S. 316 (1917).

55. *Id.* at 318.

56. *Id.* at 319-20. *But see* *United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 596-97 (1941) (holding that government-induced flooding of private property below the ordinary high water mark of a navigable stream is not a compensable taking).

57. *Cress*, 243 U.S. at 328.

58. *Id.* (“There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.”)

59. *See* *B Amusement Co. v. United States*, 180 F. Supp. 386, 389 (Ct. Cl. 1960) (holding that one flood does not necessarily mean that floods will “inevitably recur”); *Nat’l By-Products, Inc. v. United States*, 405 F.2d 1256, 1273 (holding that two or three floods are insufficient to show that flooding will “inevitably recur”); *N. Cnty. Hydro-Electric Co. v. United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957) (holding that two floods, occurring ten and nineteen years after the pool behind a dam became full, respectively, did not constitute a taking).

easement to flood the land as often as is necessary as a result of the governmental action, rather than for the taking of a fee.⁶⁰

Just seven years after the Court decided *Cress*, the Court would decide another Takings Clause case centering on floodwaters, *Sanguinetti v. United States*,⁶¹ in which it retreated from the takings standard applied in *Cress*.⁶² The alleged taking of private property at issue in *Sanguinetti* was the consequence of floodwaters claimed to have resulted from the construction of a canal and diversion dam authorized by Congress.⁶³ Although the *Sanguinetti* Court discussed *Cress* in its analysis, even highlighting that the taking in that case was the result of a “permanent liability to intermittent but inevitably recurring overflows,”⁶⁴ it held that a taking by floodwater requires that the overflow “constitute an actual, permanent invasion of the land”⁶⁵ Although some may argue that the Court’s requirement of a permanent invasion meant that only the risk of flooding had to be permanent, this view is inconsistent with later case law⁶⁶ and the original intent of the Takings Clause.⁶⁷ In the end, the *Sanguinetti* test was merely an aberration, as more recent cases have adopted the standard espoused by the Court in *Cress*, which requires floodwaters to be either permanent or certain to recur to constitute a taking,⁶⁸ to determine whether a compensable taking has occurred.⁶⁹

The use of the *Cress* standard in analyzing floodwaters in the context of the Takings Clause is what differentiates government-induced flooding from other physical invasions by the government. There are numerous instances in which the federal government appropriated a private citizen’s land for public use only temporarily, but was still required by the Takings

60. *Cress*, 243 U.S. at 329.

61. 264 U.S. 146 (1924).

62. *See id.* at 149.

63. *Id.* at 147. To establish any kind of taking, a private landowner must show that the injury to his property was the direct result of the governmental action. *See id.* at 149. *Sanguinetti* failed to meet his burden on this issue. *Id.* at 149-50. This “causation” requirement was, of course, not an issue in *Big Oak Farms*.

64. *Id.* at 149.

65. *Id.* (emphasis added).

66. *See Danforth v. United States*, 308 U.S. 271, 285-87 (1939) (holding that neither the passage of legislation authorizing the intentional flooding of private land nor the construction of a levee to contain floodwaters in a certain area constituted a taking).

67. Given the original intent and original meaning of the Takings Clause, the government must pay just compensation to a landowner only when a physical invasion has occurred. *See supra* notes 21-45 and accompanying text.

68. *Cress v. United States*, 243 U.S. 316, 328 (1917).

69. *See Ark. Game & Fish Comm’n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011) (holding that the Army Corps of Engineers’ temporary deviations from a operating plan for one of the dams over which it had control, which caused temporary flooding on private land, could not constitute a taking); *The George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 202-03 (2009) (holding that plaintiffs’ allegations that the federal government’s operation of six dams caused irregularly recurring flooding of private farmland stated a cognizable takings claim).

Clause to pay the private citizen just compensation.⁷⁰ Indeed, the first cases dealing with the issue of temporary physical takings, all of which dealt with actions by the federal government during World War II, merely accepted the idea that the Takings Clause applied to takings of a temporary nature, instead focusing on the amount of compensation due.⁷¹

Even considering the ease with which the Supreme Court adopted the validity of takings claims based on temporary physical invasions of private land, courts have refused to deviate from applying the *Cress* standard when a temporary taking claim is based on government-induced flooding.⁷² Adherence to this almost one hundred-year-old standard is especially surprising given that the Supreme Court saw fit to extend the idea of a taking based on temporary governmental action to the domain of regulatory takings.⁷³ Although the Supreme Court equated regulatory takings with the majority of physical takings when it came to determining whether temporary governmental action could invoke the requirements of the Takings Clause, the inclusion of regulatory takings was the product of judicial activism.

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70. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (condemnation of laundry plant by United States Army for almost three and one-half years, forcing laundry company to suspend its regular course of business); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (two and one-half year condemnation by the federal government of industrial building); *United States v. General Motor Corp.*, 323 U.S. 373 (1945) (temporary condemnation by the federal government, for military purposes, of leasehold interest in warehouse fitted for the storage and distribution of automobile parts). The cases were not, however, solely limited to instances where the government took continuous possession of a building, but extended to instances where intermittent government action interfered with the use and enjoyment of private land. See *United States v. Causby*, 328 U.S. 256, 268 (1946) (holding that taking had occurred when frequent low-flying government planes caused private land adjacent to airstrip to become unsuitable for chicken farm, thereby causing a diminution in value).
71. Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 *IND. L.J.* 1185, 1193 (1997). Whereas these early temporary takings cases involved federal condemnation of private land for a period of several years, another temporary takings case decided six years after *Kimball*, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), saw the Supreme Court hold that the federal government had effected a temporary taking when it seized a private coal mine for a period of five and one-half months. *Id.* at 1194.
72. See *Ark. Game & Fish*, 637 F.3d at 1374 (noting that the Supreme Court has long required flooding to be permanent or inevitably recurring in order to constitute a compensable taking).
73. See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, Cal.*, 482 U.S. 304, 318 (1987) (noting that regulatory takings that “deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation”). In *First English*, the Supreme Court held that the invalidation of an ordinance determined to be a taking, thereby making it a temporary taking, is not sufficient to escape the compensation requirement of the Takings Clause. *Id.* at 319. However, not all temporary government regulations are compensable takings. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002).

C. The Judicial Creation of Regulatory Takings and its Application to Floodwaters

Even though the history of the adoption of the Takings Clause and the prevalence of land use regulation in effect at that time leads to the conclusion that the Takings Clause applies only to physical invasions, the Supreme Court incorrectly expanded its scope to apply to instances where government regulations, rather than a physical invasion, were at issue. The history of the incorporation of regulatory takings into the Takings Clause can be traced back to a single Supreme Court case, decided in the seven-year span between the decisions in *Cress* and *Sanguinetti: Pennsylvania Coal Co. v. Mahon*.⁷⁴ *Pennsylvania Coal* dealt with a Pennsylvania statute that prohibited coal companies from removing coal when it would cause subsidence, but exceptions were made if the company owned the surface rights of the property.⁷⁵ In holding that the law violated the Takings Clause, Justice Oliver Wendell Holmes famously wrote:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.⁷⁶

While the significance of *Pennsylvania Coal* to the analysis of the Takings Clause cannot be denied,⁷⁷ it contradicted Supreme Court precedent concerning regulatory takings that had stood for thirty-five years.⁷⁸

The holding of *Pennsylvania Coal*, that regulations could constitute takings in certain situations, was further explained in another seminal takings case, *Penn Central Transportation Co. v. City of New York*.⁷⁹ In that case, the Court held that relevant factors in determining when a

74. 260 U.S. 393 (1922).

75. *Id.* at 412-13.

76. *Id.* at 413; *see also id.* at 415 (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

77. *See* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting) (noting that *Pennsylvania Coal* had “for 65 years been the foundation of [the Court’s] ‘regulatory takings’ jurisprudence.”).

78. *See* Treanor, *supra* note 21, at 801 (noting that *Pennsylvania Coal* replaced the rule set out in *Mugler v. Kansas*, 123 U.S. 623 (1887)—that regulations could not constitute a taking—with a rule that a regulation would constitute a taking if its effects were severe enough).

79. 438 U.S. 104 (1978).

regulation is a taking include the regulation's economic impact on the landowner, the extent the regulation interferes with the landowner's "investment-backed expectations," and whether the interference is a physical governmental invasion or part of plan to "promote the common good" by rearranging economic burdens and benefits.⁸⁰ Although this *Penn Central* test must generally be applied on a case-by-case basis, due to its fact-intensiveness,⁸¹ the Supreme Court has held that there are two kinds of regulation that are per se takings: regulations requiring a permanent physical invasion, regardless of the size of the invasion or the importance of the public purpose,⁸² and regulations depriving a landowner of all "economically beneficial" use of land.⁸³ On the other hand, the Court refused to recognize *all* temporary governmental regulations as per se takings.⁸⁴

The theory of regulatory takings has come up in the context of government-induced flooding of private land. In *Danforth v. United States*,⁸⁵ a landowner alleged that a taking occurred when Congress passed legislation authorizing the Army Corps of Engineers to construct levees for the purpose of creating a floodplain, which would consist of private property and be intentionally flooded if necessary to make the Mississippi River navigable or protect cities from being flooded.⁸⁶ In the alternative, he alleged that the regulatory taking occurred when construction of the set-back levee, which was designed to contain the floodwater in a certain area, began or was completed.⁸⁷

The Supreme Court held that none of those government actions constituted a compensable taking.⁸⁸ As to the takings claim based on Congress's legislative enactment, the Court held it could not be a taking, even though it lowered the property value of land located in the floodplain, because it could always be repealed, modified, or unfunded.⁸⁹ As to the alternative takings claims, the Court held, "[T]he retention of water from

80. *Id.* at 124.

81. *See id.*

82. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40 (1982) (cable facilities placed on side of apartment building)).

83. *Id.* (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

84. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (holding that two moratoria preventing the development of private land, lasting for a combined thirty-two months, should be analyzed within the framework established in *Penn Central*). The Court eventually held that the moratoria did not constitute compensable takings. *Id.* at 342.

85. 308 U.S. 271 (1939). The floodplain at issue in *Danforth* is the Birds Point-New Madrid Floodway, the same floodplain that was activated in May 2011. *See id.*; Hendricks & Britt, *supra* note 1.

86. *Danforth*, 308 U.S. at 283.

87. *Id.*

88. *Id.* at 286-87.

89. *Id.* at 286.

unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee” was not a taking, but was rather an “an incidental consequence” of the building of the set-back levee.⁹⁰

Twelve years after *Danforth* was decided, the Supreme Court was faced with a similar issue in *United States v. Dickinson*.⁹¹ In *Dickinson*, the Court had to determine the point in time when government action that eventually caused private land to flood constituted a taking in order to determine if the landowners’ claims were barred by the six-year statute of limitations.⁹² In 1935, Congress authorized the building of a dam, which was completed almost two years later in August 1937.⁹³ The dam had the effect of raising the water level of the river on which it was situated, and this rise in water level permanently flooded private land in 1938.⁹⁴

In answering the temporal question before it, the Court merely held that the taking was not complete before April 1937, thus implying that neither Congress’s enactment nor the beginning of the dam’s construction amounted to a taking.⁹⁵ In this respect, *Dickinson* and *Danforth* are in agreement. Neither of those cases, however, explicitly based their findings on the idea that a taking does not occur until private land is physically invaded. Although the issues at the heart of *Dickinson* and *Danforth* did not turn on whether the *Cress* standard had been met, only the plaintiffs in *Dickinson* could have met that standard,⁹⁶ even though private land was completely flooded due to governmental action in both cases.⁹⁷ The fact that the *Dickinson* plaintiffs could require the federal government to pay them just compensation for flooding their land, while the plaintiff in *Danforth* had to bring a tort claim against the federal government,⁹⁸ is a problem needing an appropriate remedy: the removal of the *Cress* standard from the jurisprudence of the Takings Clause.

90. *Id.* at 286-87.

91. 331 U.S. 745 (1947).

92. *Id.* at 747.

93. *Id.* at 746.

94. *Id.* at 747-48.

95. *See id.* at 749 (noting that the taking “was not complete six years prior to April 1, 1943,” which meant it was not barred by the relevant statute of limitations).

96. *See id.* at 747 (noting that the land of the plaintiffs was permanently flooded due to actions perpetrated by the federal government).

97. *Id.*; *see Danforth v. United States*, 308 U.S. 271, 287 (1939) (noting that engineers of the United States Army had dynamited a levee protecting the plaintiff’s land from the waters of the Mississippi River in 1937).

98. Although the plaintiff in *Danforth* did not allege a taking as resulting from the actual flooding of his land, the temporary nature of the flooding would have precluded such a claim because the *Cress* standard could not have been satisfied. *See Danforth*, 308 U.S. at 287.

III. FLOODWATERS AS (TEMPORARY) TAKING

The standard crafted by the *Cress* Court that a private landowner must meet to state a compensable takings claim, within the context of government-induced floodwaters, must be changed. To be fair, there are various rationales, some of which are more agreeable than others, that have been put forth as to why floodwaters have to be permanent or certain to recur in order to constitute a compensable taking under the Takings Clause. This section will examine the most persuasive reasons for applying a different takings standard to floodwaters and explain why these reasons are inadequate to uphold this unique standard, in light of the fact that floodwaters, like other physical invasions, can prohibit all beneficial use of privately held property, even if only temporary in nature. This section will also explain some scenarios in which temporary flooding will not constitute a taking, even if recognized by courts as sufficient to constitute a taking in most situations.

A. Tort vs. Taking

Sanguinetti provides an early example of the distinction drawn by courts between compensable takings and torts, which result in mere consequential injury/damage, committed by the federal government. In that case, the Supreme Court held that government-induced flooding of private land, in order to constitute a compensable taking must amount to an appropriation of that land, as opposed to “merely an injury to the property.”⁹⁹ The *Sanguinetti* Court held that this standard was not met under the facts before it, because the landowner was not ousted from his land or prevented from using his land for its customary use for extended periods of time.¹⁰⁰ In fact, the Court noted, “If the case were one against a private individual, his liability, if any, would be in tort.”¹⁰¹

Consequential damage is created through “acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use”¹⁰² The two-step method through which consequential damage sounding in tort is differentiated from a compensable taking was laid out in *Ridge Line, Inc. v.*

99. *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

100. *Id.*

101. *Id.* at 150.

102. *Franklin v. United States*, 101 F.2d 459, 461 (6th Cir. 1939) (citing *N. Trans. Co. v. City of Chicago*, 99 U.S. 635 (1878)). The *Franklin* court held that the federal government’s alteration of a river’s current did not constitute a physical invasion of the plaintiffs’ land and therefore produced only consequential damage, for which only statutory authority, not the Takings Clause, could authorize recovery. *Id.* at 463.

United States.¹⁰³ In the first step of this tort-takings test, the plaintiff-landowner must show that the “government intend[ed] to invade a protected property interest or the asserted invasion [wa]s the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.”¹⁰⁴ Therefore, flooding which could not have been reasonably foreseen as resulting from the government’s actions cannot, in any situation, constitute a taking, as any claim based upon that action would be akin to a claim for negligence.¹⁰⁵ This makes sense, given that the Takings Clause requires just compensation be paid only when private land is “taken for public use,”¹⁰⁶ which implies that the government must have the “public use” in mind when it acts in order to effect a taking. On the other hand, if flooding could have been reasonably foreseen by the government as resulting from the government’s action, the court should hold that a taking has occurred, so long as the second prong of the *Ridge Line* tort-taking test has been satisfied.

In the second step in the *Ridge Line* tort-takings test, the court must consider the “nature and magnitude of the government action.”¹⁰⁷ In order for the court to find a taking, the invasion must “appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner[’]s right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.”¹⁰⁸ In the context of government-induced flooding of private land, this step simply requires the court to determine whether the flooding is permanent or inevitably recurring.¹⁰⁹

The tort-taking distinction, as it applies to government-induced flooding of private property, may seem unproblematic to most at first sight. If the flooding is permanent or inevitably recurring, the government has to pay the landowner just compensation, as required by the Takings Clause, for the interest it has taken, whether it has taken a fee or merely an easement. Whether the landowner would have to actually bring a claim for such a taking would depend on whether the government formally

103. 346 F.3d 1346 (Fed. Cir. 2003).

104. *Id.* at 1355 (internal quotation marks omitted).

105. *See Hansen v. United States*, 65 Fed. Cl. 76, 97 (2005) (noting that at least one case incorrectly interpreted *Ridge Line* when it focused on whether the government *should* have foreseen the harm resulting from its actions, rather than whether the harm *could* reasonably have been foreseen).

106. U.S. CONST. amend. V.

107. *Ridge Line*, 346 F.3d at 1356. The *Cress* Court alluded to this consideration. *See United States v. Cress*, 243 U.S. 316, 328 (1917) (“[I]t is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking.”) (emphasis added).

108. *Ridge Line*, 346 F.3d at 1356. It is worth noting that this language is almost identical to the language used by the *Sanguinetti* Court to describe the difference between flooding as tort and flooding as taking. *See Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

109. *See Ridge Line*, 346 F.3d at 1357.

condemned the land.¹¹⁰ On the other hand, if the flooding is merely temporary in nature, the landowner may bring a tort claim against the government to recover the compensation to which he is entitled.¹¹¹ The problem with this reasoning, as far it would apply to the plaintiffs suing over the operation of the Birds Point-New Madrid Floodway, is that a provision of the Flood Control Act of 1928 states, “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place”¹¹²

Although there are certainly advantages to precluding recovery for claims based on government-induced flooding of private land,¹¹³ there has been some discussion that section 702c of the Flood Control Act of 1928 should be repealed, either in whole or in part.¹¹⁴ This discussion, however, misses the mark. What is needed, at least in terms of claims concerning government-induced flooding of private land, is to alter the second step of the *Ridge Line* tort-taking test by eliminating the requirement that the flooding be permanent or inevitably recurring to constitute a taking. If the government has acted in a way which has caused private land to become submerged under a large amount of water, even if the flooding is temporary and lasts for a short duration, then courts should find that a compensable taking has occurred, so long as the flooding could have been foreseen as a result of the government’s action. This foreseeability requirement must remain in place, as land cannot be “taken for public use” if the government invades private land through mere negligent action on its part.

110. See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, Cal., 482 U.S. 304, 316 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”).

111. However, if a plaintiff-landowner brought two alternative claims, one based on a taking through inverse condemnation and the other based on tort theory, it is possible that the court’s determination as to which claim is valid would render the court incapable of providing relief. See *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976) (“Government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort. In such cases recovery is not authorized in [the United States Court of Claims].”).

112. 33 U.S.C. § 702c (2012).

113. See Benjamin W. Janke, *Government Liability in Tort Under a Hundred Year Flood Plan*, 36 S.U. L. REV. 12, 32 (2008) (noting the heavy burden that would be placed on the federal government if immunity were repealed, the difficulty of sorting out the claims to which the immunity applies, and the benefit of compensating landowners through another administrative mechanism as justifications for retaining the immunity provision of the Flood Control Act of 1928).

114. See, e.g., Kent C. Hofmann, Note, *An Enduring Anachronism: Arguments for the Repeal of the § 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791 (2001) (arguing for a repeal of § 702c in its entirety); Mary Jean Pederson, Note, *Boudreau v. United States: Government Immunity Under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society*, 41 VILL. L. REV. 1487 (1996) (arguing that § 702c is outdated and should be either repealed or amended); Michael S. Levine, Note, *United States v. James: Expanding the Scope of Sovereign Immunity for Federal Control Activities*, 37 CATH. U. L. REV. 219 (1987) (arguing against the expansion of § 702c to personal-injury claims).

In the types of scenarios in which the Supreme Court has required the federal government to provide just compensation for takings of a temporary nature—like taking over a laundry facility for three and one-half years, as was the case in *Kimball*—the government has taken the property rights of use, possession, and disposition from the landowner.¹¹⁵ The loss of these rights prevents the landowner from remaining on the property, excluding others from the property, subleasing the property, and possibly even selling the property.¹¹⁶ Now, take the case of a landowner whose land has been flooded by a large amount of water, even though the flooding is temporary and short-lived, due to action taken by the government. That flooding prevents the landowner from using his or her land for any meaningful purpose, whether it be farming, operating a business, hunting, or merely residing in his home, for a certain amount of time.

Although, technically, a landowner retains the right to exclude others from his property and to sublease or sell that property, those rights are rendered meaningless by any waters under which the property is submerged. Indeed, if a landowner cannot gain access to his own property because of temporary flooding, he cannot keep others from trespassing onto his property, assuming that others could gain access to the property through means unavailable to the property owner. For instance, flooded land may be inaccessible to a landowner who does not own a boat of some kind, whereas any person owning a boat could invade the flooded land, for the most part unimpeded. The right to sublease or sell private property is also rendered meaningless by floodwaters. Although a landowner may certainly attempt to sublease or sell his land submerged by floodwaters, it is extremely unlikely that he will find any takers, at least not until the floodwaters have subsided, especially given that floodwaters can permanently damage property.¹¹⁷ Now to be fair, one could make a claim that flooding property could actually increase its value, possibly by creating a lake or allowing the landowner to take advantage of some water-based business. Even accepting the possibility of this unlikely scenario, it does not hold for temporary flooding, as any benefit conferred by the flooding will be short-lived, thereby lowering the value of the property due to the possible unpredictable nature of the flooding.

The Supreme Court, in its temporary takings cases based on the federal government's actions during World War II, did not indicate, or even hint, that only certain types of government action could constitute a

115. Tedra Fox, *Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 *ECOLOGY L.Q.* 399, 417 (2001).

116. *Id.* at 417-18.

117. An example of possible damage to property on account of floodwaters would be sand and gravel deposits that fill up drainage ditches, preventing the ability of those ditches to divert excess water from the property. See Amended Complaint, *supra* note 6, at 11.

temporary taking. Given the similarities, at least in terms of their effect on the abilities of landowners to use, possess, sublease, or sell their property, between temporary floodwaters and the types of temporary actions carried out by the government which the Supreme Court has held to constitute a taking, the tort-taking distinction as to floodwaters should not be drawn based on whether the flooding is temporary. Instead, the tort-takings distinction should first turn on whether the federal government could have foreseen that the flooding of private property would result because of its action, thereby giving the government immunity when it is merely negligent in invading private land.¹¹⁸ If the flooding could have been foreseen as a result of the governmental action, the court need only examine whether the interference with private property rights was substantial enough to constitute a taking.¹¹⁹ In effect, the temporary nature of government-induced flooding should be relevant, in terms of takings claims, only in determining the amount of compensation due a landowner, not whether a taking actually occurred.¹²⁰

There is nothing in the language of the Takings Clause to suggest that a physical invasion of private property must be permanent in order to constitute a taking. Indeed, if there was even a hint of such a position in the Constitution, the Supreme Court would have almost certainly addressed it in its first temporary takings cases, instead of merely assuming that temporary actions could constitute a taking. Similarly, there is nothing in the language of the Takings Clause suggesting that floodwaters should be exempt from a temporary takings analysis. To the contrary, given the focus on *physical invasions* by the government serving as the trigger for the Takings Clause,¹²¹ it seems unlikely that those alive when the Takings Clause was adopted would have intended or inferred an exception to the Takings Clause for those instances in which the government physically invaded private land by flooding, as opposed to some other method. This is

118. To be sure, foreseeability is relevant in the arena of tort. See Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 982 (2001) (“[I]n the tort of negligence, foreseeability is inherent in the description of the legal obligation because the notion of reasonable care can only operate against the notion of some perception of foreseeable risk, howsoever generally conceived.”). The relevant analysis for takings claims based on government-induced flooding, however, is specifically whether the flooding could have been foreseen.

119. See *United States v. Cress*, 243 U.S. 316, 328 (1917).

120. Indeed, it would be illogical to conclude that a landowner whose land is subject to temporary flooding is due the same amount in compensation as is due a landowner whose land is subject to permanent flooding. See *Romero*, *supra* note 47, at 792. It may even be the case that a landowner is due nothing under the Takings Clause if the flooding does not impair his use of his land in any way. See *id.* at 798.

121. See *supra* notes 31-45 and accompanying text (noting that the backdrop for the adoption of the Takings Clause included pervasive, but accepted, land use regulations and a rejection of the practice during the Revolutionary War of physically divesting Loyalists of their land).

especially so given the similarity of effects on the rights of property owners regardless of whether the government takes over a laundry facility or intentionally floods private farmland.

B. Inference of a Flood Easement

Another possible rationale for requiring flooding to be, at a minimum, inevitably recurring in order to constitute a taking is that “only then can the government be said to have taken a flooding easement requiring compensation.”¹²² This idea follows from the thought that “[p]roperty is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.”¹²³ The problem with this view is that, given the ambiguity concerning the point when flooding moves from being temporary to being inevitably recurring,¹²⁴ private property may flood numerous times and still constitute a tort, rather than a taking.¹²⁵ More importantly, due to the immunity provision located in the Flood Control Act of 1928, landowners whose properties are submerged may be forced to suffer years of property damage before they are entitled to any compensation under the Takings Clause.¹²⁶

C. Situations in which Temporary Flooding is Not a Compensable Taking

Even if courts change the current takings jurisprudence to allow temporary flooding to constitute a compensable taking, there are still several scenarios where such flooding would not constitute a taking. One of the scenarios allowing for uncompensated flooding under the Takings Clause would occur when the federal government floods private land in order to manage navigable waterways.¹²⁷ However, there are limitations to

122. Romero, *supra* note 47, at 791-92.

123. *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

124. *See supra* note 59 and accompanying text.

125. For example, the Birds Point-New Madrid Floodway has only been put into operation twice in its eighty-five-year history. Lee & Noble-Allgire, *supra* note 8, at 28. It is almost certain that the Floodway will be put into operation in the future, but if those instances are eighty or ninety years apart, it is unclear whether a court would ever hold the flooding to be inevitably recurring.

126. Hofmann, *supra* note 114, at 806. Although § 702c of the Flood Control Act of 1928 refers to flood control projects on the Mississippi River only, federal courts have extended § 702c to flood control projects on other bodies of water. Pederson, *supra* note 114, at 1491.

127. Romero, *supra* note 47, at 803; *see also* *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) (“When the Government exercises this [navigation] servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.”); *see also id.* at 807 (noting that the Court’s holding in *United States v. Cress*, 243 U.S. 316 (1917), which made the navigable servitude subject to the requirements of the Takings Clause, was to be “confined to the facts there disclosed,” in which government action caused a

this navigational servitude. For one, it applies only to navigable streams.¹²⁸ Second, the power of the federal government to flood private property only extends to property within “[t]he spatial boundaries of the federal navigational servitude.”¹²⁹ These limitations would prevent the federal government from asserting the servitude as justification for most of the flooding it causes on private land, such as that through the operation of the Birds Point-New Madrid Floodway.¹³⁰

Another scenario in which temporary flooding would not constitute a taking is where the doctrine of necessity applied.¹³¹ The necessity doctrine is a narrow exception, as it applies only when the nation’s safety is at risk or “during times of immediate and impending public danger or imminent peril when lives are threatened.”¹³² One classic case of the necessity doctrine in application is the destruction of a home in order to stop a fire from spreading and destroying an entire town.¹³³ Given that the operation of the Birds Point-New Madrid Floodway was originally designed to protect Cairo, Illinois, from catastrophic flooding, it is possible that the necessity doctrine would apply to immunize the federal government from liability for a taking based on the temporary flooding resulting from the operation of the Floodway.¹³⁴ A final situation in which temporary flooding could not constitute a taking would be one in which the federal government holds flooding easements for the submerged property.¹³⁵ As flooding which is not permanent normally involves the taking of a flood easement, rather than the taking of a fee,¹³⁶ the government need not pay

non-navigable stream to flood (quoting *United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 597 (1941))).

128. *See Chi., Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. at 596-97 (holding that the navigational servitude extends to “lands below [the] ordinary high water mark”).

129. *Mildenberger v. United States*, 91 Fed. Cl. 217, 249 (2010) (“The spatial boundaries of the federal navigational servitude are marked by the ordinary high water lines along the banks of a navigable waterway The ordinary high water line marks both the vertical and the horizontal boundaries of the servitude.”).

130. *See Amended Complaint*, *supra* note 6, at 6 (noting that the Floodway is comprised of about 130,000 acres protected from the waters of the Mississippi River).

131. Royal C. Gardner, *Invoking Private Property Rights for Environmental Purposes: The Takings Implications of Government-Authorized Aerial Pesticide Spraying*, 18 STAN. ENVTL. L.J. 65, 88 (1999).

132. *Id.* at 89-90 (footnotes omitted) (internal quotation marks omitted).

133. *Id.* at 90 (citing *Bowditch v. Boston*, 101 U.S. 16, 18 (1879)).

134. *See Lee & Noble-Allgire*, *supra* note 8, at 30 (noting that severe flooding in Cairo in 1927 was one reason for the creation of the Floodway). *But see id.* (noting that the population of Cairo is about one-fifth of what it was when the Flood Control Act of 1928 was enacted).

135. *See id.* at 31 (noting that about 100,000 of the Floodway’s roughly 130,000 acres are subject to flooding easements). However, the government would become liable for a taking if the flooding it caused went beyond the scope of the flooding easement. *See Amended Complaint*, *supra* note 6, at 18 (alleging that the easements held by the government do not conform to the current Floodway operation plan).

136. *United States v. Cress*, 243 U.S. 316, 328-29 (1917).

compensation for non-permanent flooding of private land if it already holds such an easement over that land.

Whereas these limitations can remove some temporary physical invasions by floodwaters from the scope of the Takings Clause, the original intent and original meaning of that clause do not allow *all* temporary taking claims based on floodwaters to be similarly removed. However, although the history of the Takings Clause requires its scope to be expanded to cover temporary flooding, extending that scope beyond what is required by the original intent and original meaning of the clause is similarly to be avoided. If the Takings Clause's focus on physical invasion is to be used to include temporary flooding under its scope, the same focus must be used to ensure that damages incurred prior to flooding remain outside its scope.

IV. REGULATORY TAKINGS BY FLOODWATERS

Although the scope of the Takings Clause needs to be expanded to protect those it was designed to protect, namely, landowners whose land has been temporarily flooded due to intentional government action, its scope should not be extended any farther. Doing so is as contrary to the original intent and original meaning of the Takings Clause as is not allowing for temporary takings claims based on temporary flooding. However, in his article *Takings by Floodwaters*, Professor Alan Romero argues that landowners are entitled to compensation under the Takings Clause when the government has merely completed some action that will eventually cause private land to flood.¹³⁷ This remedy is designed to cure the problem of a landowner not being able to sell his property, except at a substantial loss, because the land will flood eventually, even if the flooding is only temporary.¹³⁸ Professor Romero recognizes two possible justifications for requiring this pre-flood compensation: regulatory takings¹³⁹ and flooding easements.¹⁴⁰

The regulatory takings argument for pre-flood compensation equates the government's declaration of its intent to flood private land in certain situations or its alterations to land that will eventually cause flooding with a regulation restraining the "use, enjoyment, and value of the owner's property in the present."¹⁴¹ However, since the government action is being equated with a regulation, it may only constitute a taking if it "makes the property nearly useless and thus goes too far."¹⁴²

137. Romero, *supra* note 47, at 814.

138. *See id.* at 810.

139. *See id.* at 810-12.

140. *See id.* at 812-15.

141. *Id.* at 810.

142. *Id.* at 811.

The flooding easement argument for pre-flood compensation, on the other hand, infers the taking of an easement by the government by altering the land, possibly by constructing a lock and dam or a system of levees, in a way that will cause flooding eventually.¹⁴³ Even though the alterations could be removed by the government before the flooding occurs, it has acted in a way that has had a real effect on property values.¹⁴⁴

The practical problem with these arguments for pre-flood compensation is that they are contrary to Supreme Court precedent. In *Danforth*, the Court explicitly dismissed this argument when it stated, “A reduction . . . in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.”¹⁴⁵ Although there has been at least one case in which a court has been receptive to pre-flood compensation,¹⁴⁶ the argument has not been explicitly adopted by the Supreme Court. It is unlikely that the Court would adopt such a view now, as it would require an explicit overruling of *Danforth*. However, even if the Court was inclined to adopt the idea of pre-flood compensation, it would not completely solve the problem, given that, in doing so, it would extend the Takings Clause beyond its original intent and original meaning.

Neither the original intent behind the inclusion of the Takings Clause in the Bill of Rights, nor the original meaning of that clause, as understood by those living at the time of its ratification, requires the federal government to compensate landowners for any action not involving a physical taking.¹⁴⁷ While this does not necessarily foreclose the possibility of the Supreme Court adopting a rule of pre-flood compensation under the Takings Clause,¹⁴⁸ doing so would do more harm than good. Although

143. *Id.* at 812.

144. *Id.* at 813.

145. *Danforth v. United States*, 308 U.S. 271, 285 (1939). Ten years before the *Danforth* Court dealt with the takings issues surrounding the Birds Point-New Madrid Floodway, another court, dealing with the same flood plan, held that “the [plaintiff’s] inability to sell his property or to borrow money on the security thereof” because of the flood plan “are mere consequential damages such as the prospective construction of any great public work is likely to entail, and for which relief is not afforded.” *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E.D. Mo. 1929).

146. *See Kincaid v. United States*, 37 F.2d 602, 608 (W.D. La. 1929), *rev’d on other grounds sub nom. Hurley v. Kincaid*, 285 U.S. 95 (1932). The District Court held:
[T]he physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to that service and the taking possession, in so far as is either necessary or contemplated by the act, will begin with the construction of the first levee or works which are intended to direct the water upon the land.

Id.

147. *See supra* notes 21-45 and accompanying text.

148. There are numerous instances where the Supreme Court has interpreted the Constitution in a way that could be considered contrary to the original intent or original meaning of a constitutional

property rights are some of the most important rights held by American citizens, the meaning of the Constitution should not be sacrificed, not even to strengthen those rights, because doing so would serve as dangerous precedent. Indeed, if the Supreme Court can stretch the Constitution beyond its limits to protect property rights, there is no reason to assume it could not do so for various other reasons, perhaps for reasons that strip away, rather than strengthen, individual rights. The inability of the courts to protect landowners, whose property will eventually flood due to action taken by the government, by awarding pre-flood compensation, without extending the boundaries of the Takings Clause, makes the need to allow for temporary takings claims based on government-induced flooding all the more important.

V. TAKING BY FLOODWATERS: A SAMPLE ANALYSIS

At this point, it might be helpful to examine how a court *should* determine whether government action that has resulted in the flooding of private land constitutes a taking. The operation of the Birds Point-New Madrid Floodway will serve as a helpful example for such an examination. The Floodway was a result of the Flood Control Act of 1928 and involved the building of levees designed to allow water to overtop them at a certain height.¹⁴⁹ The passage of this legislation and the construction of the levees are insufficient to constitute a taking of the land inside the Floodway, regardless of whether those actions have had any negative effect on the value of said land, as there has been no physical invasion, which is needed to invoke the Takings Clause. This required physical invasion is certainly present in the most recent case concerning the operation of the Floodway, as the land inside the Floodway was inundated with approximately 550,000 cubic feet of water.¹⁵⁰

Therefore, the court hearing the Floodway case should have determined if the government intended to invade private property or if the invasion was a foreseeable consequence of the government's action. There can be no doubt that the government intended to flood the land in the Floodway, given that it artificially crevassed the levee protecting that land from the waters of the Mississippi River.¹⁵¹ Under the test currently utilized by federal courts for takings claims, the court, at this stage of its analysis, would determine whether the flooding was permanent or

provision. *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), the case in which the Court held that the Takings Clause applied to the states, could be viewed as such a case.

149. Lee & Noble-Allgire, *supra* note 8, at 29.

150. Sulzberger, *supra* note 3.

151. See Hendricks & Britt, *supra* note 1.

inevitably recurring.¹⁵² However, this step should be altered so as to have the court focus solely on the extent to which the landowners have been deprived of their rights to use, possess, or sell their property. This change would shift the question of whether a taking has occurred from one of duration to one of degree, keeping in mind that “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”¹⁵³ Thus, a court could find that the government had temporarily taken the private land in the Floodway that was rendered unusable because of the floodwaters, while finding no compensable taking of land flooded by less than an inch of water.

After making its determination as to whether a taking has occurred, the court could move on to determine the amount of compensation, if any, due those who own land in the Floodway, based in part on whether the flooding is temporary or inevitably recurring.¹⁵⁴ This removal of the *Cress* standard, which requires flooding to be either permanent or inevitably recurring to constitute a taking,¹⁵⁵ from the analysis of takings claims honors the original intent and original meaning of the Takings Clause.

VI. CONCLUSION

The Supreme Court has recently granted certiorari in *Arkansas Game & Fish Commission v. United States*, a case in which the United States Court of Appeals for the Federal Circuit held that temporary deviations from a water management plan that caused flooding could not rise to the level of a taking.¹⁵⁶ The Court will no doubt take notice of the fact that, for almost one hundred years, federal courts have been following a takings standard for floodwaters that requires the government to compensate landowners when government-induced flooding is permanent or inevitably recurring. This standard, which characterizes temporary flooding as mere consequential injury, sounding in tort, leaves landowners whose land has been ravaged by floodwaters, albeit temporarily, with no remedy, given the immunity the federal government enjoys with regards to flood control measures. This standard should be abolished, bringing floodwaters in line with other types of temporary government invasions that can constitute takings, as floodwaters deprive a landowner of the same property rights in

152. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1357 (Fed. Cir. 2003).

153. *United States v. Cress*, 243 U.S. 316, 328 (1917).

154. See Amended Complaint, *supra* note 6, at 11 (alleging facts sufficient to meet the “inevitably recurring” prong of the *Cress* standard).

155. See *Cress*, 243 U.S. at 328.

156. Stephen Bruckner, *Taking vs. Tort: Supreme Court’s Upcoming Review of Arkansas Flooding Case*, ACOEL (July 13, 2012), <http://www.acoel.org/post/2012/07/13/Taking-vs-Tort-Supreme-Courts-Upcoming-Review-of-Arkansas-Flooding-Case.aspx>.

practically the same way as other types of invasions. The Supreme Court, in the cases in which it held temporary physical invasions to be compensable takings, did not indicate any difference between flooding private land or commandeering a privately-held factory, in terms of the scope of the Takings Clause. The Supreme Court has given itself the opportunity to fix a mistake in its Takings Clause jurisprudence, and it should not waste that chance.